

**United Nations Conference on the Representation of States  
in Their Relations with International Organizations**

Vienna, Austria  
4 February - 14 March 1975

Document:-  
**A/CONF.67/4**

**Draft articles on the representation of States in their relations with international organizations, adopted by the International Law Commission at its twenty-third session**

Extract from Volume II of the *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations (Documents of the Conference)*

## B. DRAFT ARTICLES ON THE REPRESENTATION OF STATES IN THEIR RELATIONS WITH INTERNATIONAL ORGANIZATIONS, ADOPTED BY THE INTERNATIONAL LAW COMMISSION AT ITS TWENTY-THIRD SESSION

### Document A/CONF.67/4

*Note.* This text is reproduced as it appears in section D of chapter II of the report of the International Law Commission on the work of its twenty-third session.\*

#### PART I. INTRODUCTION

##### *Article 1.<sup>33</sup> Use of terms*

#### 1. For the purposes of the present articles:

- (1) "international organization" means an intergovernmental 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:
  - (a) any principal or subsidiary organ of an international organization, or
  - (b) any commission, committee or sub-group of any such organ,in which States are members;
- (5) "conference" means a conference of States convened by or under the auspices of an international organization;
- (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 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 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:
  - (a) the Organization has its seat or an office, or
  - (b) a meeting of an organ or a conference is held;
- (13) "sending State" means the State which sends:
  - (a) a mission to the Organization at its seat or to an office of the Organization, or
  - (b) 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 in 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;

\* *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 10.*

<sup>33</sup> Articles 1, 51 and 78 of the provisional draft.

For the text of the articles of the provisional draft and the commentary to them, see the following documents:

(a) Articles 1 to 21: *Official Records of the General Assembly, Twenty-third Session, Supplement No. 9, chap. II, sect. E.*

(b) Articles 22 to 50: *ibid.*, *Twenty-fourth Session, Supplement No. 10, chap. II, sect. B.*

(c) Articles 51 to 116: *ibid.*, *Twenty-fifth Session, Supplement No. 10, chap. II, sect. B.*

(26) "premises of the mission" means the buildings 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 buildings 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 or to the meanings which may be given to them in other international instruments or the internal law of any State.

### Commentary

(1) Following the example of many conventions concluded under the auspices of the United Nations, the Commission has specified in article 1 of the draft the meaning of the expressions most frequently used in it.

(2) As the introductory words of the article indicate, the meanings given to the terms therein are limited to the draft articles. They state only the manner in which the expressions listed in the article should be understood for the purposes of the draft articles.

(3) The meaning of the term "international organization" in sub-paragraph 1 of paragraph 1 is based on paragraph 1 (i) of article 2 of the Vienna Convention on the Law of Treaties.<sup>34</sup> The Commission has deemed this sufficient for the purposes of the present articles, which do not deal generally with international organizations but only with the representation of States in their relations with such organizations.

(4) The meaning of the term "international organization of universal character" in sub-paragraph 2 of paragraph 1 derives from Article 57 of the United Nations Charter which refers to the "various specialized agencies, established by intergovernmental agreement and having wide international responsibilities". The question whether an international organization is of universal character depends not only on the actual character of its membership but also on the potential scope of its membership and responsibilities.

(5) The term "organ" (sub-paragraph 4) applies only to bodies in which States are members. The Commission has divided the sub-paragraph into two sub-sections concerning respectively "any principal or subsidiary organ of an international organization" and "any commission, committee or sub-group of any such organ", in order to make it clear that the expression "in which States are members" applies to both sets of bodies. That expression excludes from the scope of the draft articles bodies composed of

individual experts who serve in a personal capacity. This was necessary in order to limit the expression to the aspects dealt with in the present subject. The term, as used, would not exclude the somewhat exceptional case when an organ has both States and individuals as members. The draft articles however deal only with the aspects of State participation.

(6) Sub-paragraph 5 uses the phrase "conference of States convened by or under the auspices of an international organization". This formulation would include all conferences convened by an international organization whether the invitations are issued by the international organization or by the host State. The Commission noted that in practice some meetings convened by organs were referred to as conferences. Such meetings do not come under the meaning of the term "conference" as used in the present draft. The phrase "conferences convened by or under the auspices of an international organization" covers all conferences convened by or under the auspices of organizations of universal character regardless of the number of participants or any regional limitation on participation.

(7) The meaning given to the terms "permanent mission" and "permanent observer mission" in sub-paragraphs 6 and 7 emphasizes the two main characteristics of such missions, namely their permanence and the fact that they represent the State. The phrase "representing the State" is also used in article 1 (a) of the Convention on Special Missions.<sup>35</sup>

(8) The meanings given to the terms "delegation to an organ" and "delegation to a conference" in sub-paragraphs 9 and 10 are based upon participation, which is the aspect that characterizes delegations of all kinds. They bring out clearly the distinction between participating States and other States. The Commission wishes to make it clear that the notion of participating in the proceedings of an organ covers three possible categories of delegations, namely, delegations (normally of member States) which participate in the proceedings with the right to vote, delegations which participate in the discussions without the right to vote and delegations which are allowed to express their views without taking part in the discussions. In the case of conferences on the other hand, the notion of participation is clear-cut; hence the absence in sub-paragraph 10 of any reference to the "proceedings" of the conference.

(9) The meaning given to the term "host State" in sub-paragraph 12 is linked to and limited by articles 5 and 42.

(10) The term "permanent representative" in sub-paragraph 14 is used in general at the present time to designate the heads of permanent missions to international organizations. It is true that article V of the Headquarters Agreement between the United Nations and the United States<sup>36</sup> refers to "resident representatives". However,

<sup>34</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 289.

<sup>35</sup> General Assembly resolution 2530 (XXIV), annex.

<sup>36</sup> United Nations, *Treaty Series*, vol. 11, p. 11.

since the adoption in 1948 of General Assembly resolution 257 A (III) on permanent missions, the term "permanent representative" has become the prevailing term in the law and practice of international organizations, both universal and regional. There are some exceptions to this general pattern. The Headquarters Agreement of IAEA with Austria<sup>37</sup> uses (section 1, sub-paragraph j) the term "resident representative". So does the Headquarters Agreement of ECA with Ethiopia,<sup>38</sup> which is the only Headquarters agreement for an economic commission which expressly envisages (in section 10, b) resident representatives. The term "resident representative" is also used in section 24 of the Headquarters Agreement of FAO with Italy.<sup>39</sup> The wording of sub-paragraph 14 is modelled on that used in article 1 (a) of the Vienna Convention on Diplomatic Relations<sup>40</sup> and article 1 (d) of the Convention on Special Missions. The Commission points out that according to article 16 a *chargé d'affaires ad interim* acts as head of mission if the post of head of mission is vacant or if the head of mission is unable to perform his functions. The provisions of sub-paragraphs 14, 15 and 16 are therefore subject to those of article 16.

(11) Sub-paragraphs 21 to 25 are modelled with a few changes in terminology on the corresponding provisions of article 1 of the Convention on Diplomatic Relations and article 1 of the Convention on Special Missions.

(12) Sub-paragraphs 26 and 27 correspond to article 1 (i) of the Convention on Diplomatic Relations.

(13) The other sub-paragraphs of paragraph 1 of article 1 are self-explanatory in the light of the relevant draft articles and call for no particular comment on the part of the Commission.

(14) Paragraph 2 is similar in its purpose to paragraph 2 of article 2 of the Convention on the Law of Treaties.

### **Article 2.<sup>41</sup> 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 relate to other international organizations is without prejudice to the application to the representation of States in their relations with such other organizations of any of the rules set forth in the**

**present articles which would be applicable under international law independently of these articles.**

**3. The fact that the present articles do not relate to other conferences is without prejudice to the application to the representation of States at such other conferences of any of the rules set forth in the present articles which would be applicable 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.**

### *Commentary*

(1) Article 2 embodies the decision of the Commission to make the draft articles applicable both 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) One method of determining the international organizations which, in addition to the United Nations, come within the scope of the draft articles might be the method adopted by the Convention on the Privileges and Immunities of the Specialized Agencies.<sup>42</sup> That Convention lists in article 1 a certain number of specialized agencies and adds that the expression "specialized agencies" also applies to "any other agency in relationship with the United Nations in accordance with Articles 57 and 63 of the Charter". That method of determining the scope of the Convention leaves aside such organizations as IAEA which is not considered, strictly speaking, a specialized agency as defined in the Convention in view of the circumstances of its creation and the nature of its relationship with the United Nations. It also leaves aside other organizations of universal character which are outside what has become known as the United Nations "system" or "family" or the United Nations and its "related" or "kindred" agencies. Examples of such organizations are the Bank for International Settlements, the International Institute for the Unification of Private Law, the International Wheat Council and the Central Office for International Railway Transport.<sup>43</sup> The wording of paragraph 1 of article 2 is designed to be comprehensive, embracing all international organizations of universal character.

(3) Paragraph 2 lays down a reservation to the effect that the limitation of the scope of the draft articles to the

<sup>37</sup> *Ibid.*, vol. 339, p. 152.

<sup>38</sup> *Ibid.*, vol. 317, p. 101.

<sup>39</sup> United Nations, *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations*, vol. II (United Nations publication, Sales No.: 61.V.3), p. 187.

<sup>40</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

<sup>41</sup> Article 2 of the provisional draft.

<sup>42</sup> United Nations, *Treaty Series*, vol. 33, p. 261.

<sup>43</sup> For a list of such organizations see *Repertory of Practice of United Nations Organs*, vol. III (United Nations publication, Sales No.: 1955.V2), p. 125. See also Amos J. Peaslee, *International Governmental Organizations, Constitutional Documents*, 2nd ed. rev. (The Hague, Nijhoff, 1961).

representation of States in their relations with international organizations of universal character does not affect the application to the relations of States with other organizations of any of the rules set forth in the draft articles which would be applicable under international law independently of these articles. The purpose of that reservation is to give due recognition to the fact that certain provisions in the draft articles are or are likely to become customary international law.

(4) Paragraph 3 lays down a similar reservation with respect to conferences. The words "other conferences" cover not only conferences convened by international organizations other than those of universal character but also conferences convened by States. In their written comments certain governments suggested the widening of the scope of the draft articles so as to include conferences convened by States. This view was also shared by some members of the Commission. The Commission noted, however, that such conferences do not fall within the purview of relations between States and international organizations. The treatment of the subject of conferences convened by or under the auspices of international organizations rests on the assumption that such conferences are associated with the organization and as such should be regulated in conjunction with organs of international organizations. It is to be noted that this approach is followed by the Convention on the Privileges and Immunities of the United Nations<sup>44</sup> and the Convention on the Privileges and Immunities of the Specialized Agencies. Section 11 of the former speaks of "representatives of Members to the [ . . . ] organs of the United Nations and to conferences convened by the United Nations", while section 13 of the latter speaks of "representatives of members at meetings convened by a specialized agency". On the other hand, international conferences, whether convened by international organizations or by one or more States, are conferences of States and therefore governed to a great extent by the same rules of international law. It may be expected that the adoption of an international convention on the basis of the present draft articles would promote the application of the rules contained therein to conferences convened by States through *ad hoc* decisions or other appropriate arrangements.

(5) Lastly, paragraph 4 is intended to leave it open for States to decide to apply the provisions of the draft articles in respect of international organizations other than those of universal character and to conferences convened by or under the auspices of such organizations.

**Article 3.<sup>45</sup> 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.**

*Commentary*

(1) Article 3 reproduces the corresponding provisions of the provisional draft with the addition of the words "or to any relevant rules of procedure of the conference".

(2) The purpose of this article is twofold. First, given the diversity of international organizations and their heterogeneous character, in contradistinction to that of States, the draft articles are designed to establish a common denominator and to provide general rules to regulate the diplomatic law of relations between States and international organizations in the absence of regulations on any particular point by an individual international organization.

(3) Secondly, article 3 seeks to safeguard the particular rules which may be applied by a given international organization. An example of the particular rules which may prevail in an organization concerns membership. Although membership in international organizations is, generally speaking, limited to States, there are some exceptions. A number of specialized agencies provide for "associate membership", thus permitting the participation of entities which enjoy internal self-government but have not yet achieved full sovereignty.

(4) In order to avoid having to include a specific reservation in each article in respect of which it was necessary to safeguard the particular rules prevailing in an organization or a conference, the Commission decided to formulate a general reservation in part I of the draft articles.

(5) The expression "relevant rules of the Organization" is broad enough to include all relevant rules whatever their nature: constituent instruments, certain decisions and resolutions of the organization concerned or a well-established practice prevailing in that organization.

(6) The Commission has taken the view that the rules of procedure adopted by a conference should be given, for the purpose of the draft articles, the same status as the rules of an organization with respect to matters falling within the scope of rules of procedure. A conference could not, however, completely replace the draft articles if they were in force as a treaty between the States concerned, as this would touch upon matters such as privileges and immunities that would be outside the scope of rules of procedure.

<sup>44</sup> United Nations, *Treaty Series*, vol. 1, p. 15.

<sup>45</sup> Article 3 of the provisional draft.

**Article 4.<sup>46</sup> 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 of universal character or their representation at conferences convened by or under the auspices of such organizations.**

*Commentary*

(1) Article 4 regulates the relationship between the draft articles and other international agreements. While recognizing that headquarters agreements and general conventions on privileges and immunities might be considered as forming part of the rules of the organizations within the meaning of article 3, the Commission took the view that it was preferable to include a specific provision on the point.

(2) The purpose of the provision in sub-paragraph *a* is to reserve the position of existing international agreements regulating the same subject matter as the draft articles and in particular headquarters agreements and conventions on privileges and immunities. The draft articles, while intended to provide a uniform régime, are without prejudice to different rules which may be laid down in such agreements and conventions.

(3) Sub-paragraph *a* refers to international agreements "in force between States or between States and international organizations of universal character". Headquarters agreements are usually concluded between the host State and the Organization.

(4) Certain governments expressed the view that the fact that existing agreements would remain in force might deprive the draft articles of much of their practical effect. The draft articles, however, contain many provisions on questions which have not been regulated by existing treaties; these provisions will have their binding effect but at the same time the new régime will not prejudice certain rules which prevail within certain organizations and which reflect the particular needs of an organization. Certain governments also referred to the situation which might

arise if one or several sending States ratified the future convention and the host State did not. The Commission wishes to point out that such a situation of treaties having different parties or having conflicting provisions involves problems governed by the general law of treaties and in particular article 30 of the Convention on the Law of Treaties.

(5) Sub-paragraph *b* relates to future agreements which may contain provisions diverging from some of the rules laid down in the draft articles. The Commission recognizes that situations may arise in the future in which States establishing a new international organization may find it necessary to adopt different rules more appropriate to such an organization. The draft articles are not intended in any way to preclude any further development of the law in this area.

**PART II. MISSIONS  
TO INTERNATIONAL ORGANIZATIONS**

**Article 5.<sup>47</sup> 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.**

*Commentary*

(1) Article 5 lays down a general rule according to which States may establish missions to international organizations of universal character. These missions are normally established at the seat of the Organization. However, the United Nations has an Office at Geneva where a large number of States maintain missions as liaison with that Office as well as with a number of specialized agencies which have established their seats at Geneva (ILO, ITU, WHO and WMO). Missions have also been established by

<sup>46</sup> Articles 4, 5 and 79 of the provisional draft.

<sup>47</sup> Articles 6 and 52 of the provisional draft.

States at the headquarters of United Nations regional economic commissions.<sup>48</sup>

(2) Permanent representation of States to an international organization presents two main characteristics, both of which are reflected in the wording of paragraphs 1 and 2 of article 5. First, the institution is of a non-obligatory character. States are under no obligation to establish missions at the seat or an office of the Organization. Secondly, the establishment of missions by States is subject to the relevant rules of the Organization. Only when those rules allow the establishment of missions, may States proceed to do so.

(3) Since the creation of the United Nations, the practice of establishing permanent missions of Member States at the seat or an office of international organizations of universal character has developed considerably. The institution of permanent missions, endorsed by General Assembly resolution 257 A (III) of 3 December 1948 has been generalized. Doubts that were expressed in the Sixth Committee during the first part of the General Assembly's third session concerning the advisability of recommending that Member States establish permanent missions to the United Nations have been dispelled by events.<sup>49</sup> Permanent missions as an institution are today widely accepted and used by States in their relations with international organizations. Such development and generalization were already foreseen by resolution 257 A (III) whose second preambular paragraph stated that:

[ . . . ] the presence of such permanent missions serves to assist in the realization of the purposes and principles of the United Nations and, in particular, to keep the necessary liaison between the Member States and the Secretariat in periods between sessions of the different organs of the United Nations.

(4) The legal basis of permanent missions is considered as deriving from constituent instruments of international organizations—particularly in the provisions relating to functions—as supplemented by resolutions adopted by their organs and by the general conventions on the privileges and immunities of the organizations and relevant headquarters agreements. To this must be added the practice that has accumulated in respect of permanent missions in the United Nations and agencies of the United Nations family.

<sup>48</sup> The Headquarters Agreement of ECA with Ethiopia (see footnote 38 above) is, however, the only headquarters agreement concerning a United Nations regional economic commission which expressly envisages resident representatives.

<sup>49</sup> See *Official Records of the General Assembly, Part I of the Third Session, Plenary Meetings of the General Assembly, Annexes to the Summary Records of Meetings*, document A/609. See also paragraph 2 of the commentary to article 6 of the provisional draft. (For the reference to the articles of the provisional draft, see footnote 31 above.)

(5) Given the central position which organizations of universal character occupy in the present day international order and the world-wide character of their activities and responsibilities, non-member States have also felt it necessary to establish permanent observer missions to those organizations. Frequently, it is of great interest to non-member States to be able to follow the work of international organizations of universal character. The association of non-member States with such international organizations is also of benefit to the organizations themselves and conducive to the fulfilment of their principles and purposes.

(6) Accordingly, paragraph 1 of article 5 regulates the establishment of "permanent missions" by "member States" and paragraph 2 of "permanent observer missions" by "non-member States". As stated in paragraph 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 of the present draft articles. Paragraph 2, in turn, provides that 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 of the present draft articles.

(7) The words "may establish" used in paragraphs 1 and 2 underline the non-obligatory character—mentioned above—of the institution of permanent missions of States to international organizations. The phrase "if the rules of the Organization so admit" has been inserted in both paragraphs in order to make provision for the consent of the Organization, namely to cover expressly the second main characteristic of permanent representation to international organizations referred to above. The Commission employed the expression "rules of the Organization" as including any established practice of the Organization. In this connexion, it may be recalled that article 3 of the present draft states that "The application of the present articles is without prejudice to any relevant rules of the Organization" and that article 4 sets forth another general reservation concerning existing and future international agreements regarding the representation of States in their relations with international organizations.

(8) Paragraph 3 has been included because the Commission considered that the host State should be notified of the institution of a mission even before its physical establishment, to facilitate any necessary action.

#### **Article 6.<sup>50</sup> 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;

<sup>50</sup> Article 7 of the provisional draft.

(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.

#### Commentary

(1) Since the functions of permanent missions are numerous and varied, article 6 merely lists the usual functions under broad headings. The words "*inter alia*" in the opening sentence serve to underline that the enumeration of functions made by the article is not intended to be exhaustive.

(2) Sub-paragraph *a* is devoted to the representational function of the permanent mission. In order to make it clear that the representation of a State to an international organization may take different forms, of which the permanent mission, while important, is only one, the Commission replaced the words "representing the sending State" used in the provisional draft by the words "ensuring the representation of the sending State".

(3) Sub-paragraph *b* relates to the function which characterizes a main activity of permanent missions, namely maintaining the necessary liaison between the sending State and the organization. The permanent mission, and in particular the permanent representative as head of mission, is responsible for the maintenance of official relationships between the Government of the sending State and the organization. A permanent mission maintains contact with the organization on a continuous basis and acts as a channel of communication between its Government and the organization.

(4) Sub-paragraphs *c* and *d* set out two classic diplomatic functions, *viz.*, negotiating and reporting to the Government of the sending State on activities. In a memorandum submitted to the Secretary-General of the United Nations in 1958 the Legal Counsel stated:

The development of the institution of the permanent missions since the adoption of that resolution [General Assembly resolution 257 A (III)] shows that the permanent missions also have functions of a diplomatic character [. . .]. The permanent missions perform these various functions through methods and in a manner similar to those employed by diplomatic missions, and their establishment and organization are also similar to those of diplomatic missions which States accredit to each other.<sup>51</sup>

(5) The role of permanent missions in negotiations is assuming increasing importance with the steady growth of the activities of international organizations, especially in technical assistance and in the economic and social fields. Negotiations carried out by permanent missions are not necessarily confined to negotiations "with" the organization itself. The reference in sub-paragraph *c* to negotiations "in" the organization recognizes the practice

of consultations and exchanges of views between States through their permanent missions. This latter type of negotiation, which includes what has come to be known as multilateral diplomacy, is generally recognized to be one of the significant features of contemporary international organizations. In the Introduction to his Annual Report on the work of the United Nations from 16 June 1958 to 15 June 1959, the Secretary-General observed that

The permanent representation at Headquarters of all Member nations, and the growing diplomatic contribution of the permanent delegations outside the public meetings [. . .] may well come to be regarded as the most important "common law" development which has taken place so far within the constitutional framework of the Charter.<sup>52</sup>

(6) It should be noted, however, that certain functions of diplomatic missions are not usually performed by permanent missions to international organizations. This applies in particular to the function of diplomatic protection, which belongs to the diplomatic mission of the sending State accredited to the host State. It was also pointed out during the discussion that permanent missions may in certain circumstances perform functions in relation to the host State, with the latter's consent.

(7) Sub-paragraph *e* states that one of the functions of permanent missions consists in promoting co-operation for the realization of purposes and principles of the Organization. Article 1 of the Charter of the United Nations refers to international co-operation as one of the purposes of the United Nations and to the Organization itself as "a centre for harmonizing the actions of nations". The duty of States to co-operate with one another is also one of the principles included in the "Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" adopted by the General Assembly on 24 October 1970. The promotion of international co-operation through the realization of the purposes and principles of international organizations of universal character has become a common undertaking at the present stage of development of international relations.

#### Article 7.<sup>53</sup> *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 Organisation;

(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.

<sup>51</sup> "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat" ("hereinafter referred to as "Study of the Secretariat"), *Yearbook of the International Law Commission, 1967*, vol. II, p. 165, document A/CN.4/L.118 and Add.1 and 2, part one, A, para. 17.

<sup>52</sup> *Official Records of the General Assembly, Fourteenth Session, Supplement No. 1A (A/4132/Add.1)*, p. 2.

<sup>53</sup> Article 53 of the provisional draft.

*Commentary*

(1) Permanent observer missions, being missions established by States non-members of the organization, perform different functions from those of permanent missions of member States as mentioned in article 6. Article 7, like article 6, merely enumerates the usual functions of permanent observer missions.

(2) The representational function of permanent observer missions is limited to certain specific purposes; hence the inclusion in sub-paragraph *a* of the phrase "in relations with the Organization" which delimits the scope of the representation of a sending State by a permanent observer mission. Their liaison function likewise differs from that of permanent missions inasmuch as there is no formal link between the Organization and a non-member State; sub-paragraph *a*, therefore, refers to "maintaining liaison with the Organization" instead of "maintaining the necessary liaison between the sending State and the Organization" as in the case of permanent missions (article 6).

(3) The wording of sub-paragraph *b* follows that of the corresponding provision of article 6 (sub-paragraph *d*). In paragraph 168 of the Introduction to his Annual Report on the work of the Organization covering the period 16 June 1966–15 June 1967, the Secretary-General of the United Nations stated:

In my introduction to last year's annual report as well as in previous years, I have already expressed my strong feeling that all countries should be encouraged and enabled, if they wish to do so, to follow the work of the Organization more closely by maintaining observers at the Headquarters of the United Nations, at Geneva and in the regional economic commissions. They will thus be exposed to the impact of the work of the Organization and the currents and cross-currents of opinion that prevail within it, besides gaining opportunities to contribute to that exchange.<sup>64</sup>

(4) The function of "promoting co-operation with the Organization" referred to in sub-paragraph *c* differs substantially from the corresponding function of permanent missions which is, under sub-paragraph *e* of article 6, to promote co-operation "for the realization of the purposes and principles of the Organization".

(5) Lastly, the function of negotiation may be exercised by permanent observer missions when an agreement "with" the Organization is under consideration, while permanent missions may perform negotiating functions "with or in" the Organization. On the other hand, negotiations not being a regularly recurrent part of a permanent observer mission's activity, the Commission added in sub-paragraph *c* the words "when required" before the words "negotiating with it" [the Organization].

**Article 8<sup>55</sup> 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.**

*Commentary*

(1) There have been a number of cases where a head of mission, permanent representative or permanent observer, has been accredited or appointed by the sending State to more than one international organization; at the Office of the United Nations at Geneva the practice has been developed of accrediting the same person as head of mission both to the various specialized agencies having their headquarters in Geneva and to the Office itself. Other members of a mission to an international organization are likewise sometimes called upon to exercise functions on behalf of their respective States at another organization; for instance members of missions at United Nations Headquarters have exercised functions on behalf of their respective States at specialized agencies in Washington.<sup>66</sup> The practice of accrediting or appointing the same person, head of mission or member of the staff of the mission, to two or more organizations is not limited to organizations of universal character. Representatives have on occasion simultaneously represented their country both at the United Nations and at regional organizations (e.g. at the OAS).<sup>67</sup> Permanent representatives of certain European countries to the Council of Europe have been simultaneously accredited to EEC. The provisions set forth in article 8 are, therefore, based on a well established and generalized practice.

(2) The first part of paragraph 1 provides that the same person may be accredited by a sending State as "head of mission" to two or more international organizations; and the second part of that paragraph that a sending State may appoint a "head of mission" to an international organization as a "member of the diplomatic staff" of another of its missions. Paragraph 2, in turn, states that a sending State may accredit "a member of the diplomatic staff" of a mission to an international organization a "head of mission" to other international organizations or to appoint "a member of the staff" of a mission as "a member of the staff" of another of its missions. The Commission used the verb "to appoint" in connexion with designations as a member of the diplomatic staff of a mission or as a member of the staff of a mission, because only the designation as "head of mission" requires accreditation.

(3) Both paragraph 1 of article 5 of the Vienna Convention on Diplomatic Relations, which regulates the case of the accreditation of a head of mission or the assignment of a member of the diplomatic staff to more than one State, and article 4 of the Convention on Special Missions which deals with the sending of the same special mission

<sup>64</sup> *Official Records of the General Assembly, Twenty-second Session, Supplement No. 1A (A/6701/Add.1).*

<sup>65</sup> Articles 8 and 54 of the provisional draft.

<sup>66</sup> Study of the Secretariat [see foot-note 51 above], *op.cit.*, p. 169, para. 38.

<sup>67</sup> *Ibid.*, para. 39.

to two or more States, require that none of the receiving States objects. That requirement is designed to avoid the undesirable conflict and difficulties that may arise in certain instances of accreditation or assignment of the same diplomatic agent to more than one State or the sending of the same mission to two or more States. Given the different character of missions to international organizations, the considerations underlying the requirement contained in paragraph 1 of article 5 of the Convention on Diplomatic Relations and in article 4 of the Convention on Special Missions do not apply to missions to international organizations. Moreover, such a requirement is not supported by practice. Article 8 therefore does not make the accreditation or appointment of the same head of mission or member of the diplomatic staff of a mission to two or more international organizations conditional upon the lack of objection of the organizations concerned.

(4) Article 6 of the Convention on Diplomatic Relations provides that two or more States may accredit the same person as head of mission to another State, and article 5 of the Convention on Special Missions authorizes the sending of a joint special mission by two or more States. In the cases where a similar situation has arisen within the framework of representation to international organizations, what has been involved in fact has been representation to one of the organs of the organization or to a conference convened by it, and not the institution of missions as such.

#### **Article 9.<sup>58</sup> Appointment of the members of the mission**

**Subject to the provisions of articles 14 and 72, the sending State may freely appoint the members of the mission.**

#### *Commentary*

(1) The freedom of choice by the sending State of the members of the mission is a principle basic to the effective performance of the functions of the mission. Article 9 expressly provides for two exceptions to that principle. The first relates to the size of the mission; that question is regulated by article 14. The second exception is embodied in article 72 which requires the consent of the host State for the appointment of one of its nationals as head of mission or as a member of the diplomatic staff of the mission of another State.

(2) Unlike the relevant articles of the Convention on Diplomatic Relations and of the Convention on Special Missions, article 9 does not make the freedom of choice by the sending State of the members of its mission to an international organization subject to the *agrément* of either the Organization or the host State as regards the appointment of the head of mission.

(3) The members of the mission are not accredited to the host State in whose territory the seat of the organization is situated. They do not enter into direct relationship with the host State, unlike the case of bilateral diplomacy. In

the latter case, the diplomatic agent is accredited to the receiving State in order to perform certain functions of representation and negotiation between the receiving State and his own. That legal situation is the basis of the institution of *agrément* for the appointment of the head of the diplomatic mission. As regards the United Nations, the Legal Counsel made, at the 1016th meeting of the Sixth Committee on 6 December 1967 the following statement which, though referring to representatives to United Nations organs and conferences, is likewise of relevance to missions:

The Secretary-General, in interpreting diplomatic privileges and immunities, would look to provisions of the Vienna Convention [on Diplomatic Relations] so far as they would appear relevant *mutatis mutandis* to representatives to United Nations organs and conferences. It should of course be noted that some provisions—such as those relating to *agrément*, nationality or reciprocity—have no relevancy in the situation of representatives to the United Nations.<sup>59</sup>

#### **Article 10.<sup>60</sup> 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.**

#### *Commentary*

(1) Article 10 is based on paragraph 1 of General Assembly resolution 257 A (II) on permanent missions, adopted on 3 December 1958. This paragraph reads:

[The General Assembly]

#### *Recommends*

1. That credentials of the permanent representatives shall be issued either by the Head of the State or by the Head of the Government or by the Minister of Foreign Affairs, and shall be transmitted to the Secretary-General.

(2) During the debates in the Sixth Committee which led to the adoption of the resolution the use of the word "credentials" in the draft resolution under consideration<sup>61</sup> was criticized by some representatives. It was argued that the word "credentials" was out of place because it tended to give the impression that the United Nations was a State. As matters stood, certain permanent representatives had full powers and not "credentials" (*lettres de créance*).<sup>62</sup> A number of representatives, however, did not share that point of view. They preferred the use of the word "credentials", pointing out that it had been intentionally included in the draft resolution and that it was unnecessary for permanent representatives to receive full powers to carry out their functions.<sup>63</sup>

<sup>58</sup> *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98, document A/C.6/385, para. 4.

<sup>59</sup> Articles 12 and 57 of the provisional draft.

<sup>61</sup> *Official Records of the General Assembly, Part I of the Third Session, Plenary Meetings of the General Assembly, Annexes to the Summary Records of Meetings*, document A/609.

<sup>62</sup> *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, 125th meeting, pp. 624 and 625.

<sup>63</sup> *Ibid.*, pp. 626, 628 and 630.

<sup>60</sup> Articles 10 and 55 of the provisional draft.

(3) The general practice regarding issuance of credentials in respect of permanent representatives to international organizations is that these credentials are issued by the Head of State or by the Head of Government or by the Minister for Foreign Affairs. In the case of some specialized agencies the credentials of permanent representatives may also be issued by the member of government responsible for the department which corresponds to the field of competence of the organization concerned. For instance, credentials for representatives to ICAO are usually signed by the Minister for Foreign Affairs or the Minister of Communications or Transport.

(4) While the credentials of permanent representatives are usually transmitted to the chief administrative officer of the Organization, whether designated "Secretary-General", "Director-General" or otherwise, there is no consistent practice as to which organ that officer should report on the matter. The last operative paragraph of General Assembly resolution 257 A (III) instructs the Secretary-General to submit, at each regular session of the General Assembly, a report on the credentials of the permanent representatives accredited to the United Nations. In the case of some other organizations, the credentials are submitted to the Director-General who reports thereon to the appropriate organ (e.g. the Board of Governors of IAEA). There are also some organizations which have no procedure of this kind in relation to credentials.

(5) The Study of the Secretariat refers only indirectly to the question of credentials of permanent observers, in the context of facilities accorded to them. In that respect, the study quotes a memorandum, dated 22 August 1962, sent by the Legal Counsel to the then Acting Secretary-General, paragraph 4 of which states *inter alia* :

[. . .] Communications informing the Secretary-General of their [the permanent observers] appointment are merely acknowledged by the Secretary-General or on his behalf and they are not received by the Secretary-General for the purpose of presentation of credentials as is the case for Permanent Representatives of States Members of the Organization.<sup>64</sup>

(6) During the discussion of this question in the Commission some members were in favour of adhering to the present United Nations informal practice in accordance with which permanent observers do not present credentials. However, the Commission considered that given the limited extent of that practice and in the interest of uniformity, it would be preferable to provide for the submission of credentials of permanent observers in substantially the same form as permanent representatives.

(7) Article 10 is therefore designed to consolidate the practice in the matter where such practice exists, and to set up a general pattern for the submission of the credentials of the head of mission, whether permanent representative or permanent observer, to the Organization. The article provides that 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. The latter words, namely "or, if the rules of the Organization so

admit, by another competent authority" have been inserted in order to cover situations such as those discussed in paragraph 3 of the present commentary. The Commission has chosen the expression "competent authority" rather than the more restricted expression "competent minister" because a reasonable degree of latitude appeared desirable in view of the widely varying nature of international organizations and State practice. Thus, in some States credentials are issued by authorities which although equivalent, cannot be termed ministers. For reasons already indicated in connexion with other articles, the Commission replaced the words "if that is allowed by the practice followed in the Organization" which appeared in the provisional draft by the words "if the rules of the Organization so admit".

(8) Lastly, article 10 provides that the credentials of the head of mission "shall be transmitted to the Organization." The Commission deleted the words "the competent organ of" from the corresponding provisions of the provisional draft in view of the definition of the term "organ" given in article 1, paragraph 1 (4), according to which "organ" means a body in which States are members. In making that change, the Commission did not therefore intend to depart from practices such as those referred to in paragraph 4 of the present commentary.

#### *Article 11.<sup>65</sup> 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 delegate to one or more organs of the Organization when this is admitted.

#### *Commentary*

(1) Paragraph 1 of this article—which is derived from paragraph 4 of General Assembly resolution 257 A (III)—provides that a member State may specify in the credentials of its permanent representative that he is authorized to act as its delegate in one or more organs of the Organization.

(2) According to the information supplied by the legal advisers of international organizations, the position as to whether a permanent representative accredited to a particular organization is entitled to represent his State before all organs of the organization varies to some extent from organization to organization. It would seem, however, to be a general practice that accreditation as a permanent representative does not by itself entitle the representative to participate in the proceedings of any organ to which he is not specifically accredited.

<sup>64</sup> Study of the Secretariat, *op. cit.*, p. 190, para. 169.

<sup>65</sup> Articles 13 and 57, para. 2, of the provisional draft.

(3) The competence of a permanent representative to represent his State on the Interim Committee of the General Assembly was discussed by that Committee in 1948. The summary of the discussion in the Committee's report contains, *inter alia*, the following passages:

The Committee considered [a] proposal submitted by the Dominican Republic. According to that proposal the Heads of permanent delegations at the seat of the United Nations should, in that capacity, be automatically entitled to represent their countries on the Interim Committee. This would provide for greater elasticity by making it unnecessary for each delegation to submit new credentials for each convocation of the Interim Committee. With regard to alternates and advisers, rule 10 of the rules of procedure of the Interim Committee stated that they could normally be designated by the appointed representative. Consequently, special credentials would only be required when a Member of the United Nations desired to send a special envoy. It was said that such a procedure, in addition to its practical usefulness, would induce all Governments to set up permanent delegations which would be an important contribution to the work of the United Nations.

It was pointed out that the matter of credentials was properly one for the Governments concerned to decide for themselves. For example, in accrediting the head of a permanent delegation, it might be specified that, in the absence of notification to the contrary, he might act as representative on all organs or committees of the United Nations. The representative of the Dominican Republic made it clear, however, that the proposal submitted by his Government was intended to apply exclusively to the Interim Committee.<sup>66</sup>

(4) While paragraph 1 of article 11 embodies the practice described in paragraphs 2 and 3 of this commentary, paragraph 2 establishes a principle in favour of granting in general to the permanent representative competence to represent his country in the different organs of the organization because this simplifies the operations of international organizations.

(5) As the reservation stated in the first phrase of paragraph 2 makes clear, the competence of the permanent representative to act as a delegate of his State in the organs of the organization is necessarily subject to the relevant rules of the organization which may prescribe special requirements as regards representation to organs. Special credentials, for instance, are required for the representative of a Member State in the Security Council. The same applies in a considerable number of other organizations, for instance in the case of government delegates in the General Conference and the Governing Body of ILO, and of the Executive Board of UNESCO.

(6) It should also be noted that the rule stated in paragraph 2 of the present article is without prejudice to the functions of credentials committees or to other similar procedures which may be set up by the different organs to examine the credentials of delegates.

(7) Paragraph 3 concerning permanent observers is parallel to paragraph 1. The provisions embodied in those paragraphs are, however, substantially different. First, paragraph 3 provides that a non-member State may specify in the credentials issued to its permanent observer that he is authorized to act as "an observer delegate", and not as "a delegate", in one or more organs. Secondly, the

provision in paragraph 3 is subject to the proviso "when this is admitted". The Commission has added that proviso to paragraph 3 because there is no generally accepted practice under which a non-member State may be represented by an observer delegate in an organ of that organization. Lastly, no provision parallel to paragraph 2 of article 11 was included with regard to permanent observers, since there was no general rule in international practice that non-member States could be represented by permanent observers at meetings of organs of international organizations for which there were no special requirements as regards representation by observers.

#### **Article 12.<sup>67</sup> 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.

#### *Commentary*

(1) The Commission decided to limit the scope of article 12, as indicated by its title, to treaties between States and the Organization. The article does not cover treaties concluded within organs of international organizations or in conferences convened under the auspices of international organizations.

(2) This article concerns the authority of heads of mission, whether permanent representatives or permanent observers. As one of the functions of permanent observer missions is negotiating "when required" with the organization (article 7, sub-paragraph c), the Commission considered that the provisions of this article should apply to permanent observers.

(3) Paragraph 1 of article 12 complements the relevant provisions of paragraph 2 b of article 7 of the Convention on the Law of Treaties<sup>68</sup> by establishing for heads of

<sup>67</sup> Articles 14 and 58 of the provisional draft.

<sup>68</sup> The provisions in question read:

#### *Article 7: Full powers*

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

The term "full powers" is defined in article 2, paragraph 1 (c), of the same Convention as meaning

a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.

<sup>66</sup> *Official Records of the General Assembly, Third Session, Supplement No. 10* (document A/606), paras. 67 and 68.

missions accredited to an international organization, with regard to treaties concluded by their respective States "with" the organization, a presumption similar to that contained in paragraph 2 *b* of article 7, of that Convention.

(4) Paragraph 2 of article 12 is based on the practice of international organizations. The requirement of United Nations practice that permanent representatives need full powers to sign international agreements was described as follows by the Legal Counsel in response to an inquiry made by a permanent representative in 1953:

As far as permanent representatives are concerned, their designation as such has not been considered sufficient to enable them to sign international agreements without special full powers. Resolution 257 (III) of the General Assembly of 3 December 1948 on permanent missions does not contain any provision to this effect and no reference was made to such powers during the discussions which preceded the adoption of this resolution in the Sixth Committee of the General Assembly.<sup>69</sup>

(5) In the case of treaties in simplified form, the production of an instrument of full powers is not usually insisted upon in the practice of States. Since treaties between States and international organizations are sometimes concluded by exchanges of notes or in other simplified forms, the Commission has included in paragraph 2 of article 12 a clause which dispenses with the production of full powers for the purpose of signing a treaty if "it appears from the practice of the Organization, or from other circumstances, that the intention of the parties was to dispense with full powers".

### *Article 13.<sup>70</sup> Composition of the mission*

**In addition to the head of mission, the mission may include diplomatic staff, administrative and technical staff and service staff.**

#### *Commentary*

(1) Article 13 is modelled on article 9, paragraph 1, of the Convention on Special Missions.

(2) The terms used in article 13 are defined in article 1 of the draft. Where appropriate, the extent of their meaning has been explained in the commentary to that article.

(3) Every mission must include a head since the host State and the organization must at any given moment know who is responsible for the mission. As for the further composition of missions, it may be very similar to that of diplomatic missions which States accredit to each other. In paragraphs 7 and 8 of its commentary on articles 13 to 16 of the 1958 draft articles on diplomatic intercourse and immunities,<sup>71</sup> the Commission set out the normal composition of diplomatic missions.

(4) Missions often include experts and advisers as members of the diplomatic staff, who play an important role,

especially as regards international organizations of a technical character.

### *Article 14.<sup>72</sup> 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.**

#### *Commentary*

(1) Article 14 is modelled on article 11, paragraph 1 of the Convention on Diplomatic Relations. There is, however, one essential difference between the two texts. According to the provision of the Vienna Convention, the receiving State "may require"<sup>73</sup> that the size of a mission be kept within limits considered by it to be reasonable and normal [ . . . ]. Article 14 of the present draft articles states the problem differently. It creates an obligation for the sending State, when establishing the composition of its mission, to keep its size within "reasonable and normal" limits.

(2) In their replies to the questionnaire addressed to them by the Legal Counsel, the specialized agencies and IAEA stated that they had encountered no difficulties in relation to the size of permanent missions accredited to them, and that host States had imposed no restrictions on the size of those missions. The practice of the United Nations itself, as summed up in the Study of the Secretariat, indicates that although no provision appears to exist specifically delimiting the size of permanent missions it has been generally assumed that some upper limit does exist.<sup>74</sup>

(3) When negotiations were held with the United States of America authorities concerning the Agreement regarding the Headquarters of the United Nations,<sup>75</sup> the United States representative, while accepting the principle of the proposed article V dealing with permanent representatives "felt that there should be some safeguard against too extensive an application". The text thereupon suggested—which, with slight modifications, was finally adopted as article V—was considered by the Secretary-General and the Negotiating Committee to be a possible compromise. This compromise is reflected in section 15, paragraph 2 (article V), which grants privileges and immunities to:

such resident members of [the] staffs [of the resident representatives] as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned.

(4) The main difference between article 14 and the corresponding provision of the Convention on Diplomatic Relations has already been indicated in paragraph 1 of this commentary. In this respect, the Commission wishes to observe that, unlike the case of bilateral diplomacy, the

<sup>69</sup> Study of the Secretariat, *op. cit.*, p. 169, para. 35.

<sup>70</sup> Articles 15 and 59 of the provisional draft.

<sup>71</sup> *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859)*, p. 16 (*Yearbook of the International Law Commission, 1958*, vol. II, p. 94, document A/3859, para. 53).

<sup>72</sup> Articles 16 and 60 of the provisional draft.

<sup>73</sup> Emphasis supplied.

<sup>74</sup> Study of the Secretariat, *op. cit.*, p. 166, para. 18.

<sup>75</sup> For the reference to the text of the Agreement, see foot-note 36 above.

members of missions to international organizations are not accredited to the host State. Nor are they accredited to the international organization in the proper sense of the word. As will be seen in different parts of the draft articles, remedy for the grievances which the host State or the organization may have against the permanent mission or one of its members cannot be sought in the prerogatives which derive from the fact that diplomatic envoys are accredited to the receiving State and from the latter's inherent right, in the final analysis, to refuse to maintain relations with the sending State. In the case of missions to international organizations, the principle of the freedom of the sending State in the composition of its mission and the choice of its members must be recognized in order to ensure the effective functioning of multilateral diplomacy. Remedies against any misuse of that freedom must be sought in the consultation and conciliation procedure provided for in articles 81 and 82 of the present draft articles.

(5) Like paragraph 1 of article 11 of the Convention on Diplomatic Relations, article 14 lays down as objective factors in determining the size of the mission "the needs of the particular mission" and "the circumstances and conditions in the host State." To these article 14 adds the "functions of the Organization". Indeed, the Commission observed that a number of specialized agencies drew attention to the fact that, owing to the technical and operational nature of their functions, they corresponded directly with ministries or other authorities of member States; the role of missions to those agencies tended to be of a formal and occasional nature rather than of day-to-day importance.

#### *Article 15.<sup>76</sup> 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;

(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.**

#### *Commentary*

(1) With the exception of paragraph 1 *e* which is modelled on paragraph 1 *f* of article 11 of the Convention on Special Missions, the provisions of article 15 are modelled on those of article 10 of the Convention on Diplomatic Relations, with the changes required by the particular nature of missions to international organizations.

(2) It is essential that the organization and the host State be informed of the persons who are entitled to privileges and immunities. Consequently sending States are obliged to give notification as regards missions to international organizations, just as they are with regard to diplomatic and special missions.

(3) The question of the notification of the appointment of members of permanent missions to the United Nations was regulated by General Assembly resolution 257 A (III), paragraph 2 of which provides that

the appointments and changes of members of the permanent missions other than the permanent representative shall be communicated in writing to the Secretary-General by the head of the mission.

On the basis of the practice established in 1947 and 1948, the normal procedure at present is for permanent missions to notify the Protocol and Liaison Section of the Secretariat of the names and ranks of persons on their staff who are entitled to privileges and immunities under sub-sections 1 and 2 of section 15 of the Headquarters Agreement. These particulars are then forwarded by the Secretariat to the United States Department of State through the United States Mission.

(4) The question of notifications is also dealt with in the "Decision of the Swiss Federal Council concerning the legal status of permanent delegations to the European Office of the United Nations and to other international organizations having their headquarters in Switzerland" of 31 March 1948.<sup>77</sup> Paragraph 4 of the decision provides that:

The establishment of a permanent delegation and the arrivals and departures of members of permanent delegations are notified to the Political Department by the diplomatic mission of the State concerned at Berne. The Political Department issues to members of delegations an identity card (*carte de légitimation*) stating the privileges and immunities to which they are entitled in Switzerland.

(5) While the United Nations has a system of notification of the appointment of members of permanent missions and of their departures and arrivals, the arrangements applied within other international organizations of universal character regarding notifications appear to be fragmentary and far from systematized. The Commission took the view that it was desirable to establish a uniform regulation and article 15 seeks to do this.

<sup>77</sup> United Nations Legislative Series, *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations* (United Nations publication, Sales No.: 60.V.2), p. 92. [Text in French].

<sup>76</sup> Articles 17 and 61 of the provisional draft.

(6) The rule formulated in article 15 is based on considerations of principle as well as practical considerations. Its rationale is that since the direct relationship is between the sending State and the Organization, notifications are to be made by the sending State to the organization (para. 1). Those notifications are transmitted to the host State by the organization (para. 3). Paragraph 4 of the article makes it optional for the sending State to address notifications directly to the host State. Paragraph 4 provides a supplement to and not an alternative for the pattern prescribed in paragraphs 1 and 3 of the article.

(7) Sub-paragraph *a* of paragraph 1 departs from the corresponding provision of the Convention on Diplomatic Relations in that it specifies an obligation for the sending State to notify changes in the status of the members of the mission.

(8) With respect to sub-paragraph *d* of paragraph 1, the Commission considered that the expression "engagement and discharge" which appeared in the corresponding sub-paragraph of its earlier draft and derives from article 10, paragraph 1 *d* of the Convention on Diplomatic Relations was too narrow; for instance it did not cover the case of the death of one of the persons referred to. The Commission therefore replaced it by the words "the beginning and the termination of the employment".

(9) The Commission included paragraph 1 *e* at its twenty-third session because of the need of the host State to be aware of the exact location of the premises and private residences whose inviolability it is called upon to ensure.

#### **Article 16.<sup>78</sup> *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.**

##### *Commentary*

(1) Article 16, which is modelled on paragraph 1 of article 19 of the Convention on Diplomatic Relations, provides for situations when the post of head of mission falls vacant, or the head of mission is unable to perform his functions. As indicated by the use of the expression "head of mission", it covers both permanent representatives and permanent observers. The provision which the Commission had adopted at its twenty-second session concerning the designation of a *chargé d'affaires ad interim* in the case of a prolonged absence of the permanent observer differed from the corresponding provision on permanent representatives inasmuch as it provided a faculty instead of imposing an obligation on the sending State. At its present session, however, the Commission has eliminated that difference: it considers that once a mission is established, it is necessary in the interest both of the organization and of the host State that there should be at any given moment a person responsible for the mission.

<sup>78</sup> Articles 18 and 62 of the provisional draft.

(2) In the case of permanent missions, General Assembly resolution 257 A (III) envisages the possibility that the duties of head of mission may be performed temporarily by someone other than the permanent representative. Paragraph 3 of the resolution provides that:

the permanent representative, in case of temporary absence, shall notify the Secretary-General of the name of the member of the mission who will perform the duties of head of the mission.

As regards permanent observer missions, it is the practice of a number of them, in particular in Geneva, to appoint members of their staff to be *chargé d'affaires ad interim* in the case of a prolonged absence of the permanent observer.

(3) Article 16 does not retain the word "provisionally" which appears in paragraph 1 of article 19 of the Convention on Diplomatic Relations; the Commission deemed the word unnecessary since the concept it expresses is already covered by the words "*ad interim*", and misleading since it may give the impression that acts performed by a *chargé d'affaires* are subject to confirmation. Also, the Commission has deleted the reference to the authority responsible for notifying the name of the *chargé d'affaires ad interim* to the organization which appeared in the corresponding provisions of its earlier draft. In its view the important point is that notification should be given to the organization and it is not necessary to specify by what authority it should be given. As regards permanent missions, the term "*chargé d'affaires*" should be distinguished from the terms "alternate representative" or "deputy permanent representative". The latter are frequently used by member States to designate the person ranking immediately after the permanent representative.

#### **Article 17.<sup>79</sup> *Precedence***

**1. Precedence among permanent representatives shall be determined by the alphabetical order of the names of the States used in the Organization.**

**2. Precedence among permanent observers shall be determined by the alphabetical order of the names of the States used in the Organization.**

##### *Commentary*

(1) Article 17 adopts the rule of alphabetical order to govern precedence. That rule is intended to apply in the case of permanent representatives as well as in the case of permanent observers. However, the Commission has deemed it appropriate to provide in separate paragraphs for each case to make it clear that only two orders of precedence are covered by the article: precedence of permanent representatives as among themselves and precedence of permanent observers as among themselves.

(2) At its twenty-second session, the Commission had not included a provision on precedence for permanent observers. At the present session, however, the Commission took the view that the regulation which the draft articles try to achieve should be as complete as possible, and it therefore included such a provision in paragraph 2.

<sup>79</sup> Article 19 of the provisional draft.

(3) The articles on precedence among permanent representatives contained in the Commission's provisional draft laid down a dual criterion for determining precedence: alphabetical order or the time and the date of the submission of credentials. At its present session, the Commission decided that affording a choice between two solutions in accordance with usage in the organization did not offer a definite solution. It therefore retained only the rule of alphabetical order since it is generally followed in international organizations. For clarity, and since there are several alphabetical orders, the article specifies that the alphabetical order is that of the names of the States concerned used in the Organization.

#### *Article 18.<sup>80</sup> 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.**

##### *Commentary*

(1) Article 18 starts from the presumption that the sending State has a right to establish an office in the locality where the seat or an office of the organization is established. Its purpose is to ensure that an office of the mission is established in a locality other than that in which the seat or an office of the organization is established, only with the consent of the host State.

(2) The article is confined to the establishment of an office of the mission in the territory of the host State as is expressly indicated by the words "within the host State" which are inserted after the word "locality". The Commission deleted a provision contained in a separate paragraph of the corresponding article of its provisional draft which allowed for the establishment of offices in the territory of a State other than the host State only with the prior consent of such a State. The Commission considered that this provision related to a wholly exceptional situation with which it was unnecessary to deal in the draft articles.

(3) The words "office" and "locality" appear in the singular, since the article is concerned with the establishment of a specific office of the mission.

#### *Article 19.<sup>81</sup> 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.**

<sup>80</sup> Articles 20 and 63 of the provisional draft.

<sup>81</sup> Articles 21 and 64 of the provisional draft.

**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.**

##### *Commentary*

(1) The right to the use of the flag and emblem of the sending State was recognized for diplomatic missions in article 20 of the Convention on Diplomatic Relations. The present article is modelled on that text as far as recognizing a similar right for missions to international organizations is concerned. However, the difference in functions between permanent missions and permanent observer missions led the Commission to establish some distinction as regards the extent of the right accorded to each kind of mission. Consequently, it decided to provide in separate paragraphs for each case.

(2) Paragraph 1 of the article concerns permanent missions. Unlike the corresponding article of the Vienna Convention on Diplomatic Relations, it is divided in two sentences to make clearer the distinction between the right granted to the permanent mission as such and the right granted to the permanent representative.

(3) Paragraph 2 covers permanent observer missions. The omission in this paragraph of a sentence corresponding to the second sentence of paragraph 1 reflects the Commission's opinion that some reduction in the visible signs of the presence of permanent observers was justified in view of the functional difference between permanent missions and permanent observer missions.

(4) Paragraph 3 of the article concerning the exercise of the right accorded under paragraphs 1 and 2 is common to both kinds of missions. It is modelled on paragraph 3 of article 29 of the Convention on Consular Relations<sup>82</sup> and on paragraph 2 of article 19 of the Convention on Special Missions.

#### *Article 20.<sup>83</sup> 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.**

##### *Commentary*

(1) Paragraph 1 of article 20 is modelled on article 25 of the Convention on Diplomatic Relations. Sub-paragraph *a* provides that the host State shall accord to the permanent mission "all facilities" for the performance of its functions. The Commission replaced in the English version the expression "full facilities" of the provisional

<sup>82</sup> United Nations, *Treaty Series*, vol. 596, p. 261.

<sup>83</sup> Articles 22 and 65 of the provisional draft.

draft by the expression "all facilities". It considered that such a departure from the corresponding provision of the Convention on Diplomatic Relations was justified, the expression "all facilities" rendering better the idea expressed in the French ("*toutes facilités*") and Spanish ("*toda clase de facilidades*") versions. Sub-paragraph *b* states that the host State shall accord to the permanent observer mission "the facilities required" for the performance of its functions. The Commission considered it advisable to retain the intentional difference in wording between sub-paragraphs *a* and *b*. The different wording of sub-paragraph *a* and sub-paragraph *b* reflects a certain distinction between the functions, obligations and needs of "permanent missions" on the one hand, and those of "permanent observer missions" on the other, which makes it unnecessary for the latter to be given the same facilities as the former.

(2) Paragraph 2 establishes the obligation of the organization "to assist" the mission in obtaining the facilities to which permanent missions and permanent observer missions are entitled under paragraph 1. It provides also that the Organization "shall accord to the mission such facilities as lie within its own competence". The latter words are designed to recognize both that the facilities which an organization is able to supply are limited and that the according of facilities to a mission by an organization has to be carried on in light of the relevant rules of the organization.

#### *Article 21.<sup>84</sup> 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.

#### *Commentary*

(1) Article 21 is modelled on article 21 of the Convention on Diplomatic Relations.

(2) As indicated by the Commission in the commentary on the relevant provision (article 19) of its draft articles on diplomatic intercourse and immunities which served as the basis for the Convention,

the laws and regulations of a given country may make it impossible for a mission to acquire the premises necessary for it. For that reason the Commission inserted in the draft an article which makes it obligatory for the receiving State to ensure the provision of accommodation for the mission if the latter is not permitted to acquire it.<sup>85</sup>

These considerations equally underlie paragraph 1 of the present article.

<sup>84</sup> Articles 23 and 66 of the provisional draft.

<sup>85</sup> *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859)*, p. 17 (*Yearbook of the International Law Commission, 1958*, vol. II, p. 95, document A/3859, para. 53).

(3) Certain members of the Commission pointed out during the discussion of the article that in some cases property rights over the premises of a mission to an international organization could not be obtained by acquisition under the applicable municipal law and that in other cases the premises were acquired not by the sending State but, on its behalf, by the head of mission. They believed therefore that the expressions "acquisition" and "by the sending State" unduly restricted the scope of article 21. It was, however, observed that all such cases would come under the clause of article 21 obliging the host State to assist the sending State "in obtaining accommodation in some other way". The Commission decided, therefore, to retain in the article the expressions in question.

(4) The assistance which the organization may give to the members of the mission under paragraph 2 in obtaining suitable accommodation would be very useful, among other reasons, because the organization itself would as a rule have experience of conditions in the host State. In light of the concern expressed in comments submitted by some secretariats of international organizations regarding the burdens resulting from the requirement of paragraph 2 of the article, the Commission wishes to stress that the organization's obligation under that paragraph is *to assist in obtaining*, not *to provide*. On the other hand, the statement of the organization's obligation does not exclude the use of arrangements such as those existing at the Headquarters of the United Nations in New York or at its Office in Geneva for joint activities of international organizations in this area.

#### *Article 22.<sup>86</sup> 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.

#### *Commentary*

(1) One of the characteristics of representation to international organizations is that the observance of juridical rules governing privileges and immunities is not solely the concern of the sending and the receiving (host) State as it is the case in bilateral diplomacy. In the discussion of the "Question of diplomatic privileges and immunities" (agenda item 98) which took place in the Sixth Committee during the twenty-second session of the General Assembly (1967) it was generally agreed that the United Nations itself had an interest in the enjoyment by the representatives of Member States of the privileges and immunities necessary to enable them to carry out their functions. It was also recognized that the Secretary-General should maintain his efforts to ensure that the privileges and immunities concerned were respected.<sup>87</sup>

<sup>86</sup> Articles 24 and 66 of the provisional draft.

<sup>87</sup> *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda, item 98, document A/6965, para. 14.

(2) In his statement at the 1016th meeting of the Sixth Committee (1967), the Legal Counsel, speaking as the representative of the Secretary-General, stated that:

It therefore seems elementary that the rights of representatives should properly be protected by the Organization and not left entirely to bilateral action of the States immediately involved. The Secretary-General would therefore continue to feel obligated in the future, as he has done in the past, to assert the rights and interests of the Organization on behalf of representatives of Members as the occasion may arise. I would not understand from the discussion in this Committee that the Members of the Organization would wish him to act in any way different from that which I have just indicated. Likewise, since the Organization itself has an interest in protecting the rights of representatives, a difference with respect to such rights may arise between the United Nations and a Member and consequently be the subject of a request for an advisory opinion under section 30 of the Convention [on the Privileges and Immunities of the United Nations]. It is thus clear that the United Nations may be one of the "parties", as that term is used in section 30.<sup>88</sup>

(3) The Commission was unable to agree with a governmental comment that even where there was no real problem concerning privileges and immunities, international organizations would be induced to intervene in relationships between sending and host States because of the provisions of article 22. In this regard, it should be recalled that the obligation imposed by article 22 on the organization is subject to the proviso "where necessary". The obligation of the organization to assist the sending State, the mission and the members of the mission relates to the articles of the draft providing for privileges and immunities. The scope of the organization's obligation to assist relates only to these privileges and immunities as formulated in the present draft.

### *Article 23.<sup>89</sup> 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.

#### *Commentary*

(1) The first and second sentences of paragraph 1 and paragraphs 2 and 3 of article 23 are modelled on article 22 of the Convention on Diplomatic Relations. The third sentence of paragraph 1 is modelled on the third sentence

of paragraph 1 of article 25 of the Convention on Special Missions. The General Assembly introduced that sentence in article 25 of the Convention on Special Missions, following the adoption by the Sixth Committee of an amendment submitted by Argentina to article 25 of the International Law Commission's draft articles on special missions.<sup>90</sup>

(2) The requirement that the host State should ensure the inviolability of the missions' premises, archives and documents has been generally recognized. In a letter sent to the Legal Adviser of one of the specialized agencies in 1964, the Legal Counsel of the United Nations stated that:

There is no specific reference to mission premises in the Headquarters Agreement and the diplomatic status of these premises therefore arises from the diplomatic status of a resident representative and his staff.<sup>91</sup>

(3) The headquarters agreements of some of the specialized agencies contain provisions relating to the inviolability of the premises of permanent missions. An example of such provision may be found in article XI (section 24) of the Headquarters Agreement of FAO.

(4) The inviolability of the premises of the United Nations and the specialized agencies is provided in article II (section 3) of the Convention on the Privileges and Immunities of the United Nations and article III (section 5) of the Convention on the Privileges and Immunities of the Specialized Agencies respectively. These provisions state that the property and assets of the United Nations and the specialized agencies, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

(5) The Commission unanimously agreed on the principle of the inviolability of the premises of missions to international organizations. The Commission was divided only on the question raised by the third sentence of paragraph 1.<sup>92</sup> Some members were in favour of formulating the inviolability of the premises without exceptions, while others considered that such inviolability should not prevail over the fundamental obligation of the host State to guard against loss of life and personal injuries in serious cases of fire or other disaster. In adopting such a formulation, the Commission felt entitled to assume that both sending and host States would apply the provision embodied therein in good faith. The Commission wished to make it clear also that, in the context of paragraph 1 of article 23 of the draft, the words "head of mission" ("permanent representative" or "permanent observer") were to be understood to mean any person authorized to act on his behalf.

<sup>88</sup> Amendment adopted at the 1088th meeting of the Sixth Committee during the consideration of the item entitled "Draft Convention on Special Missions" at the twenty-third session (1968) of the General Assembly (See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 85, document A/7375, paras. 190, 192, 194 and 195).

<sup>89</sup> Study of the Secretariat, op. cit., p. 187, para. 154.

<sup>90</sup> cf. article 22 of the Convention on Diplomatic Relations and article 25 of the Convention on Special Missions.

<sup>88</sup> *Ibid.*, document A/C.6/385, para. 8.

<sup>89</sup> Articles 25 and 67 of the provisional draft.

(6) The inviolability of premises granted by this article applies to the "premises of the mission" as defined in article 1, paragraph 1 (26), of the draft.

**Article 24.<sup>93</sup> 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.

*Commentary*

(1) Article 24 is modelled on article 23 of the Convention on Diplomatic Relations.

(2) The replies of the United Nations and the specialized agencies indicate that the exemption provided for in this article is generally recognized. Examples of provisions of headquarters agreements for such exemption are to be found in article XI of the Headquarters Agreement of FAO and in articles XII and XIII of the Headquarters Agreement of IAEA.

(3) The Commission changed the beginning of paragraph 1 to correspond to that of article 32, paragraph 1, of the Convention on Consular Relations. It might be argued that the wording of paragraph 1, as provisionally adopted in 1969, covered only taxes levied against persons holding title to or possession of real property and did not include taxes made a direct charge on the property itself. As modified, the beginning of the paragraph reads: "The premises of the mission of which the sending State or any person acting on its behalf is the owner or the lessee . . .". A consequential change has been made at the end of paragraph 2 ("by persons contracting with the sending State or any person acting on its behalf").

(4) The Commission, bearing in mind the provisions of article 33 of the draft—especially sub-paragraph *a*—was of the opinion that article 24 should be interpreted as covering also "indirect taxes". It considered that the exemption provided for in article 24 covered likewise shares in housing corporations in respect of mission premises.

**Article 25.<sup>94</sup> Inviolability of archives and documents**

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

<sup>93</sup> Articles 26 and 67 of the provisional draft.

<sup>94</sup> Articles 27 and 67 of the provisional draft.

*Commentary*

(1) Article 25 is modelled on article 24 of the Convention on Diplomatic Relations.

(2) In paragraph 3 of its commentary on that article (article 22: Inviolability of the archives) of its 1958 draft on diplomatic intercourse and immunities, the Commission commented:

Although the inviolability of the mission's archives and documents is at least partly covered by the inviolability of the mission's premises and property, a special provision is desirable because of the importance of this inviolability to the functions of the mission. This inviolability is connected with the protection accorded by article 25 to the correspondence and communications of the mission.<sup>95</sup>

**Article 26.<sup>96</sup> 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.

*Commentary*

(1) Article 26 is modelled on article 26 of the Convention on Diplomatic Relations.

(2) The only difference of substance between article 26 of the Convention and article 26 of the present draft is the addition of the phrase "and members of their families forming part of their respective households". The Commission considered that the families of members of the mission should have the right to move freely in the host State. The Commission decided that it was desirable to include a specific provision to that effect in the present draft.

(3) Replies of the specialized agencies indicate that no restrictions have been imposed by the host State on the movement of members of missions to international organizations.

(4) Some members of the Commission referred to governmental comments which raised the question whether the proper functioning of missions to international organizations required that their members enjoy the same freedom of movement that was granted to members of diplomatic missions. They suggested that the freedom of movement guaranteed in article 26 should be qualified in the same manner as in the corresponding article (article 27) of the Convention on Special Missions. In their view it would be appropriate to restrict freedom of movement to what was necessary for the purpose of the functions of the mission. The majority of the members of the Commission considered that the only grounds on which the host State could validly restrict freedom of movement were those of national security, and the article already covered that

<sup>95</sup> *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859)*, p. 18 (*Yearbook of the International Law Commission, 1958*, vol. II, p. 96, document A/3859, para. 53).

<sup>96</sup> Articles 28 and 68 of the provisional draft.

point. They thought that any attempt to introduce a limitation based on the functional element would unduly restrict the freedom of movement of members of missions. The view of those members was that it would be preferable not to add the reservation which had been provided for in the case of special missions and which was justified by the particular character of those missions.

### *Article 27.<sup>97</sup> 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 permanent 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.

#### *Commentary*

(1) Article 27 is modelled on article 27 of the Convention on Diplomatic Relations.

(2) Missions to the United Nations, the specialized agencies and other international organizations enjoy in practice freedom of communication on the same terms as the diplomatic missions accredited to the host State.

<sup>97</sup> Articles 29 and 67 of the provisional draft.

(3) Replies of the United Nations and specialized agencies indicate also that the inviolability of correspondence, which is provided for in section 11 *b* (article IV), of the Convention on the Privileges and Immunities of the United Nations and section 13 *b* (article V), of the Convention on the Privileges and Immunities of the Specialized Agencies, has been fully accorded.

(4) One difference between this article and article 27 of the Convention on Diplomatic Relations is the addition in paragraph 1 of the words "permanent missions", "permanent observer missions", "special missions" and "delegations" in order to co-ordinate the article with other provisions of the present draft and article 28, paragraph 1, of the Convention on Special Missions and to enable those missions and delegations to communicate with each other. The reference to "permanent observer missions" and "delegations" has been added at the second reading. When the draft article was provisionally formulated in 1969, the Commission had not yet undertaken the study of permanent observer missions and delegations to organs or to conferences.

(5) A further difference is that paragraph 7 of article 27 provides that the bag of the mission may be entrusted not only to the captain of a commercial aircraft, as provided for the diplomatic bag in article 27 of the Convention on Diplomatic Relations, but also to the captain of a merchant ship. A similar provision is found in article 35 of the Convention on Consular Relations and article 28 of the Convention on Special Missions.

(6) On the basis of article 28 of the Convention on Special Missions, the article uses the expressions "the bag of the mission" and the "courier of the mission". The expressions "diplomatic bag" and "diplomatic courier" were not used in order to prevent any possibility of confusion with the bag and courier of the diplomatic mission.

(7) Finally, the Commission reversed its decision of 1969 and included the phrase "By arrangement with the appropriate authorities of the host State" at the beginning of the last sentence of paragraph 7. In paragraph 7 of the commentary to article 29 of the provisional draft, the Commission had already expressed the view that "the omission of the phrase was not, however, to be taken as implying that a member of the permanent mission could, for example, proceed to an aircraft without observing the applicable regulations".<sup>98</sup> The phrase in question is based on the corresponding provision of article 28, paragraph 8, of the Convention on Special Missions.

### *Article 28.<sup>99</sup> 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

<sup>98</sup> *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10 (A/7610/Rev.1)*, p. 8 (*Yearbook of the International Law Commission, 1969, vol. II, p. 211, document A/7610/Rev.1, chap. II, B*).

<sup>99</sup> Articles 30 and 69 of the provisional draft.

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 29.<sup>100</sup> 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.

*Commentary*

(1) Articles 28 and 29 are modelled on articles 29 and 30 of the Convention on Diplomatic Relations.

(2) Articles 28 and 29 deal with two generally recognized immunities which are essential for the performance of the functions of the head of mission and of the members of the diplomatic staff of the mission.

(3) The principle of the personal inviolability of the head of mission and of the members of the diplomatic staff, which article 28 confirms, implies the obligation for the host State to respect, and to ensure respect for, the person of the individuals concerned. The host State must take all necessary measures to that end, which may include the provision of a special guard if circumstances so require.

(4) Inviolability of all papers and documents of representatives of States to the organs of the organizations concerned is consistently provided for in the conventions on the privileges and immunities of the United Nations and the specialized agencies and in the agreements relating to other international organizations.

(5) In paragraph 1 of its commentary on article 28 (Inviolability of residence and property) of its 1958 draft articles on diplomatic intercourse and immunities, the Commission stated:

This article concerns the inviolability accorded to the diplomatic agent's residence and property. Because this inviolability arises from that attaching to the person of the diplomatic agent, the expression "the private residence of a diplomatic agent" necessarily includes even a temporary residence of the diplomatic agent.<sup>101</sup>

(6) The wording of the consolidated provisions of articles 28 and 29 follows that of the provisional draft articles except for a minor drafting change introduced at the beginning of the second sentence of article 28 in the French and Spanish versions. In the French version the word "ils" has been replaced by the word "ceux-ci" and in the Spanish the words "Ni el jefe de la misión ni esos miembros" have been inserted before "podrán ser". The Commission made those drafting changes in the French and Spanish versions in order to make it clearer

that the "head of mission" and the "members of the diplomatic staff of the mission" are not liable to any form of arrest or detention.

(7) Lastly, it should be pointed out that, as provided for in article 29, the inviolability of the private residence of the head of mission and of the members of the diplomatic staff of the mission is "the same" as the inviolability of the "premises of the mission" regulated by article 23 of the draft. Therefore, the observations made on the terms in which the inviolability of the premises of the mission is formulated in article 23 also apply to article 29 (see commentary to article 23).

**Article 30.<sup>102</sup> 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 sending State for the purposes of the mission;

(b) 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.

*Commentary*

(1) Article 30 is modelled on article 31 of the Convention on Diplomatic Relations. Paragraph 1 of article 30 grants complete immunity from criminal jurisdiction. Subject to the exceptions stated in that paragraph, immunity from civil and administrative jurisdiction is also recognized.

(2) The Commission agreed that the phrase "civil and administrative jurisdiction" in paragraph 1 of article 30 is

<sup>100</sup> Articles 31 and 69 of the provisional draft.

<sup>101</sup> *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859)*, p. 20 (*Yearbook of the International Law Commission*, vol. 11, p. 98, document A/3859, para. 53).

<sup>102</sup> Articles 32 and 69 of the provisional draft.

used in a general sense, in contradistinction to "criminal jurisdiction", and includes, for instance, commercial and labour jurisdiction.

(3) Paragraph 4 of the Commission's commentary to article 32 (Immunity from jurisdiction) of the provisional draft stated:

After a lengthy discussion, the Commission was unable owing to a wide divergence of views, to reach any decision on the substance of the provision in sub-paragraph 1 (*d*). It decided to place the provision in brackets and to bring it to the attention of Governments. Those favouring the proposal, which was based on sub-paragraph (2) (*d*) of article 31 of the draft articles on special missions, argued that it would meet a real and growing problem which had, it was said, been inadequately recognized at the 1961 Vienna Conference on Diplomatic Intercourse and Immunities. Further, there were problems in some countries concerning the application and effect of insurance laws and practices as well as the adequacy of the insurance coverage. On the other hand, it was argued that the Vienna precedent should be followed, since it provided the closer analogy. In addition, considerable emphasis was placed on articles 34 and 45 of the present draft [articles 31, paragraph 5, and 75 of the present draft articles]; the former provision, which goes beyond the corresponding resolution of the 1961 Vienna Conference, requires the sending State to waive immunity 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 immunity is not waived the sending State "shall use its best endeavours to bring about a just settlement of such claims".<sup>103</sup> The latter provision requires all persons enjoying privileges and immunities to respect the laws and regulations of the host State. Those opposing the proposal in sub-paragraph 1 (*d*) also argued that one particular kind of claim should not be singled out in this way and that the functional line drawn in it would be difficult to apply.<sup>104</sup>

(4) At its present session, the Commission examined again the question of the advisability of including sub-paragraph *d* of paragraph 1 in the text of the article as well as its formulation. Several Governments had submitted comments on the matter 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 and Add.1-6,<sup>105</sup> chap. III, observations on article 32, para. 21.) Most members were in favour of including sub-paragraph *d* of paragraph 1 in the text of the article, as the General Assembly did in article 31 of the Convention on Special Missions, with a slightly different wording to reflect the frequently expressed desire that the vehicles of members of missions to international organizations should be insured against third-party risks.

(5) Accordingly, the Commission decided to include sub-paragraph *d* of paragraph 1 in the text of article 30 and to make therein an express reference to the question of the insurance coverage. In doing so, the Commission made two changes in the wording of that sub-paragraph. It replaced the words "outside the official functions of the

person in question", of which there was no definition, by the words "by the person in question outside the exercise of the functions of the mission". The "functions of the mission" are defined in articles 6 and 7 of the present draft. Secondly, the Commission added at the end of the sub-paragraph the phrase "where those damages are not recoverable from insurance". The Commission used that phrase instead of other alternatives, like for instance "and only if those damages are not covered by insurance," to avoid any possibility that, under the applicable law in force in the host State, recovery on a claim might be defeated if an insurance company were able to invoke immunity from jurisdiction of a person causing an accident in order to avoid compensating the victim.

#### *Article 31.<sup>106</sup> 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 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.

#### *Commentary*

(1) Paragraphs 1 to 4 of article 31 are modelled on article 32 of the Convention on Diplomatic Relations. Paragraph 5 is based on resolution II adopted by the United Nations Conference on Diplomatic Intercourse and Immunities on 14 April 1961<sup>107</sup> and on the recommendation contained in General Assembly resolution 2531 (XXIV) of 8 December 1969 adopted in connexion with the Convention on Special Missions. Paragraph 5 replaces the articles on "settlement of civil claims" included in the Commission's provisional draft.

(2) The basic principle of the waiver of immunity is contained in article IV (section 14) of the Convention on the Privileges and Immunities of the United Nations which states:

Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connexion with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member

<sup>103</sup> The formulation of provisional draft article 34 has been substantially modified by the Commission at the second reading (see commentary to article 31 of the present draft).

<sup>104</sup> *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10 (A/7610/Rev.1)*, pp. 9-10 (*Yearbook of the International Law Commission, 1969*, vol. II, pp. 212-213, document A/7610 Rev.1, chap. II, B).

<sup>105</sup> To be printed in *Yearbook of the International Law Commission, 1971*, vol. II, part II.

<sup>106</sup> Articles 33, 34 and 71 of the provisional draft.

<sup>107</sup> *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication Sales No.: 62.XI.1), p. 90.

the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

(3) This provision was reproduced *mutatis mutandis* in article V (section 16) of the Convention on the Privileges and Immunities of the Specialized Agencies and in a number of the corresponding instruments of regional organizations.

(4) At the second reading, the Commission has made only some minor drafting changes in the wording of paragraphs 1 to 4 of article 31. The text of paragraph 5 is different from that of the corresponding provision of the provisional draft (article 34). The text proposed in former article 34 stated that:

The sending State shall waive the immunity of any of the persons mentioned in paragraph 1 of article 33 [paragraph 1 of the present article] 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.

This text was similar to that of article 42 of the Commission's draft articles on special missions adopted in 1967.<sup>108</sup> Since then, however, the General Assembly deleted such a provision from the 1969 Convention on Special Missions and made it the subject-matter of the separate recommendation contained in resolution 2531 (XXIV) mentioned above. This recommendation follows the language of resolution II adopted by the United Nations Conference on Diplomatic Intercourse and Immunities.

(5) At the present session, the Commission considered whether the best course would be to follow the solution adopted in connexion with the Convention on Special Missions, namely to delete altogether former article 34 and to append to the draft articles a recommendation along the lines of General Assembly resolution 2531 (XXIV). Many members, however, considered it desirable to retain some ideas of the General Assembly's recommendation in the text of the draft articles. The Commission, therefore, decided to replace former article 34 by a new paragraph 5 to be added to article 31 on waiver of immunity. This paragraph 5 does not strictly speaking lay down an obligation to waive immunity, but it does impose upon a sending State the duty to "use its best endeavours to bring about a just settlement of the case" if it is unwilling to waive immunity. The Commission was of the opinion that, so formulated, the provision should be acceptable to States in general and, therefore, retained in the convention they might adopt in the future on the basis of the present draft.

### **Article 32.<sup>109</sup> 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**

<sup>108</sup> *Official Records of the General Assembly, Twenty-second Session, Supplement No. 9 (A/6709/Rev.1)*, p. 21 (*Yearbook of the International Law Commission, 1967*, vol. II, p. 365, document A/6709/Rev.1, chap. II, D).

<sup>109</sup> Articles 35 and 69 of the provisional draft.

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 paragraph 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.**

### *Commentary*

(1) Article 32 is modelled on article 33 of the Convention on Diplomatic Relations.

(2) As has been pointed out in some written comments of Governments, there is no express provision in paragraph 1 of this article exempting the sending State itself, in its capacity as employer, from social security legislation. The Commission considered any such clause unnecessary in view of the rule of general international law concerning the immunity enjoyed by the State in diplomatic relations. The reference to the sending State is, therefore, implicit in paragraphs 1 and 3 of this article.

(3) Like paragraph 2 of article 32 of the Convention on Special Missions, paragraph 2 of this article substitutes the expression "persons who are in the sole private employ" for the expression "private servants who are in the sole employ", which is used in article 33 of the Convention on Diplomatic Relations. Referring to this change in terminology, the Commission stated in paragraph 2 of its commentary on article 32 of its draft articles on special missions:

Article 32 of the draft applies not only to servants in the strict sense of the term, but also to other persons in the private employ of members of the special mission such as children's tutors and nurses.<sup>110</sup>

(4) Owing to the special character of agreements on social security, the Commission considered it desirable to maintain paragraph 5 of article 32 rather than to leave the matter to be covered by article 4.

<sup>110</sup> *Official Records of the General Assembly, Twenty-second Session, Supplement No. 9 (A/6709/Rev.1)*, p. 19 (*Yearbook of the International Law Commission, 1967*, vol. II, p. 362, document A/6709/Rev.1, chap. II, D).

(5) As stated in paragraph 2 of article 37 of the present draft, members of the staff of the mission, other than members of the diplomatic staff, who are nationals of or permanently resident in the host State, enjoy privileges and immunities "only to the extent admitted by the host State". The case could therefore occur that a person, national of or permanently resident in the host State, employed by the sending State for instance as a member of the technical and administrative staff of the mission, might be obliged to participate in the social security system of the host State and make the appropriate contributions. The Commission noted that in such case the practice of several countries was that the mission voluntarily undertook to pay the employer's contribution.

### **Article 33.<sup>111</sup> 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, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 24.

#### *Commentary*

(1) Article 33 is modelled on article 34 of the Convention on Diplomatic Relations.

(2) The immunity of representatives from taxation is dealt with indirectly in article IV (section 13) of the Convention on the Privileges and Immunities of the United Nations which provides that:

Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in a State for the discharge of their duties shall not be considered as periods of residence.

(3) This provision was reproduced *mutatis mutandis* in article V (section 15) of the Convention on the Privileges and Immunities of the Specialized Agencies and in a number of the corresponding instruments of regional organizations.

(4) Except in the case of nationals of the host State, representatives enjoy extensive exemption from taxation.

<sup>111</sup> Articles 36 and 69 of the provisional draft.

In ICAO and UNESCO all representatives, and in FAO and IAEA, resident representatives, are granted the same exemptions in respect of taxation as diplomats of the same rank accredited to the host State concerned. In the case of IAEA, no taxes are imposed by the host State on the premises used by missions or delegates including rented premises and parts of buildings. The taxation system applied to permanent delegations to UNESCO is in principle the same as that enjoyed by embassies. Permanent delegations to UNESCO pay only taxes for services rendered (scavenging, sewage, etc.) and real property tax ("*contribution foncière*") when the permanent delegate is the owner of the building. Permanent delegates are exempt from tax on movable property ("*contribution mobilière*"), a tax imposed on residents in France according to the residential premises they rent or occupy, in respect of their principal residence but not in respect of any secondary residence.<sup>112</sup>

(5) In the light of the comments submitted by Governments and secretariats of international organizations, the Commission wishes to make it clear that in the opening sentence of the article the words "personal or real, national, regional or municipal" apply to "dues" as well as to "taxes". The provision in sub-paragraph *b* is general in character and covers every relevant concrete situation, like, for instance, shares in housing corporations in respect of mission premises. The Governments which referred to the question having indicated the existence of no practical difficulties in interpreting and applying the provision of sub-paragraph *f* of article 34 of the Convention on Diplomatic Relations, the Commission decided to maintain the final phrase of sub-paragraph *f* of this article ("subject to the provisions of article 24").

(6) In sub-paragraph *f*, the Commission retained words "with respect to immovable property". Taking into consideration that those words, which appeared both in article 34 of the Convention on Diplomatic Relations and article 33 of the 1967 draft articles on special missions, had been deleted from the Convention on Special Missions by the General Assembly following the adoption of an oral amendment in the Sixth Committee, the Commission did not include them in the corresponding provision (sub-paragraph *f* of article 102) of part IV of the provisional draft relating to delegations. However, at its present session the Commission decided to include the words in question in article 64 (in the part of the draft dealing with delegations), because if they were omitted from article 64 and retained in article 33, the result would be that missions of a permanent character would have to pay registration, court or records fees, mortgage dues and stamp duty only with respect to movable property whereas delegations would have to pay them on all property, movable and immovable.

### **Article 34.<sup>113</sup> 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

<sup>112</sup> Study of the Secretariat, op. cit., p. 201, document A/CN.4/L.118 and Add.1 and 2, part one, B. para. 45.

<sup>113</sup> Articles 37 and 69 of the provisional draft.

personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

*Commentary*

(1) Article 34 is modelled on article 35 of the Convention on Diplomatic Relations.

(2) The Commission's commentary on the provision on which article 35 of the Convention was based (article 33 of the draft articles on diplomatic intercourse and immunities), stated that it dealt

with the case where certain categories of persons are obliged, as part of their general civic duties or in cases of emergency, to render personal services or to make personal contributions.<sup>114</sup>

(3) The immunity in respect of national service obligations provided in article IV (section 11 *d*), of the Convention on the Privileges and Immunities of the United Nations and article V (section 13 *d*), of the Convention on the Privileges and Immunities of the Specialized Agencies has been widely acknowledged. That immunity does not normally apply when the head of mission or a member of the diplomatic staff of the mission is a national of the host State.<sup>115</sup> The phrase "military obligations" is comprehensive; the enumeration in article 34 is by way of example only.

**Article 35.<sup>116</sup> 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 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.**

*Commentary*

(1) Article 35 is modelled on article 36 of the Convention on Diplomatic Relations.

(2) While in general, heads of missions and members of the diplomatic staff of missions enjoy exemption from

<sup>114</sup> *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859)*, p. 22 (*Yearbook of the International Law Commission, 1958*, vol. II, p. 100, document A/3859, para. 53)

<sup>115</sup> Study of the Secretariat, op. cit., p. 200, para. 37.

<sup>116</sup> Articles 38, 67 and 69 of the provisional draft.

customs and excise duties, the detailed application of this exemption in practice varies from one host State to another according to the headquarters agreements and to the system of taxation in force.

(3) As regards the United Nations Headquarters, the "United States Code of Federal Regulations, Title 19—Customs Duties (Revised 1964)" provides in section 10.30 *b*, paragraph *b*, that resident representatives and members of their staffs may import ". . . without entry and free of duty and internal-revenue tax articles for their personal or family use".<sup>117</sup>

(4) At the United Nations Office at Geneva the matter is dealt with largely in the Swiss Customs Regulation of 23 April 1952. Briefly, permanent missions may import all articles for official use and belonging to the Government they represent (art. 15). In accordance with the declaration of the Swiss Federal Council of 20 May 1958,<sup>118</sup> the heads of permanent delegations may import free of duty all articles destined for their own use or that of their family (art. 16, para. 1). Other members of permanent delegations have a similar privilege except that the importation of furniture may be made only once (art. 16, para. 2).<sup>119</sup>

(5) The position in respect of missions to specialized agencies having their headquarters in Switzerland is identical with that of missions to the United Nations Office at Geneva. In the case of FAO, the extent of the exemption of resident representatives depends on their diplomatic status and is granted in accordance with the general rules relating to diplomatic envoys. Permanent delegates to UNESCO, with rank of ambassador or minister plenipotentiary, are assimilated to heads of diplomatic missions (article 18 of the Headquarters Agreement)<sup>120</sup> and can import goods for their official use and for that of the delegation free of duty. Other delegates or members of delegations may import their household goods and effects free of duty at the time of taking up their appointment. They may also temporarily import motor cars free of duty, under customs certificates without deposit (article 22, sub-paragraphs *g* and *h* of the Headquarters Agreement).

(6) Apart from minor drafting changes in some language versions, the Commission made only one change in the wording of the corresponding provisions of the provisional draft. 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 the provisions of article 35 concerning the members of the family of the head of mission and the members of the family of a member of the diplomatic staff of the mission were incorporated in article 36, paragraph 1.

<sup>117</sup> Study of the Secretariat, op. cit., document A/CN.4/L.118 and Add.1 and 2, part one, A, p. 183, para. 134. For details of the position in respect of the various federal and State taxes in New York, see *ibid.*, pp. 183–186, paras. 132–148.

<sup>118</sup> *Ibid.*, p. 173, para. 62.

<sup>119</sup> *Ibid.*, p. 183, para. 136.

<sup>120</sup> For the text of the Agreement, see United Nations, *Treaty Series*, vol. 357, p. 3.

**Article 36.<sup>121</sup> 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 in 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 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.

*Commentary*

(1) Article 36 is modelled on article 37 of the Convention on Diplomatic Relations.

(2) The Study of the Secretariat does not include data on privileges and immunities which host States accord to the members of the families of permanent representatives and to the members of the administrative and technical staff and of the service staff of permanent missions. The Commission understands that the practice relating to the status of these persons conforms to the corresponding rules established within the framework of inter-State diplomatic relations as codified and developed in the Convention on Diplomatic Relations. This understanding is corroborated by the identity of the legal bases of the status of these persons inasmuch as their status attaches to and derives from that of the diplomatic agents or permanent representatives, who are accorded analogous diplomatic privileges and immunities.

(3) The article grants to the administrative and technical staff, to the members of service staff and to the private staff, dealt with in paragraphs 2, 3 and 4 of the article, full immunity from the criminal jurisdiction of the host State. However, paragraph 2 expressly states that the

<sup>121</sup> Articles 40 and 69 of the provisional draft.

immunity of the administrative and technical staff from civil and administrative jurisdiction of the host State "shall not extend to acts performed outside the course of their duties". The immunity granted to the service staff in paragraph 3 is limited to acts "performed in the course of their duties". Under paragraph 4 the host State is only obliged to grant to the private staff exemption from dues and taxes on the emoluments they receive "by reason of their employment". The criteria of privileges and immunities necessary for the performance of the duties does not concern the members of the family dealt with in paragraphs 1 and 2.

(4) The Commission did not include a reference to article 31 in paragraph 1 of article 36. Article 31 does not specify a privilege or an immunity, but concerns waiver of immunity and settlement of claims. On the other hand, paragraph 1 of article 31 already provides that the rules stated in that article apply to "persons enjoying immunity under article 36". In addition, the Commission noted that article 35, paragraph 1 *a*, was concerned with a custom exemption granted to the permanent mission itself and not to members of the family of the head of mission or a member of the diplomatic staff. It replaced, therefore, the reference to the whole article by a more specific reference to "paragraphs 1 *b* and 2 of article 35".

(5) In paragraphs 3 and 4 the Commission deleted the reference to persons not nationals of or permanently resident in the host State as being unnecessary in the light of the provisions contained in paragraph 2 of article 37 (Nationals of the host State and persons permanently resident in the host State).

**Article 37.<sup>122</sup> 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 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.

*Commentary*

(1) Article 37 is modelled on article 38 of the Convention on Diplomatic Relations.

(2) A number of the existing conventions on the privileges and immunities of international organizations, whether universal or regional, stipulate that the provisions which define the privileges and immunities of the representatives

<sup>122</sup> Articles 41 and 70 of the provisional draft.

of States are not applicable as between a representative and the authorities of the State of which he is a national, or of which he is or has been the representative. A well-known example of such a provision is section 15 of the Convention on the Privileges and Immunities of the United Nations. A similar provision appears in section 17 of the Convention on the Privileges and Immunities of the Specialized Agencies as well as in the following: article 11 of Supplementary Protocol No. 1 to the Convention for European Economic Co-operation on the Legal Capacity, Privileges and Immunities of OEEC,<sup>123</sup> article 12 *a* of the General Agreement on Privileges and Immunities of the Council of Europe,<sup>124</sup> article 15 of the Convention of the Privileges and Immunities of the League of Arab States,<sup>125</sup> and article V, paragraph 5, of the General Convention on the Privileges and Immunities of the Organization of African Unity.<sup>126</sup> Examples of similar provisions in national legislation may be found in paragraph 9 of the Diplomatic Privileges (United Nations and International Court of Justice) Order in Council 1947 (United Kingdom)<sup>127</sup> and paragraph 6 of the Order in Council PC 1791 relating to the Privileges and Immunities of ICAO (Canada).<sup>128</sup>

(3) The Commission took the view that nationals of the host State and persons permanently resident in the host State once appointed as members of a mission or a delegation of the sending State, in accordance with the rule stated in article 72 of the draft, are entitled only to privileges and immunities as provided for in this article.

(4) Paragraph 1 of the article regulates the question of the privileges and immunities of the head of mission and any member of the diplomatic staff of the mission who are nationals of or permanently resident in the host State. The wording follows the corresponding provision of the Convention on Diplomatic Relations.

(5) Paragraph 2 concerns any member of the administrative and technical staff and of the service staff of the mission and any person on the private staff who are nationals of or permanently resident in the host State. It follows the corresponding provision of the Convention on Diplomatic Relations.

### **Article 38.<sup>129</sup> 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**

<sup>123</sup> United Nations, *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations*, vol. II (United Nations publication, Sales No.: 61.V.3), p. 369.

<sup>124</sup> *Ibid.*, p. 390.

<sup>125</sup> *Ibid.*, p. 414.

<sup>126</sup> Text published by the Secretariat of the Organization of African Unity, Addis Ababa.

<sup>127</sup> United Nations, *Legislative text and treaty provisions concerning the legal status, privileges and immunities of international organizations*, vol. I (United Nations publication, Sales No.: 60.V.2), p. 113.

<sup>128</sup> *Ibid.*, vol. II (United Nations publication, Sales No.: 61.V.3), p. 20.

<sup>129</sup> Articles 42 and 73 of the provisional draft.

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.

#### *Commentary*

(1) Article 38 is modelled on article 39 of the Convention on Diplomatic Relations.

(2) Paragraph 1 deals with the commencement of privileges and immunities for persons who enjoy them under these articles. Its formulation follows the corresponding paragraph of article 39 of the Convention on Diplomatic Relations, except that the phrase "from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed" has been replaced by the phrase "from the moment when his appointment is notified to the host State by the Organization or by the sending State". This change is in conformity with the provisions of paragraphs 3 and 4 of article 15 of the draft articles.

(3) Paragraph 2 dealing with the time of termination of the enjoyment of privileges and immunities follows also the corresponding provision of article 39 of the Convention. Having regard to the decision set out in paragraph 55 of the Introduction to the draft, the Commission has not, however, included the reference to the case of armed conflict which appears in paragraph 2 of article 39 of the Convention.

(4) Paragraphs 1 and 2 are both drafted in terms of persons who enjoy privileges and immunities in their official capacity. The Commission considered the advisability of including in the article a specific provision concerning commencement and termination in regard to persons who do *not* enjoy privileges and immunities in their official capacity (members of the family of a member of the mission forming part of his household; persons employed in the private staff of the members of the mission) as has been done in article 53, paragraph 2 and 3

of the Convention on Consular Relations. The Commission arrived at the conclusion that it was not necessary to add such a specific provision. The application *mutatis mutandis* to those persons of the provisions stated in paragraphs 1 and 2 of this article, bearing in mind the provisions on notifications set forth in article 15, paragraphs 1 *b*, *c* and *d*, seemed to the Commission the best practical solution of the matter.

(5) Paragraphs 3 and 4 also reproduce the corresponding provisions of the Convention on Diplomatic Relations. For drafting reasons, the Commission replaced in paragraph 4 the expression "the presence of which in the receiving State [host State] was due solely to the presence there of the deceased" by the expression "which is in the host State solely because of the presence there of the deceased", as did the General Assembly in paragraph 2 of article 44 of the Convention on Special Missions.

(6) Lastly, the Commission recalls that article IV (section 11) of the Convention on the Privileges and Immunities of the United Nations and article V (section 13) of the Convention on the Privileges and Immunities of Specialized Agencies provide that representatives shall enjoy the privileges and immunities listed therein while exercising their functions and during their journey to and from the place of meeting. In 1961 the Legal Counsel of the United Nations replied to an inquiry made by one of the specialized agencies as to the interpretation to be given to the first part of this phrase. The reply contained the following:

You inquire whether the words "while exercising their functions" should be given a narrow or broad interpretation [. . .] I have no hesitation in believing that it was the broad interpretation that was intended by the authors of the Convention.<sup>130</sup>

In addition, article IV (section 12) of the Convention on the Privileges and Immunities of the United Nations, which is reproduced *mutatis mutandis* in article V (section 14) of the Convention on the Privileges and Immunities of the Specialized Agencies, provides that:

In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

#### **Article 39.<sup>131</sup> Professional or commercial activity**

**The head of mission and members of the diplomatic staff of the mission shall not practise for personal profit any professional or commercial activity in the host State.**

##### *Commentary*

(1) Article 39 is modelled on article 42 of the Convention on Diplomatic Relations.

<sup>130</sup> Study of the Secretariat, op. cit., p. 176, para. 87.

<sup>131</sup> Articles 46, 76 and 113 of the provisional draft. Article 113 was deleted at the present session.

(2) The Commission took the view that the right of the host State to grant permission to persons referred to in the article to practise a professional or commercial activity on its territory was self-evident.<sup>132</sup>

#### **Article 40.<sup>133</sup> 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.**

##### *Commentary*

(1) Sub-paragraph *a* of article 42 is modelled on sub-paragraph *a* of article 43 of the Convention on Diplomatic Relations. For the sake of precision, the Commission replaced the words "to this effect" which appeared in the provisional draft by the words "of their termination".

(2) Sub-paragraph *b* refers to the case where the sending State recalls the mission temporarily or finally.

#### **Article 41.<sup>134</sup> 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.**

##### *Commentary*

(1) Although there is a degree of similarity between article 41 and article 45 of the Convention on Diplomatic Relations, they regulate situations that are substantially different. Bilateral relationships between States and relationships between States and international organizations are of an essentially different nature. Withdrawal of a mission to an international organization may be due to a wide variety of causes and may be final. The host State is

<sup>132</sup> A similar position was adopted by the Commission in connexion with its draft articles on special missions in paragraph 2 of the commentary on article 49 of that draft. See *Official Records of the General Assembly, Twenty-second Session Supplement No. 9 (A/6709/Rev.1)*, p. 23 (*Yearbook of the International Law Commission, 1967*, vol. II, p. 367, document A/6709/Rev.1, chap. II, D). Draft article 49 was adopted without change by the General Assembly; it became article 48 of the Convention on Special Missions.

<sup>133</sup> Articles 47 and 77 of the provisional draft.

<sup>134</sup> Articles 49 and 77 of the provisional draft.

not ordinarily involved in the factors which may determine such a withdrawal or its duration. It would, therefore, mean imposing an unjustified burden on that State to require it to provide, for an unlimited period, special guarantees concerning the premises, archives and property of a mission which has been recalled even on a temporary basis. It was therefore decided that, in case of the recall of its mission, the sending State must terminate this special duty of the host State within a reasonable time. Where the sending State has failed to discharge its obligation within a reasonable period, the host State ceases to be bound by the special duty imposed by article 41, but, with respect to the property, archives and premises, remains bound by any obligations which may be imposed upon it by its municipal law, by general international law or by special agreements for the protection of the property of foreign States in general.

(2) The sending State is free to discharge the obligation imposed on it by the second sentence of paragraph 1 of this article in various ways, for instance, by removing its property and archives from the territory of the host State. The premises similarly cease to enjoy special protection from the time the property and archives situated in them have been withdrawn or, after the expiry of a reasonable period, have ceased to enjoy special protection. The second sentence of paragraph 1 has been drafted in the most general terms in order to cover all these possibilities. The Commission considered, however, that one of the possibilities open to the sending State should be mentioned in the text of the paragraph itself, namely entrusting the premises, property and archives of the mission to the custody of a third State.

(3) Paragraph 2 concerning facilities for removing the property and the archives of the mission from the territory of the host State is based on article 45, paragraph 2, of the Convention on Special Missions. The obligation of the host State under paragraph 2 of the present article is subject to the proviso "if requested by the sending State."<sup>135</sup>

### PART III. DELEGATIONS TO ORGANS AND TO CONFERENCES

#### *Article 42.*<sup>136</sup> *Sending of delegations*

**A State may send a delegation to an organ or to a conference in accordance with the rules and decisions of the Organization.**

#### *Commentary*

(1) This article parallels article 5 relating to the establishment of missions. It provides that a State may send a delegation to an organ or to a conference in accordance with the rules and decisions of the organization.

<sup>135</sup> See paragraph 3 of the commentary to article 77 (Facilities for departure).

<sup>136</sup> New article.

(2) It is to be noted that, as stated by the Commission in paragraph 5 of its commentary on article 3, the expression "rules of the Organization" included all relevant rules whatever their nature. Constituent instruments of international organizations usually contain provisions regarding the membership of their organs and regulating the conditions under which States not members of such organs may participate therein (examples: Article 32 of the Charter of the United Nations and Article 14 of the provisional rules of procedure of the Security Council). The specific reference to "decisions of the Organization" is designed to cover the cases where a State is invited to participate in an organ or in a conference by an *ad hoc* decision. Thus the General Assembly of the United Nations decides, upon the recommendation of the Security Council, on the participation in the elections to the International Court of Justice of States parties to the Statute of the Court but not members of the United Nations. The decisions taken by international organizations to convoke conferences usually lay down the criterion in accordance with which invitations to States for participation in such conferences are issued.

(3) At its twenty-second session, the Commission included in its provisional draft articles on delegations to organs and conferences a provision that a delegation to an organ or to a conference may represent only one State (article 83 of the provisional draft). In paragraph 1 of its commentary on that article, the Commission stated that some of the members of the Commission expressed reservations concerning the article and that the Commission would review the matter at the second reading of the draft articles in the light of the observations which it received from governments and international organizations. In their written comments a number of Governments and international organizations suggested that the article on the principle of single representation should be redrafted so as not to exclude double representation in certain cases or that the article be deleted altogether. Reference was made to a number of international conventions and constituent instruments of international organizations where representation of two or more States by a single delegation is envisaged.<sup>137</sup> The Commission concluded that this

<sup>137</sup> The following international conventions were cited [see below annex I, section A, Netherlands, part c, para. 23]:

The Universal Postal Union of 1874 (Berne Convention of 1874 revised in the Acts of the Union, Vienna 1964: article 101, paragraph 2, of the UPU General Regulations pertaining to the Convention provides for the possibility of double representation in the Congress of the Union).

The International Union for the Protection of Industrial Property (Convention of Paris 1883, revised at Stockholm 1967: article 13, paragraph 3 (b) contains a special regulation for group representation in the Assembly of the Union).

The International Telecommunication Union (Madrid Convention of 1932, revised at Montreux 1965: Chapter 5, margin No. 640-642, of the General Regulations annexed to the Convention provides for double representation in the Conference of the Union and also for the transference of votes up to a maximum of one extra vote).

The International Organization of Legal Metrology (1955 Paris Convention: article XVII provides for the possibility of transferring votes in the International Committee of Legal Metrology up to a maximum of two extra votes).

The European Economic Community (Treaty of Rome 1957: article 150 provides for the possibility of a member of the Council of

aspect of representation concerns a matter which is governed by the internal law of international organizations and decided therefore not to deal with it in the present articles.

**Article 43.<sup>138</sup> Appointment of the members of the delegation**

Subject to the provisions of articles 46 and 72, the sending State may freely appoint the members of the delegation.

*Commentary*

- (1) Article 43 parallels article 9.
- (2) The freedom of choice by the sending State of the members of the delegation is a principle basic to the effective performance of the tasks of the delegation. Article 43 expressly provides for two exceptions to that principle. The first relates to the size of the delegation; that question is regulated by article 46. The second exception is embodied in article 72, which requires the consent of the host State for the appointment of one of its nationals as a delegate or as a member of the diplomatic staff of the delegation.
- (3) Like article 9 relating to permanent missions, article 43 does not make the freedom of choice by the sending State of the members of its delegation to an organ or a conference subject to the *agrément* of either the organization or the host State as regards the appointment of the head of the delegation. The reasons why the *agrément* of the host State does not operate within the framework of representation of State in their relations with international organizations have been stated by the Commission in its commentary on article 9.
- (4) In their written comments on the provisional draft, two Governments indicated that they would like to see the position of the host State invested with further guarantees. They suggested that the host State should be

the Community acting as proxy for not more than one other member in case of a vote).

In addition ITU pointed out [see below annex I, sect C, 11] that the terms of article 83 conflict with chapter 5, paragraphs 6, 7 and 8 of the General Regulations annexed to the Montreux Convention, the texts of which are as follows:

640 6. As a general rule, Members of the Union should endeavour to send their own delegations to conferences of the Union. However, if a Member is unable, for exceptional reasons, to send its own delegation, it may give the delegation of another Member of the Union powers to vote and sign on its behalf. Such powers must be conveyed by means of an instrument signed by one of the authorities mentioned in 629 or 630, as appropriate.

641 7. A delegation with the right to vote may give to another delegation with the right to vote a mandate to exercise its vote at one or more meetings at which it is unable to be present. In such a case it shall, in good time, notify the Chairman of the conference in writing.

642 8. A delegation may not exercise more than one proxy in any of the cases referred to in 640 and 641.

Finally, UPU pointed out [see below annex I, section C, 10] that the regulations in force in UPU allow a delegation to represent only one member country other than its own (article 101, paragraph 2, of the General Regulations of UPU). It therefore shared the reservations expressed by certain members of the Commission about article 83 and agreed with the reasoning advanced by them.

<sup>138</sup> Article 84 of the provisional draft.

empowered to reject the entering into the State of a given individual as a member of a delegation. The Commission decided not to depart from the principle of freedom of appointment in the framework of the representation of States in their relations with international organizations. Meanwhile, it has endeavoured to provide adequate guarantees to the States concerned through the procedures envisaged in articles 81 and 82.

**Article 44.<sup>139</sup> 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. They shall be transmitted, as the case may be, to the Organization or to the Conference.

*Commentary*

- (1) Article 44 parallels article 10. It is to be noted, however, that in the case of delegates to a conference, the question of credentials is usually regulated by the rules of procedure of the conference; hence the inclusion in the text of article 44 of the phrase "it [ . . . ] the rules of procedure of the conference so admit".
- (2) As indicated in the commentary to article 10, the phrase "by another competent authority" is designed to cover the practice whereby credentials of delegates to organs or to conferences dealing with technical matters are issued by the authority in the sending State directly responsible for those matters. This phrase also covers a practice whereby credentials of delegates to organs are sometimes issued by the head of the permanent mission.
- (3) In its written comments on the provisional draft,<sup>140</sup> ITU states that while persons appointed by a member country to serve on the Administrative Council are accredited in the two organs of the Administrative Council, namely the International Radio Consultative Committee and the International Telegraph and Telephone Consultative Committee, no system of formal accreditation for representatives of States is used, since they do not have the power to draw up treaties or regulations, but merely make recommendations. In formulating article 44, the Commission is seeking to lay down a residual requirement which does not preclude the application of a different rule as authorized under article 3 which might be appropriate to the particular needs of certain organs.
- (4) At its twenty-second session, the Commission had included in its provisional draft articles on delegations to organs and conferences a provision regarding full powers to represent the State in the conclusion of treaties (article 88 of the provisional draft).<sup>141</sup> In their written com-

<sup>139</sup> Article 87 of the provisional draft.

<sup>140</sup> See below annex I, section C, 11.

<sup>141</sup> That article read:

*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

ments, certain Governments questioned the advisability of the repetition in the present articles of what is already laid down in the Convention on the Law of Treaties. The Commission, at its present session, reexamined this question in the light of these comments. It concluded that the matter of full powers of delegations to represent the State in the conclusion of treaties should be left to be governed by the general law of treaties or to be covered by the topic of treaties concluded between States and international organizations or between two or more international organizations.

#### **Article 45.<sup>142</sup> 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.**

#### *Commentary*

- (1) Article 45 parallels article 13.
- (2) Every delegation includes at least one person to whom the sending State has entrusted the task of representing it. Otherwise the delegation would be without a member who could speak on behalf of the State or cast its vote. Article 45 is also formulated on the assumption that each delegation will have a head to whom the host State, the organization or the conference, as the case may be, and the other participating delegations can turn at any time as the person responsible for the delegation.
- (3) In its written comments on the provisional draft,<sup>143</sup> the ILO noted that although States may appoint a head of delegation, the rules applicable in the ILO do not compel them to do so, since each of the Government delegates (as well as the employers' and workers' delegates) are treated by the Conference as being on equal footing. It further pointed out that the delegates representing employers and workers are not subject to the authority of any head of delegation. The Commission notes that the particular situation prevailing in the Conference of the International Labour Organisation is covered by article 3 of the draft articles.
- (4) While each delegation must have at least one representative, the appointment of other members is permitted under article 45.

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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.

<sup>142</sup> Article 81 of the provisional draft.

<sup>143</sup> See below annex I, section C, 2.

#### **Article 46.<sup>144</sup> 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, as well as the needs of the particular delegation and the circumstances and conditions in the host State.**

#### *Commentary*

- (1) Article 46 parallels article 14. The Commission wishes to point out one difference between these two articles. Article 14 refers to the "functions" of the organization. Article 46 does use that term as regards organs, but it uses the word "object" in referring to conferences, which in the opinion of the Commission is more appropriate in relation to conferences.
- (2) In their written comments on the provisional draft, some Governments criticized the formulation of the provision on the size of the delegation, in that, unlike article 11, paragraph 1 of the Convention on Diplomatic Relations, it does not apportion to the host State the right to determine "what is reasonable and normal". It is to be noted that article 46 is based on article 14 which relates to missions to international organizations. In its commentary on this latter article, the Commission explained the reasons why a different rule is required for relations between States and international organizations than that for bilateral diplomatic relations. The Commission wishes also to underline the procedures available to the host State under articles 81 and 82 of the draft.
- (3) In their written comments on the provisional draft certain international organizations referred to provisions contained in their constituent instruments relating to the composition of delegations or defining the number of delegates and alternates. They expressed fears of what they called contradiction between such provisions and the rule stated in article 46. The Commission is of the opinion that no such contradiction exists. Article 46 seeks to regulate the size of the delegation as a whole, and does not purport to pose limitations on the specific category of delegates. Moreover, the constituent instruments would necessarily prevail under articles 3 and 4 of the draft.

#### **Article 47.<sup>145</sup> Notifications**

**1. The sending State 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;

<sup>144</sup> Article 82 of the provisional draft.

<sup>145</sup> Article 89 of the provisional draft.

(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;

(e) the location of the premises of the delegation and of the private accommodation enjoying inviolability under articles 54 and 60 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.

#### *Commentary*

(1) Article 47 is modelled partly on article 15 of the draft and partly on article 11 of the Convention on Special Missions. The Commission has taken the position that, owing to the temporary character of delegations to organs and conferences, the provisions concerning notifications with regard to such delegations should follow the Special Missions precedent more closely than did the corresponding provisions adopted in 1970 for the provisional draft.

(2) As a result of that position, article 47 differs in several respects from the corresponding provisions of the 1970 text. Firstly sub-paragraph *a* of paragraph 1 of the original provision has been divided into two sub-paragraphs, the first of which refers not to the "appointment [. . .] of the members of this delegation", as did the previous text, but to the "composition of the delegation". In practice, notifying the composition of the delegation is simpler and speedier than giving separate notifications for each appointment. Also in paragraph 1 *a*, the Commission has added the words "and any subsequent changes therein", which are borrowed from paragraph 1 *a* of article 11 of the Convention on Special Missions. Lastly, the Commission has merged paragraphs 1 *b* and 1 *c* of the 1970 text into one single provision (sub-paragraph 1 *c*) which reproduces with the necessary drafting changes paragraph 1 *c* of article 11 of the Convention on Special Missions.

(3) In its written comments on the provisional draft, one Government suggested that, as it is the host State which grants privileges and immunities, it is to the host State that the notifications should be sent first. As previously stated by the Commission in its commentary on article 15 (which article 47 parallels) the rationale of the rule formulated in the provision on notifications is that since the direct relationship is between the sending State and the organization, notifications are to be made by the sending State to the organization which in turn transmits them to the host State.

(4) One international organization, while conceding that it would indeed be desirable if organizations could be told of the dates of arrival and departure of the persons referred to in the article on notifications and so inform

the government of the country in which the conference meets of the period in which those persons will enjoy rights and privileges provided for in the draft convention, pointed out that the provision might face insurmountable difficulties when it came to be implemented. It cited as an example the case when some delegates fail to inform the organization of their arrival and departure. In seeking to lay down a general requirement in article 47, the Commission is conscious that total implementation cannot always be expected in practice. It trusts however that the formulation of a rule on notification will lead to the organization and the host State being provided with all the necessary information.

#### *Article 48.<sup>146</sup> 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 44.

#### *Commentary*

(1) Paragraph 1 of article 48 parallels article 16. There are, however, two main differences between that paragraph and article 16. In the first place, the expression "*chargé d'affaires ad interim*" (article 16) has been replaced by "acting head" in order to conform to the terminology normally used in delegations. In the second place, since meetings of conferences and organs are sometimes of a very short duration, the first sentence of the article provides for a speedy and flexible mode of designation of the acting head.

(2) Paragraph 2 deals with the case in which no delegate is available to replace the head of delegation. It provides that in such a case "another person may be designated for that purpose". However, because a delegation cannot function as a delegation in the absence of a representative empowered to act on behalf of the sending State, paragraph 2 of article 48 contains a requirement that such person must be designated as a delegate through the issuance and transmittal of credentials in accordance with article 44.

(3) In its written comments, one Government pointed out that it would be preferable for the acting head of the delegation to be designated in advance, before any case of unavoidable absence, which may be sudden, can occur. The Commission is not sure that such a requirement would be practicable and fears that its adoption might result in unnecessary rigidity.

<sup>146</sup> Article 86 of the provisional draft.

**Article 49.<sup>147</sup> Precedence**

**Precedence among delegations shall be determined by the alphabetical order of the names of the States used in the Organization.**

*Commentary*

- (1) Article 49 parallels article 17.
- (2) The text of article 90 of the provisional draft provided that precedence among delegations was determined by the alphabetical order used in the host State. In its written comment on that text, one Government observed that it remains to some extent unclear by what alphabetical order the precedence among delegates shall be determined in countries which have several official languages. To meet this point and taking into account the practice of international organizations as indicated in the written comments of some of these organizations,<sup>148</sup> according to which it is the alphabetical order used in the organization rather than that used in the host State which is generally followed to determine precedence among delegations to organs and conferences, the Commission redrafted the article accordingly.
- (3) During the discussion of article 49 some members of the Commission criticized the use of the word "precedence" which in their view raised questions regarding the principle of sovereign equality of States. The Commission decided, however, to retain that word, as it had been used in the Conventions on Diplomatic Relations and on Consular Relations and in the Convention on Special Missions. The word has thus acquired a special connotation in convention of this character, with respect to matters of etiquette and protocol.

**Article 50.<sup>149</sup> 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.**

*Commentary*

- (1) Article 50 is modelled on article 21 of the Convention on Special Missions. It provides that Heads of State and

<sup>147</sup> Article 90 of the provisional draft.

<sup>148</sup> See annex I, section C below. In WHO, for example, precedence among delegations is determined by using English or French alphabetical order in alternate years, in accordance with the rules of procedure.

<sup>149</sup> Article 91 of the provisional draft.

other persons of high rank who become delegates retain the facilities, privileges and immunities accorded to them by international law.

- (2) Apart from the necessary drafting changes, article 50 differs from article 21 of the Convention on Special Missions and from article 91 of the provisional draft in two respects: firstly the words "in addition to what is granted by the present articles" have been inserted in paragraph 1. Secondly, the last part of paragraph 1 reads "privileges and immunities accorded by international law to Heads of States" instead of "privileges and immunities accorded by international law to Heads of State on an official visit". In this connexion, the Commission wishes to point out that when a head of State leads a delegation to an organ or to a conference, he is not on an official visit to the host State and that it would not be appropriate to impose upon the host State the whole range of special duties which such a visit might entail.

- (3) The Commission wishes to point out that article 50 relates only to privileges and immunities of a legal character and not to ceremonial privileges and honours.

- (4) In their written comments, certain Governments expressed the view that article 50 was unnecessary in view of the fact that the persons concerned would enjoy the facilities, privileges and immunities accorded to them by international law whether the article was included or not in the draft. The Commission, however, considered that since it was specified in another article (article 74) that a member of a diplomatic mission retained the benefit of diplomatic privileges and immunities when he became a member of a delegation, it would be consistent to do the same for a head of State, head of Government or other person of high rank. It was also pointed out that those persons did in fact enjoy special status so that the article reflected a well-established practice.

- (5) The Commission noted in that connexion that on numerous occasions a delegation to an organ or to a conference is headed by or includes among its members a head of State, a head of Government, a Minister for Foreign Affairs or "other persons of high rank". For instance, such high level representation is quite common in delegations to the General Assembly of the United Nations and corresponding general representative organs of the specialized agencies. Also, article 28, paragraph 2, of the Charter provides as follows:

The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.

The Security Council approved recently a statement expressing the consensus of the Council:

that the holding of periodic meetings, at which each member of the Council would be represented by a member of the Government or by some other specially designated representative, could enhance the authority of the Security Council and make it a more effective instrument for the maintenance of international peace and security.<sup>150</sup>

<sup>150</sup> Statement approved in connexion with the question of initiating periodic meetings of the Security Council in accordance with article 28, paragraph 2, of the Charter. See *Official Records of the Security Council, Twenty-fifth Year, 1544th meeting.*

(6) The question was raised whether the provisions in paragraph 2 of article 50 should not be made more general so as to cover also the case of members, and in particular heads of missions, who were holding a rank higher than that of ambassador. The Commission, however, took the view that the persons of high rank referred to in paragraph 2 were entitled to special privileges and immunities by virtue of the functions which they performed in their countries and would not be performing those functions as a head of mission. The expression "person of high rank" therefore refers not to persons who because of the functions they perform in a mission are given by their State a particularly high rank, but to persons who hold high positions in their home States and are temporarily called upon to take part in a delegation to an organ or to a conference.

#### **Article 51.<sup>151</sup> 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.**

#### *Commentary*

(1) Article 51 parallels paragraphs 1 *a* and 2 of article 20. Although the language is similar, the general facilities granted to delegations by this article necessarily reflect the special character and tasks of delegations.

(2) The first sentence of article 51 refers to "all facilities for the performance of [the] tasks" of the delegation. This change results from the Commission's decision to use all through part III of the draft articles the expression "tasks of the delegation" instead of "functions of the delegation" employed in the provisional draft. In the Commission's view the term "tasks" is more appropriate than the term "functions" in the light of the temporary nature of delegations and their different purposes. No article has been included in part III of the draft defining the tasks of the delegation because of the great variety in the nature and activities of delegations.

(3) In the second sentence the words "the Organization or, as the case may be, the conference" recognize that in some cases the conference may be in a better position than the organization to take up a question with the host State, particularly if the conference is held in a place other than that of the headquarters of the organization. On the other hand, it is for the conference to accord the facilities which lie within its own competence.

(4) The observations made in paragraph 2 of the commentary to article 20 apply *mutatis mutandis* to the provisions of this article. It should be added that the *ad hoc* agreements usually concluded between the organization and the host State in whose territory the meeting of the organ or the conference is convened often include provisions not only on privileges and immunities but also on facilities to be granted to delegations in the host State.

<sup>151</sup> Article 92 of the provisional draft.

#### **Article 52.<sup>152</sup> 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.**

#### *Commentary*

(1) Article 52 parallels article 21 and is modelled on article 23 of the Convention on Special Missions.

(2) The Commission modelled the first sentence of the article on the corresponding provision of the Convention on Special Missions because the temporary nature of a delegation raises somewhat similar considerations with regard to premises and accommodation as in the case of a special mission. The Commission considered that it is not necessary to grant the sending State, as paragraph 1 of article 21 does in the case of missions, the right to acquire the premises necessary for the delegation. It is sufficient for the host State "to assist" the delegation "in procuring the necessary premises" by means other than acquisition. On the other hand, the host State should also assist the delegation "in obtaining suitable accommodation for its members" as in the case of missions (paragraph 2 of article 21). The obligations of the host State provided for in the first sentence of article 52 are subject to the proviso "if it so requests".

(3) The second sentence of article 52 concerns the obligation of the organization or the conference to assist delegations "where necessary" in procuring and obtaining premises and accommodation as provided for in the first sentence. This obligation of the organization or the conference is not intended, therefore, to replace the obligation of the host State laid down in the first sentence. Only the territorial State has the ability to make arrangements for the provision of premises and accommodation for a delegation and its members. To the extent of its ability and means, the organization or the conference must, however, co-operate with the host State in facilitating the availability of premises necessary for the performance of the delegation's tasks as well as suitable accommodation for its members.

(4) Thus, for instance, a delegation requesting assistance under the first sentence of article 52 may address its request to the host State directly or indirectly through the secretariat of the organization or the conference, the latter being normally constituted by members of the staff of the convening organization itself. On the other hand, the Commission noted that when the meeting of an organ or a conference was held in a place other than that in which the seat or an office of the organization which convened the conference, or to which the organ belonged, was established, it was a frequent practice for secretariats of international organizations, acting in accord with the host State which had invited the organ or the conference, to request sending States in advance to send particulars of the accommodation needed by their delegations to that host State.

<sup>152</sup> Article 93 of the provisional draft.

**Article 53.<sup>153</sup> 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 by the present articles.

*Commentary*

Article 53 parallels article 22, except that the words "the Organization" have been replaced by the words "The Organization or, as the case may be, the Organization and the conference". With regard to conferences, the Commission considers that in some cases the assistance might be given by the international organization convening the conference, in other cases by the conference itself and in some circumstances by both together. The observations contained in paragraphs 2 and 3 of the commentary to article 22 apply, *mutatis mutandis*, to the provisions set forth in this article.

**Article 54.<sup>154</sup> 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 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.

*Commentary*

- (1) Article 54 parallels article 23.
- (2) In the provisional draft, the Commission had made provision in cases of emergency for seeking the permission to enter the premises either of the head of delegation or, if appropriate, of the head of the permanent diplomatic mission of the sending State accredited to the host State. On reflection, the reference to the latter has been deleted; to request the consent of the head of the permanent diplomatic mission would complicate matters unnecessarily, particularly when the organs or conferences to which delegations are sent meet, as is quite often the case, in a city which is not the capital of the host State.
- (3) If, as is often the case, offices of the delegation are established in premises which already enjoy the privileges

<sup>153</sup> Article 92 of the provisional draft.

<sup>154</sup> Article 94 of the provisional draft.

of inviolability—for instance in the premises of the permanent diplomatic mission of the sending State or in the premises of a mission of that State to an international organization—the fact that delegation offices are established therein will not affect the inviolability enjoyed by such premises and the rules concerning such inviolability will continue to apply. If the delegation occupies premises of its own, these premises will enjoy inviolability as provided for in this article.

(4) The observations in paragraphs 2 to 5 of the commentary to article 23 apply *mutatis mutandis*, to the provisions set forth in this article. For the same reasons as those advanced in connexion with article 23, some members of the Commission were opposed to the third sentence of paragraph 1 of article 54, while others considered that the provision contained in this sentence was the more justified in the case of delegations because delegation premises are often established in hotel rooms or buildings to which the public has access.

**Article 55.<sup>155</sup> 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.

*Commentary*

- (1) Article 55 parallels article 24 and is modelled on article 24 of the Convention on Special Missions. At the second reading, however, on the basis of governmental comments, the Commission decided to delete at the beginning of paragraph 1 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" which had been included in the provisional draft following the wording of the above-mentioned article of the convention on Special Missions. Paragraph 2 reproduces unchanged the text of the corresponding provision of the provisional draft.
- (2) In their observations, Governments were concerned about the meaning of the phrase at the beginning of paragraph 1, which they considered could be interpreted in either a liberal or a narrow sense. Its deletion is intended to simplify the application of the provision set forth in paragraph 1 of article 55.
- (3) The wording of paragraph 1 of this article has not, however, been brought into line with the corresponding provision of part II (paragraph 1 of article 24). The Commission considered that, as its duration was relatively

<sup>155</sup> Article 95 of the provisional draft.

short, the delegation would probably not buy or lease premises but would in general make use of hotels. Consequently, it would not be appropriate to refer in article 55 to premises owned or leased by the delegation, as did article 24 for missions having a permanent character. In most cases, therefore, the practical result of the application of the provision embodied in paragraph 1 of article 55 will be to exempt delegation premises from taxes based on occupancy of hotel rooms.

**Article 56.<sup>156</sup> Inviolability of archives and documents**

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

*Commentary*

Article 56 parallels article 25, the commentary of which applies equally here.

**Article 57.<sup>157</sup> 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.

*Commentary*

Article 57 parallels article 26 of the draft and is modelled on article 27 of the Convention on Special Missions. Freedom of movement for members of the delegation is granted for travel necessary for the performance of the delegation's tasks. As delegations are temporary, it is not necessary to accord to their members the same freedom of movement and travel as that granted to missions of a permanent character by article 26. Another difference is that article 57 does not mention the members of the family of a member of the delegation accompanying him. It was generally understood in the Commission that the provisions of this article should not be interpreted in an unduly strict manner in light of the general practice of host States to allow members of delegations and their families to travel freely in their territory.

**Article 58.<sup>158</sup> 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 permanent diplomatic missions, consular posts,

<sup>156</sup> Article 92 of the provisional draft.

<sup>157</sup> Article 96 of the provisional draft.

<sup>158</sup> Article 97 of the provisional draft.

permanent missions, permanent observer missions, special missions and other 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 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.

*Commentary*

(1) Article 58 parallels article 27 of the draft and is modelled on article 28 of the Convention on Special Missions.

(2) In view of the needs of a delegation, the Commission considered it advisable to insert, as paragraph 3, a provision similar to paragraph 3 of article 28 of the Convention on Special Missions. One difference between this article and article 28 of that Convention is the addition in paragraphs 1 and 3 of the words "permanent mission(s)" and "permanent observer mission(s)" in order to coordinate the article with the corresponding provisions of part II of the draft. Another difference is the addition in paragraph 1 of the words "other delegations", in order to enable the delegations of the sending State to communicate with each other. Finally, as to terminology, the article uses the expressions "bag of the delegation" and "courier of the delegation" for reasons similar to those set forth in paragraph 6 of the commentary to article 27.

**Article 59.<sup>159</sup> 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.

**Article 60.<sup>160</sup> 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 3 of article 61, their property shall likewise enjoy inviolability.

*Commentary*

(1) Article 59 parallels article 28 of the draft and is modelled on article 29 of the Convention on Special Missions. Article 60 parallels article 29 of the draft and is modelled on article 30 of the Convention on Special Missions. The observations set forth in paragraphs 2 to 7 of the commentary to articles 28 and 29 of the draft apply also, *mutatis mutandis*, to the provisions of articles 59 and 60.

(2) At the second reading, only minor drafting adjustments and consequential terminological changes have been made by the Commission in the texts of the provisional draft (articles 98 and 99). Thus, the terms "of the representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff" have been replaced by the terms "of the head of delegation and of other delegates and members of the diplomatic staff of the delegation". The Commission retained, however, in article 60 the expression "private accommodation" used in the Special Missions Convention, instead of "private residence" as in article 30 of the Convention on Diplomatic Relations and article 29 of the present draft, in view of the temporary character of delegations. Finally, the Commission added to the title of article 60 the words "and property".

(3) It is to be noted that the inviolability of private accommodation of the head of delegation and of other delegates and members of the diplomatic staff of the delegation, as provided for in article 60, applies regardless of the nature of the private accommodation—whether in hotel rooms, rented apartments, etc.

**Article 61.<sup>161</sup> Immunity from jurisdiction**

1. The head of delegation and other delegates and members of the diplomatic staff of the delegation shall enjoy immu-

<sup>159</sup> Article 98 of the provisional draft.

<sup>160</sup> Article 99 of the provisional draft.

<sup>161</sup> Article 100 of the provisional draft.

nity 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 performance of the tasks 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.

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 States does not exempt them from jurisdiction of the sending State.

*Commentary*

(1) The present article replaces article 100 of the provisional draft, which was presented in the form of two alternatives.<sup>162</sup>

<sup>162</sup> *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 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.

(Continued overleaf)

(2) In bringing to the attention of Governments the two alternatives for article 100 of its provisional draft, the Commission stated in paragraph 1 of the commentary on that article that:

Alternative A is modelled directly on article 31 of the Convention on Special Missions. Alternative B is based on article IV, section 11, of the General Convention [on the Privileges and Immunities of the United Nations]; it follows that section in limiting immunity from the civil and administrative jurisdiction to acts performed in the exercise of official functions but goes beyond it in providing, as in alternative A, for full immunity from the criminal jurisdiction of the host State.<sup>163</sup>

Article 61 reproduces the substance of alternative A of article 100 of the provisional draft.

(3) In their comments some Governments expressed preference for alternative A as affording greater protection to delegations and being based directly on the corresponding article of the Convention on Special Missions. One international organization observed that alternative A is based on the Convention on Diplomatic Relations and the Convention on Special Missions, which it assumed to reflect more closely the current thinking on the subject than the earlier Convention on the Privileges and Immunities of the United Nations. Other Governments expressed preference for alternative B, because they considered that it set out all the safeguards that were needed for the proper functioning of delegations. Two Governments did not regard either alternative A or B as satisfactory. They observed that alternative A is based on the Convention on Special Missions which they did not consider to be the appropriate precedent. They further pointed out that alternative B would confer immunity from criminal jurisdiction in respect of the non-official acts of a representative and that under the United Nations and the Specialized Agencies Conventions, the immunity is only from arrest and detention in connexion with such matters and not immunity from jurisdiction as such.

(4) The Commission re-examined the question at its present session in the light of these comments. Certain members expressed preference for alternative B, since in their opinion alternative A departed from existing practice and such departure was not justifiable. The majority of the members expressed, however, preference for alternative A.

*Alternative B:*

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. (a) The representatives and members of the diplomatic staff of 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.

<sup>163</sup> *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 10 (A/8010/Rev.1)*, p. 25 (*Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chap. II, B).

In deciding to draft article 61 in its present form, the Commission takes the position that the privileges and immunities of members of delegations to organs of international organizations and to conferences convened by or under the auspices of international organizations should be based upon a selective merger of the pertinent provisions of the Convention on Special Missions and the provisions regarding missions to international organizations provided for in part II of the present draft. This position is derived from a number of recent developments in the codification of diplomatic law. One of these developments is the evolution of the institution of permanent missions to international organizations and the assimilation of their status and immunities to diplomatic status and immunities. Another factor is that during the discussion and in the formulation of its provisional draft articles on special missions, the Commission expressed itself in favour of: (a) making the basis and extent of the immunities and privileges of special missions more or less the same as those of permanent diplomatic missions; (b) taking the position that it was impossible to make a distinction between special missions of a political nature and those of a technical nature; every special mission represented a sovereign State in its relations with another State. The Commission is of the view that, owing to the temporary character of their task, delegations to organs of international organizations and to conferences convened by international organizations occupy, in the system of diplomatic law of international organizations, a position similar to that of special missions within the framework of bilateral diplomacy.

*Article 62.<sup>164</sup> 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 67 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.

*Commentary*

(1) Article 62 parallels article 31. Paragraphs 1 to 4 are therefore modelled on article 32 of the Convention on Diplomatic Relations and article 41 of the Convention on

<sup>164</sup> Article 101 of the provisional draft.

Special Missions. Paragraph 5, like paragraph 5 of article 31, is based on resolution II adopted by the United Nations Conference on Diplomatic Intercourse and Immunities and General Assembly resolution 2531 (XXIV) relating to the settlement of civil claims in connexion with the Convention on Special Missions.

(2) As indicated in paragraph 5 of the commentary to article 31, the provision set forth in paragraph 5 places the sending State, in respect of a civil action, under the obligation of using its best endeavours to bring about a just settlement of the case if it is unwilling to waive the immunity of the person concerned. If, on the one hand, the provision of paragraph 5 leaves the decision to waive immunity to the discretion of the sending State which is not obliged to explain its decision, on the other, it imposes on that State an objective obligation which may give to the host State grounds for complaint if the sending State fails to comply with it. The legal obligation of the sending State to seek a just settlement of the case might lead, in the case of delegations as well as of missions, to the initiation of the consultation and conciliation procedures provided for in articles 81 and 82, to which the host State can resort if the sending State does not find a means of settlement.

(3) As in the case of missions (articles 30 and 31), the provisions of articles 61 and 62, taken together, will therefore guarantee the solution of disputes in civil matters.

#### *Article 63.<sup>165</sup> 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.

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

<sup>165</sup> Article 104 of the provisional draft.

previously and shall not prevent the conclusion of such agreements in the future.

#### *Commentary*

Article 63 parallels article 32. The Convention on Diplomatic Relations (article 33) and the Convention on Special Missions (article 32) dealt with the subject-matter of this article in the same manner. The observations set forth in paragraphs 2 to 5 of the commentary to article 32 of the draft apply *mutatis mutandis* to article 63.

#### *Article 64.<sup>166</sup> 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 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 69;

(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 55.

#### *Commentary*

(1) Article 64 parallels article 33 of the draft and is modelled on article 34 of the Convention on Diplomatic Relations and article 33 of the Convention on Special Missions. The observations in paragraphs 2 to 6 of the commentary to article 33 of the draft apply *mutatis mutandis* to the provisions embodied in article 64.

(2) At the first reading, the Commission considered whether to insert a sub-paragraph which would add "excise duties or sales tax" to the list of exclusions from exemption.<sup>167</sup> Some members considered that such an addition would be desirable because it would accord with the existing provisions in the United Nations Convention on Privileges and Immunities and would reduce administrative difficulties in the host States. Other members considered that the nature and level of "sales tax" varied according to the country concerned. Some members were of the opinion that "excise duties or sales tax" were, at least to some extent, covered by sub-paragraph *a* of the article.

<sup>166</sup> Article 102 of the provisional draft.

<sup>167</sup> *Yearbook of the International Law Commission, 1970*, vol. I, p. 201, 1077th meeting, paras. 134 *et seq.*

A similar division of views was reflected in discussions in the Sixth Committee and comments received from Governments. The Commission decided then that it was desirable to adhere to the pattern originally laid down in the Convention on Diplomatic Relations. At the second reading, the Commission decided to maintain that decision.

**Article 65.<sup>168</sup> 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.

*Commentary*

Article 65 parallels article 34 of the draft, and is modelled on article 35 of the Convention on Diplomatic Relations and article 34 of the Convention on Special Missions. The observations set forth in paragraph 3 of the commentary to article 34 of the draft apply *mutatis mutandis* to the provisions of article 65.

**Article 66.<sup>169</sup> 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 exemptions mentioned in paragraph 1, or articles the import or export of which is prohibited by the law or controlled by the 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.

*Commentary*

(1) Article 66 parallels article 35. It is modelled on article 36 of the Convention on Diplomatic Relations and article 35 of the Convention on Special Missions.

(2) The Commission replaced in paragraph 1 the phrase "within the limits of such laws and regulations as it may adopt" which appears in article 35 of the Convention on

Special Missions by the phrase "in accordance with such laws and regulations as it [the host State] may adopt" used in article 36 of the Convention on Diplomatic Relations and article 35 of the present draft.

(3) The Commission did not include in paragraph 1b of this article the words "including articles intended for his establishment", which appear in the corresponding subparagraph of article 35, because the tasks of delegations are generally of short duration.

**Article 67.<sup>170</sup> 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 59, 60, 61, 63, 64, 65 and paragraphs 1 (b) and 2 of article 66.

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 59, 60, 61, 63, 64 and 65, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 61 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 66 in respect of articles imported at the time of their first entry into the territory of the host State for the purpose of attending 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 provided for in article 63.

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.

*Commentary*

(1) Article 67 parallels article 36 of the draft and is modelled on article 37 of the Convention on Diplomatic Relations and articles 36 to 39 of the Convention on Special Missions. Having adopted alternative A of the provisional draft for article 61 dealing with immunity from jurisdiction, the Commission, at the second reading, formulated article 67 along the lines of the corresponding article of part II of the draft (article 36).

(2) More particularly, the Commission found it necessary to retain the distinction between the members of the family

<sup>168</sup> Article 104 of the provisional draft.

<sup>169</sup> Article 103 of the provisional draft.

<sup>170</sup> Article 105 of the provisional draft.

“accompanying” members of delegations, as described in paragraphs 1 and 2 of article 67, and the members of the family “forming part of the household” of members of missions, as described in paragraphs 1 and 2 of article 36. The Commission considered that the word “accompany” was appropriate in article 67, having regard to the temporary character of delegations.

(3) Another difference between articles 36 and 67 is the retention of the words “or permanently resident in the host State” in paragraph 1 of article 67. This is in accord with the corresponding provision in article 39 of the Convention on Special Missions.

(4) The observations contained in paragraphs 2, 3 and 4 of the commentary to article 36 apply, *mutatis mutandis*, to the provisions of this article.

**Article 68.<sup>171</sup> 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.

*Commentary*

Article 68 parallels article 37 of the draft and is modelled on article 38 of the Convention on Diplomatic Relations and article 40 of the Convention on Special Missions. The observations in paragraphs 2 to 5 of the commentary to article 37 of the draft apply, *mutatis mutandis*, to the provisions of article 68.

**Article 69.<sup>172</sup> 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 for the purpose of attending the meeting of an organ or conference or, if 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 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

<sup>171</sup> Article 106 of the provisional draft.

<sup>172</sup> Articles 108 and 109 of the provisional draft.

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.

*Commentary*

(1) Article 69 parallels article 38 of the draft and is modelled on article 39 of the Convention on Diplomatic Relations and articles 43 and 44 of the Convention on Special Missions.

(2) In 1970, the Commission, following the Convention on Special Missions, provisionally formulated the provisions of this article in two separate articles. At the second reading, the Commission adopted the arrangement and language found in the Convention on Diplomatic Relations as being better designed for the present purposes.

(3) Articles 38 and 69 have, however, some differences in wording, due mainly to the temporary nature of delegations. In paragraph 1 the phrase “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” has been replaced by the phrase “for the purpose of attending the meeting of an organ or conference or, if 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.” The words “by the conference” have been inserted in order to cover the case when notification is made by the conference itself and not by the organization responsible for convening it, or directly by the sending State. The expression “forming part of his household” has been replaced by the expression “accompanying him” in paragraph 4.

(4) The observations in paragraphs 2 to 6 of the commentary to article 38 apply, *mutatis mutandis*, to the provisions of article 69.

**Article 70.<sup>173</sup> 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*:

<sup>173</sup> Article 114 of the provisional draft.

(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.

*Commentary*

(1) Article 70 parallels article 40.

(2) The English word "meeting" is used in this article in its broad sense (like "réunion" and "reunión" used in the French and Spanish versions), and not in the narrower meaning in which it is sometimes used in the context of the rules, procedures and practice of organs and conferences.

(3) The observations in paragraph 1 of the commentary to article 40 apply, *mutatis mutandis*, to the provisions of this article. It should also be pointed out that both article 40 and article 70 regulate the "end of functions" and not the question of the "duration of the privileges and immunities", which is dealt with in articles 38 and 69.

**Article 71.<sup>174</sup> 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.

*Commentary*

(1) Article 71 parallels article 41.

(2) One difference between article 41 and article 71 is that the protection of the premises of the delegation, provided for in the first sentence of paragraph 1 of article 71, is qualified by the words "so long as they are assigned to it", taken from article 46 of the Convention on Special Missions. The Commission considered that difference justified because, unlike the premises of missions, those of delegations are in most cases occupied only for a short time. Under the circumstances, the host State could not be required to protect them when they are no longer assigned to the delegation.

(3) In view also of the short duration of most delegations, the Commission felt it unnecessary to include in article 71 a provision on entrusting custody of the premises, property and archives of the delegation to a third State, as provided for in the case of missions in the third sentence of paragraph 1 of article 41.

(4) Lastly, the opening words of article 41 "When the mission is temporarily or finally recalled" have been

replaced by the words "When the meeting of an organ or a conference comes to an end", in view of the fact that it is normally when the meeting of the organ or the conference has come to an end, that the question of the protection of the premises, property and archives of the delegation arises.

(5) As appropriate, the observations of the commentary to article 41 apply also to the provisions of article 71.

PART IV. GENERAL PROVISIONS

**Article 72.<sup>175</sup> 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 members 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 State which may be withdrawn at any time.

*Commentary*

(1) Article 72 is modelled on paragraphs 1 and 2 of article 8 of the Convention on Diplomatic Relations and paragraphs 1 and 2 of article 10 of the Convention on Special Missions.

(2) The rule the article lays down applies to both the head of mission and members of the diplomatic staff of the mission and to the head of delegation, other delegates and members of the diplomatic staff of the delegation. Persons belonging to these categories of members of the mission or the delegation should in principle be of the nationality of the sending State and may not be appointed from among persons having the nationality of the host State, except with the consent of that State. With respect to members of delegations, however, the Commission assumed that, given the temporary nature of delegations, the host State would withdraw its consent to the appointment of one of its nationals to a delegation only in serious cases and that every effort would be made not to disrupt the work of the delegation.

(3) The Commission decided to limit the scope of the article to nationals of the host State and not to extend it to nationals of a third State. It therefore did not include in article 72 the rule contained in paragraph 3 of article 8 of the Convention on Diplomatic Relations and in paragraph 3 of article 10 of the Convention on Special Missions. The highly technical character of some international organizations makes it desirable not to restrict unduly the free selection of members of missions and delegations since the sending State may find it necessary to appoint, as members of its missions and delegations,

<sup>174</sup> Article 116 of the provisional draft.

<sup>175</sup> Articles 11, 56 and 85 of the provisional draft.

nationals of a third State who possess the required training and experience.

(4) To the considerations stated in the preceding paragraph, the objection might be raised that, in some States, nationals have to seek the consent of their own Government before entering into the service of a foreign Government. Such a requirement, however, applies only to the relationship between a national and his own Government; it does not affect relations between States and is therefore not a rule of international law.

(5) The Commission also considered the question of the appointment of stateless persons or persons with dual nationality. It concluded that, like the cases falling under the Conventions on Diplomatic Relations and on Consular Relations and the Convention on Special Missions, the matter should be settled according to the relevant rules of international law.

### **Article 73.<sup>176</sup> 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.**

#### *Commentary*

(1) Article 73 is based on the rule stated in article II of the Optional Protocol concerning Acquisition of Nationality, adopted on 18 April 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities.<sup>177</sup> A similar Optional Protocol was adopted on 24 April 1963 by the United Nations Conference on Consular Relations.<sup>178</sup>

(2) The origin of the rule stated in the 1961 Optional Protocol is to be found in article 35 of the draft articles on diplomatic intercourse and immunities adopted by the Commission at its tenth session (1958). At the time, the Commission gave the following explanation on the matter in its commentary on article 35:

This article is based on the generally received view that a person enjoying diplomatic privileges and immunities should not acquire the nationality of the receiving State solely by the operation of the law of that State, and without his consent. In the first place the article is intended to cover the case of a child born on the territory of the receiving State of parents who are members of a foreign diplomatic mission and who also are not nationals of the receiving State. The child should not automatically acquire the nationality of the receiving State solely by virtue of the fact that the law of that State would normally confer local nationality in the circumstances. Such a child may, however, opt for that nationality later if the

<sup>176</sup> Articles 39, 72 and 104 of the provisional draft.

<sup>177</sup> *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No.: 62.X.1.), p. 88.

<sup>178</sup> *Official Records of the United Nations Conference on Consular Relations*, vol. II (United Nations publication, Sales No.: 64.X.1), p. 189.

legislation of the receiving State provides for such an option. The article covers, secondly, the acquisition of the receiving State's nationality by a woman member of the mission in consequence of her marriage to a local national. Similar considerations apply in this case also and the article accordingly operates to prevent the automatic acquisition of local nationality in such a case. On the other hand, when the daughter of a member of the mission who is not a national of the receiving State marries a national of that State, the rule contained in this article would not prevent her from acquiring the nationality of that State, because, by marrying, she would cease to be part of the household of the member of the mission.<sup>179</sup>

(3) In support of the Commission's recommendation that the provision should form an integral part of the draft articles on missions to international organizations and delegations to organs and to conferences, the Commission wishes to point out a significant difference between bilateral diplomatic relations and situations covered by the present draft with regard to the scope of application of the rule of acquisition of nationality. The Optional Protocol concerning Acquisition of Nationality (1961) was intended to apply to the bilateral relationships among the great number of States members of the community of nations. On the other hand, in the case of missions to international organizations and delegations to their organs and to conference convened by or under their auspices, the persons whose nationality is in question are on the territory of the host State in virtue of the relationship of their State with the international organization or of its participation in the conference and not of any purely bilateral relation between the sending State and the host State; indeed, bilateral diplomatic relations may in some cases not even exist between the host State and the sending State. Similarly, the element of reciprocity which exists in the case of diplomatic relations does not exist in the present context. Accordingly, the Commission considered that in the present draft there was a reasonable case for making the matter one of express provision rather than relegating it to an optional protocol.

(4) It is also worthwhile noting that even in bilateral diplomacy many States under whose internal law citizenship is automatically conferred by the fact of birth within their territory recognize that there is an exemption in the case of children of diplomats.

(5) As formulated, the article does not exclude the acquisition of the nationality of the host State by consent but only automatic acquisition by the operation of the law of the host State. It applies to: (a) members of the mission (head of mission and members of the diplomatic staff, the administrative and technical staff and the service staff of the mission) who are not nationals of the host State; (b) members of the delegation (head of delegation, delegates and members of the diplomatic staff, the administrative and technical staff and the service staff of the delegation) who are not nationals of the host State; (c) members of the family forming part of the household of a member of the mission who is not a national of the host State; (d) members of the family accompanying a member of the delegation who is not a national of the host State.

<sup>179</sup> *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A 3859)*, p. 23 (*Yearbook of the International Law Commission, 1958*, vol. II, p. 101, document A/3859, para. 53).

**Article 74.<sup>180</sup> 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.

*Commentary*

(1) Article 74 is modelled on paragraph 2 of article 9 of the Convention on Special Missions. It deals with a situation which frequently arises in practice. Sending States have often appointed members of their permanent diplomatic mission or consular posts in the host State as members of their permanent mission or permanent observer mission to an international organization as well as members of their delegation to an organ or to a conference.

(2) These functions are not incompatible. The performance by diplomatic agents and consular officers of representative functions to or in an international organization has already been regulated by the Convention on Diplomatic Relations and the Convention on Consular Relations. Paragraph 3 of article 5 of the Convention on Diplomatic Relations provides that:

A head of [diplomatic] mission or any member of the diplomatic staff of the [diplomatic] mission may act as representative of the sending State to any international organization.

and the first sentence of paragraph 2 of article 17 of the Convention on Consular Relations states:

A consular officer may, after notification addressed to the receiving State, act as representative of the sending State to any inter-governmental organization.

The accreditation or appointment to a diplomatic mission or a consular post of members of a mission to an international organization or of members of a delegation to an organ or to a conference, is, of course, governed by the rules of international law concerning diplomatic and consular relations. Having come to the conclusion that the compatibility of these functions is well established and regulated by the two Conventions referred to above, the Commission decided to limit article 74 to the question of the privileges and immunities in case of multiple functions and deleted from the present articles the provision contained in article 9 (Accreditation, assignment or appointment of a member of a permanent mission to other functions) of the provisional draft.

(3) Article 74 provides that when a member of the permanent diplomatic mission or a consular post in the host State is included in a mission to an international organization or in a delegation to an organ or to a conference, he will retain his privileges and immunities as a member of the permanent diplomatic mission or of the consular post in addition to the privileges and immunities accorded by the present articles. In other words, he will not lose either his diplomatic or consular privileges and immunities by reason of the fact that he is during the same period performing functions in the mission to an international organ-

ization or in the delegation to an organ or to a conference. In this connexion it is worth noting that the second sentence of paragraph 2 of article 17 of the Convention on Consular Relations states that when a consular officer acts as a representative of a State to an inter-governmental organization

he shall be entitled to enjoy any privileges and immunities accorded to such a representative by customary international law or by international agreements; however, in respect of the performance by him of any consular function, he shall not be entitled to any greater immunity from jurisdiction than that to which a consular officer is entitled under the present Convention.

(4) Finally, the Commission did not consider it necessary to regulate expressly in the article the question of the privileges and immunities of members of a special mission included in a mission to an international organization or in a delegation to an organ or to a conference. Owing to the temporary nature of special missions, situations such as those envisaged in article 74 do not occur so frequently with regard to special missions as in the case of permanent diplomatic missions and consular posts. It would be natural that by analogy the general principle embodied in the article should apply, *mutatis mutandis*, to members of a special mission included in a mission to an international organization or in a delegation to an organ or to a conference in the particular instances in which such a situation may occur in practice.

**Article 75.<sup>181</sup> 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 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.

*Commentary*

(1) Paragraphs 1 and 3 of article 75 are modelled on the provisions of article 41, paragraphs 1 and 3, of the Convention on Diplomatic Relations, and article 47 of the Convention on Special Missions. The absence of the *persona non grata* procedure in the context of relations

<sup>180</sup> Article 59, paragraph 2, and article 107 of the provisional draft.

<sup>181</sup> Articles 45, 76 and 112 of the provisional draft.

between States and international organizations is the basis for the requirement of withdrawal in the circumstances provided for in paragraph 2. The formulation of the article as a whole reflects the need for safeguarding all the interests involved, namely the interests of the host State, of the sending State and of the international organization in question.

(2) Paragraph 2 regulates the obligations of the sending State in the particular circumstances specified therein. In order to clarify the meaning of the paragraph, the Commission has made the following major changes in the text of the corresponding paragraph of the provisional draft articles: (a) the first sentence has been retained, but the word "criminal" before the word "jurisdiction" has been deleted as unnecessary; (b) the words "The sending State shall take the same action in case of grave and manifest interference in the internal affairs of the host State" have been inserted as a new second sentence; (c) in the third sentence, formerly second sentence, the specification of place has been deleted ("within either the Organization or the premises of a [mission]"; "in the premises where the organ or conference is meeting or the premises of the delegation"). Accordingly, paragraph 2 establishes the obligations of the sending State in the event of a grave and manifest breach of the criminal law of the host State by a person enjoying immunity from jurisdiction and of a grave and manifest interference in its internal affairs by any such persons. In this connexion, the Commission is of the opinion that repeated minor violations of the criminal law could lead to a "grave and manifest violation" thereof within the meaning of paragraph 2.

(3) Three alternatives are offered to the sending State for the discharge of the obligations imposed on it by paragraph 2: (a) to waive the immunity of the person concerned; (b) to terminate his functions in the mission or the delegation; (c) to secure his departure from the host State. The paragraph, therefore, imposes on the sending State an obligation to recall a member from his mission or delegation in cases of grave and manifest violation of the criminal law of the host State and in cases of grave and manifest interference in its internal affairs. Where the gravity of certain offences or acts would be evident, the sending State clearly has the obligation to recall the person concerned. If a dispute should arise between the sending State and the host State on the matter, consultations can be held, in accordance with the procedure provided for in articles 81 and 82, which will either convince the sending State that the person concerned ought to be recalled, or convince the host State that the act was not such as to require his recall. The expression "unless it waives the immunity" has been included in order to emphasize that the provisions of the paragraph are not intended to derogate from those of articles 30 and 61.

(4) The last sentence of paragraph 2 contains a saving clause intended *inter alia* to safeguard the independent exercise of the functions of the members of the mission or the delegation. The reservation, which concerns grave and manifest offences committed in carrying out the functions of the mission or the tasks of the delegation, is designed to deal with extreme cases. The Commission has used the expression "act [. . .] performed in carrying out

the functions of the mission or the tasks of the delegation" instead of the expression "official acts", with the view of keeping within the rules provided for in the first and second sentences of the paragraph any act belonging to one of the two categories referred to in those sentences which does not fall within the scope of acts performed in carrying out the functions of the mission or the tasks of the delegation. For instance, if a grave and manifest interference in the internal affairs of the host State took the form of publishing material aimed at encouraging disaffection in the host State, such interference will not fall within the scope of acts performed in carrying out the functions of the mission or the tasks of the delegation.

(5) Paragraph 2 is not a limitation upon the obligations embodied in paragraph 1. The obligations of the sending State under paragraph 2 do not modify with respect to the person concerned either the general obligation to respect the laws and regulations of the host State or the general duty not to interfere in the internal affairs of that State. Although the obligation to recall imposed on the sending State by paragraph 2 relates only to "grave and manifest violation of criminal law" and to "grave and manifest interference in the internal affairs", grounds for recall may also arise from failure to comply with the duties established in paragraph 1, even if the failure relates to violations of non-criminal law or to violations or interferences not necessarily grave and manifest. In other words, paragraph 2 defines the obligations of the sending State in specified circumstances, including the obligation to recall under these circumstances, but it is not intended to limit the cases in which the host State can ask the sending State to recall a person enjoying privileges and immunities.

(6) Finally, paragraph 3, which remains unchanged, stipulates that the premises of the mission or 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. Failure to fulfil the obligation laid down in this paragraph does not render the inviolability of the premises, as established in the draft articles, inoperative but, on the other hand, that inviolability does not authorize a use of the premises which is incompatible with the functions of the mission or the tasks of the delegation. Unlike paragraph 3 of article 41 of the Convention on Diplomatic Relations and paragraph 2 of article 47 of the Convention on Special Missions, paragraph 3 of this article does not include the expression "as laid down (envisaged) in the present Convention or by (in) other rules of general international law", or a phrase similar to that referring to "any special agreements in force between the sending and the receiving State". These were deemed unnecessary, particularly in the light of articles 2 and 4 of the draft.

#### **Article 76.<sup>182</sup> Entry into the territory of the host State**

1. The host State shall permit entry into its territory of:
  - (a) members of the mission and members of their families forming part of their respective households, and

<sup>182</sup> New article.

(b) 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.

#### Commentary

(1) As stated in the commentaries to articles 48 (permanent missions) and 115 (delegations) of the provisional draft articles, the Commission had considered at its twenty-first<sup>183</sup> and twenty-second<sup>184</sup> sessions the possibility of including in the draft, as a counterpart to the articles relating to "facilities for departure", a general provision on the obligation of the host State to allow members of missions or delegations to enter its territory to take up their posts, but had postponed its decision until the second reading of the draft.

(2) In the light of the comments made by several Governments and the Secretariats of the United Nations and IAEA, the Special Rapporteur submitted to the Commission, as a basis for discussion at its present session, the text of a new article entitled "Entry into the host State" in the part of the draft dealing with permanent missions (A/CN.4/241 and Add. 1-6,<sup>185</sup> chap. III, article 27 *bis*). The Special Rapporteur made identical proposals for the parts concerning permanent observer missions and delegations to organs and to conferences (*ibid.*, chap. IV, article 67, and chap. V, article Z).

(3) The Secretariat of the United Nations expressed its views on the question in the following manner:

The Secretariat of the United Nations believes it desirable that express provision should be made in the draft articles to ensure to members of permanent missions and their families the right of entry into and sojourn in the territory of the host State and the freedom of transit to and from the premises of the international organization concerned. The Commission has indicated, in paragraph 2 of its commentary to article 48 of the draft articles, that it would consider this point at its second reading of the draft articles.

Entry into the territory of the host State is an indispensable privilege and immunity for the independent exercise on the part of members of permanent missions of their functions in connexion with the organization to which they are accredited. It is a prerequisite to all other privileges and immunities in the host State. Provisions for it have been made in the Convention on the Privileges and Immunities of the United Nations (section 11, para. *d*), the Convention on the Privileges and Immunities of the Specialized Agencies (section 13, para. *d*) and the Agreement on the Privileges and Immunities of IAEA (section 12, para. *d*). Similar provisions are contained in the headquarters agreements of the United Nations and in those of various specialized agencies, of IAEA, and of the subsidiary organs of the United Nations such as the regional economic commissions and UNIDO.

In the draft articles in their present form, the right of entry is probably implied in article 28 dealing with "freedom of movement" in the host State, in article 48 on "facilities for departure" and in

<sup>183</sup> Paragraph 2 of the commentary to article 48. See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10 (A/7610/Rev.1)*, p. 17 (*Yearbook of the International Law Commission, 1969*, vol. II, p. 221, document A/7620/Rev.1).

<sup>184</sup> Commentary to article 115. See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 10 (A/8010/Rev.1)*, p. 29 (*Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chap. II, B).

<sup>185</sup> To be printed in *Yearbook of the International Law Commission, 1971*, vol. II, part II.

article 45, paragraph 2, on "recall" (of the person concerned by the sending State). These provisions, on the other hand, appear to make its omission all the more conspicuous. Indeed, its absence renders the enumeration of privileges and immunities of representatives logically incomplete and the enjoyment of those already provided for possibly nugatory. Under article 42, every person entitled to privileges and immunities shall enjoy them only "from the moment he enters the territory of the host State". This provision would preclude a representative from claiming vis-à-vis the host State, any privilege and immunity, including that of entry, until he has entered the host State. It is therefore imperative to expressly provide for the right of entry into the host State. Without such a provision, a host State might in effect be given the unintended power of veto over the appointment by States of their representatives.

In the experience of the Secretariat of the United Nations, there have been occasions when—convention, headquarters agreement and/or "host agreement" notwithstanding—a representative of State has been refused entry by a host State. While most of such cases concerned representatives to a specific session of a United Nations organ or to an *ad hoc* meeting convened under the auspices of the United Nations, members of permanent missions have on occasion been involved too. Indeed, sessions of a regional economic commission have had their venue changed from one Member State to another because entry was not assured for the representative of a State entitled to attend.

The Secretariat of the United Nations would therefore suggest that an article be added to provide for members of permanent missions the right of entry into the host State in order to exercise their functions in connexion with the organization to which they are accredited. In the context of the existing text of the draft articles, in the light of the relevant provisions of existing conventions and headquarters agreements, and on the basis of the experience of the Secretariat, the additional article on entry might comprise several elements:

- (1) The host State should facilitate
  - (a) entry into its territory, and
  - (b) sojourn in its territory

of all members of all permanent missions and members of their families forming part of their respective households;

- (2) It should ensure the freedom of transit to and from the organization to any person referred to in 1 above;
- (3) Visas, where required, should be granted free of charge and as promptly as possible; and
- (4) Laws or regulations of the host State tending to restrict the entry or sojourn of aliens should not apply to any person referred to in 1 above.

With reference to the privilege of sojourn in the host State, it is noted that article 45 of the draft envisages the recall or termination by the sending State of any member of its permanent mission "in case of grave and manifest violation of the criminal law of the host State" by the person concerned.<sup>186</sup>

(4) The Secretariat of IAEA noted that:

although article 43 provides for the facilitation of transit of permanent representatives and staff through "third States", and article 48 for that of departure from the "host State", there appears to be no provision on the facilitation of the entry of permanent representatives and staff of a permanent mission into the "host State". It would be desirable to introduce a provision on the facilitation of granting visas, wherever necessary, by the "host State" to members of permanent missions. Furthermore, it may be borne in mind that host government agreements concluded for holding meetings in the territories of member States contain such a provision.<sup>187</sup>

<sup>186</sup> See below annex I, section C, 1.

<sup>187</sup> *Ibid.*, section C, 13.

(5) The Commission considered that the inclusion in the present draft of an article on the obligation of the host State to allow members of missions or delegations to enter its territory to take up their post would serve a useful purpose and decided to insert such an article in the draft among the general provisions applicable to the whole draft articles.

(6) Accordingly, paragraph 1 of article 76 states that the host State shall permit entry into its territory of members of the mission and of the delegation. This obligation of the host State applies also in the case of members of the families of members of the mission "forming part of their respective households" and of members of the families of members of the delegation "accompanying them". Paragraph 2 provides for the prompt issuance of visas, when required, to the persons referred to above.

(7) The Commission thought it unnecessary to make an explicit reference in this article to the freedom of "transit" or "access" to and from the premises of the organization, the facilitation of the "sojourn" in the host State, the exemption from the laws and regulations of the host State tending to restrict the entry or sojourn of aliens and the granting of visas free of charge. The Commission considered that the freedom of "transit" or "access" to and from the premises of the organization was already granted by the provisions contained in articles 26 and 57 (Freedom of movement) and that the obligation of the host State to facilitate the "sojourn" was inherent in several provisions of the draft articles. The Commission was further of the view that a general statement of the obligation of the host State concerning entry into its territory, as stated in this article 76, implied the inapplicability to the persons concerned of any restrictive laws and regulations on entry or sojourn of aliens.

#### *Article 77.<sup>188</sup> 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.

#### *Commentary*

(1) Article 77 is modelled on article 44 of the Convention on Diplomatic Relations and paragraph 1 of article 45 of the Convention on Special Missions.

(2) In the Convention on Diplomatic Relations and the Convention on Special Missions, both of which deal with bilateral relations, the article was drafted for extreme situations between the receiving State and the sending State—for instance, a rupture of diplomatic relations or an armed conflict between those States. This was considered inappropriate for a draft concerning relations between States and international organizations.

(3) Under the present article, the obligation of the host State to facilitate departure is subject to a request made to it by the sending State. In normal circumstances there

would be no question of facilities being requested by the sending State. On the other hand, the host State should comply with such a request in the event of a real difficulty. It is, of course, understood that the difficulties mentioned may result, in actual fact, from emergencies such as a case of *force majeure* or even the outbreak of hostilities affecting the situation at the headquarters of the organization or at the place of the meeting of an organ or a conference. The obligation of the host State to facilitate departure, if it is so requested by the sending State, applies therefore whatever the cause of the difficulty may be, including situations created by emergencies of the kind described.

#### *Article 78.<sup>189</sup> 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 resume his functions, 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:

(a) 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;

(b) 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 the host State is bound to accord under the present articles. 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 under the present articles.

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*.

<sup>188</sup> Articles 48, 77 and 115 of the provisional draft.

<sup>189</sup> Articles 43, 74 and 110 of the provisional draft.

*Commentary*

(1) Article 78 is modelled on article 40 of the Convention on Diplomatic Relations and article 42 of the Convention on Special Missions.

(2) Reference has been made in paragraph 3 of the commentary on article 9 of the draft to the broad interpretation given by the Legal Counsel of the United Nations to the provision of article IV (section 11) of the Convention on the Privileges and Immunities of the United Nations and of article V (section 13) of the Convention on the Privileges and Immunities of the Specialized Agencies which stipulates that representatives shall enjoy the privileges and immunities listed in those Conventions while exercising their functions and during their journeys to and from the place of meeting.

(3) The Study of the Secretariat mentions the special problem which may arise when access to the country in which a United Nations meeting is to be held is only possible through another State. It states that:

While there is little practice, the Secretariat takes the position that such States are obliged to grant access and transit to the representatives of Member States for the purpose in question.<sup>100</sup>

(4) During the discussion in the Commission it was noted that when the Commission had drafted the corresponding articles of the draft on diplomatic intercourse and immunities 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.<sup>101</sup> 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*. Reference was made to the difficulties which the obligation of granting transit would give rise to and in particular to the difficulties that would be encountered in the case in which the request for transit was made on behalf of a person who might be objectionable to the third State. Particular attention was given to the situation when a member of a mission or a delegation, being a national of a land-locked State, finds himself obliged to pass through the territory of the third State. In such an exceptional situation there is perhaps a case for asserting the existence of an obligation on the part of the third State, at least when it is a member of the organization concerned, by virtue of Articles 104 and 105 of the United Nations Charter and similar provisions in the constitutions of specialized agencies and regional organizations.

(5) In the present article the Commission decided to follow, with some adjustments and drafting changes in some language versions, the wording of article 40 of the

<sup>100</sup> Study of the Secretariat, *op. cit.*, p. 190, para. 168.

<sup>101</sup> Paragraph 2 of the commentary to article 39 of the draft articles on diplomatic intercourse and immunities [*Official Records of the General Assembly, Thirteenth session, Supplement No. 9 (A/3859)*, p. 25; *Yearbook of the International Law Commission, 1958*, vol. II, p. 103, document A/3859, para. 53] and paragraph 2 of the commentary to article 43 of the draft articles on special missions [*Official Records of the General Assembly, Twenty-second Session, Supplement No. 9 (A/6709/Rev.1)*, p. 22; *Yearbook of the International Law Commission, 1967*, vol. II, p. 365, document A/6709/Rev.1, chap. II, D].

Convention on Diplomatic Relations rather than the wording of article 42 of the Convention on Special Missions.

(6) Consequently, the phrases "which has granted him a passport visa if such visa was necessary" and "who have been granted a passport visa if such a visa was necessary" have been maintained in paragraphs 1 and 4 of the present article instead of being replaced by a separate paragraph along the lines of paragraph 4 of article 42 of the Convention on Special Missions. The Commission considers that a provision like paragraph 4 of article 42 of the Convention on Special Missions was not necessary with regard to delegations to organs or to conferences. It believes that in the framework of multilateral diplomacy the visa requirement, as provided for in this article and in the Convention on Diplomatic Relations, offers adequate protection to the third State.

(7) Paragraph 2 of the present article corresponds to the last sentence of paragraph 1 of article 40 of the Convention on Diplomatic Relations and the last sentence of paragraph 1 of article 42 of the Convention on Special Missions. It concerns the transit through the territory of a third State of members of the family of the head of mission, of a member of the diplomatic staff of the mission, of the head of delegation, of any other delegate or of a member of the diplomatic staff of the delegation. The different position of members of the family enjoying privileges and immunities in the context of permanent or of temporary diplomacy explains the need of a separate formulation. So far as missions are concerned, the members of the family referred to are those "forming part of the household" of the person concerned, while in the case of delegations the members of the family dealt with are those "accompanying" the member of the delegation in question.

(8) Finally, "third State" means in this article any State party to the convention which will be adopted on the basis of the present draft articles, other than the sending State or the host State. For third States not parties to the future convention, the subject-matter of the article will be governed by particular conventions or agreements, where applicable, or by customary international law.

**Article 79.<sup>102</sup> 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 governments 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.**

<sup>102</sup> New article.

## Commentary

(1) This article has been added to the draft after the discussion of a working paper entitled "Consideration by the International Law Commission of the question of the possible effects of exceptional situations such as absence of recognition, absence or severance of diplomatic and consular relations, or armed conflict on the representation of States in international organizations" (A/CN.4/L.166).<sup>193</sup> submitted by the Special Rapporteur at the present session of the Commission. The working paper was submitted by the Special Rapporteur in the light of the Commission's decision, recorded in the reports on its twenty-first<sup>194</sup> and twenty-second sessions,<sup>195</sup> to examine at the second reading the question of the possible effects of exceptional situations on the representation of States in international organizations. The Commission kept in mind the interest expressed, during the twenty-fourth<sup>196</sup> and twenty-fifth<sup>197</sup> sessions of the General Assembly, in the fact that the Commission was to examine that question.

(2) As indicated in paragraphs 30 and 55 of the Introduction to this chapter, the Commission decided to limit the scope of this new article to non-recognition of States or governments or absence of diplomatic or consular relations.

(3) The question of the non-existence or the severance of diplomatic or consular relations has been dealt with explicitly or by implication in several provisions of the Convention on Diplomatic Relations, the Convention on Consular Relations and the Convention on Special Missions. In particular, paragraph 3 of article 2 of the Convention on Consular Relations states that

The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations;

and article 7 of the Convention on Special Missions that

The existence of diplomatic or consular relations is not necessary for the sending or reception of a special mission.

Articles 63 and 74 of the Convention on the Law of Treaties dealt also with the question of the severance or absence of diplomatic or consular relations in the law of treaties.

(4) These Conventions, however, do not contain provisions concerning situations deriving from the recognition or non-recognition of States or governments. Paragraph 2 of article 7 of the draft articles on special missions, adopted by the Commission in 1967, did provide that

A State may send a special mission to a State, or receive one from a State, which it does not recognize,<sup>198</sup>

but the paragraph was deleted by the Sixth Committee and it did not appear in the Convention on Special Missions adopted by the General Assembly in 1969. In the context of the law of treaties, paragraph 1 of the commentary to article 60 of the final draft articles on the subject, adopted by the Commission in 1966, states

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.<sup>199</sup>

(5) Once decided that it was advisable to include an article on non-recognition of States or governments or absence of diplomatic or consular relations in the present draft, the Commission examined thoroughly the possible effects of such exceptional situations on the relations between States and international organizations and arrived at the conclusion that the formulation of the corresponding provision should not follow that of the relevant provisions of the Conventions referred to above. The Conventions on Diplomatic and Consular Relations and the Convention on Special Missions govern bilateral relations between a receiving State and a sending State, while the present draft articles are concerned with relations between States and international organizations and with the relations between the sending State and the host State only within the framework of the organization. The element of consent is not, of course, absent from relations between States and international organizations, but it appears in a somewhat different perspective. The consent of the host State to act as such and the consent of a sending State to establish a relationship with the organization or to participate in a meeting of an organ or a conference are both directed to the organization. In the framework of the relations between States and international organizations, the consent and the legal nexus derived therefrom is established (a) between the host State and the organization and (b) between each sending State and the organization. The non-recognition or the absence of diplomatic or consular relations between a host State and a sending State cannot therefore have the same effects as it would have in their mutual relations.

(6) As formulated, article 79 regulates the question of the effects on the relations between States and international organizations of (a) the non-recognition of States and governments (paragraphs 1 and 2) and (b) the non-existence or the severance of diplomatic or consular relations (paragraph 1).

(7) Paragraph 1 ensures that the non-recognition by the host State or the sending State of the other State or of its government or the non-existence or severance of diplomatic or consular relations between them does not affect their respective "rights and obligations" under the present articles. In other words, the rights and obligations of the

<sup>193</sup> To be printed in *Yearbook of the International Law Commission, 1971*, vol. II, part II.

<sup>194</sup> *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10 (A/7610/Rev.1)*, p. 3, para. 18 (*Yearbook of the International Law Commission, 1969*, vol. II, p. 206, document A/7610/Rev.1, para. 18).

<sup>195</sup> *Ibid.*, *Twenty-fifth Session, Supplement No. 10 (A/8010/Rev.1)*, p. 5, para. 22 (*Ibid. 1970*, vol. II, document A/8010/Rev.1, para. 22).

<sup>196</sup> *Ibid.*, *Twenty-fourth Session, Annexes*, agenda items 86 and 94 b, document A/7746, para. 22.

<sup>197</sup> *Ibid.*, *Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 17.

<sup>198</sup> *Official Records of the General Assembly, Twenty-second Session, Supplement No. 9 (A/6709/Rev.1)*, p. 7 (*Yearbook of the International Law Commission, 1967*, vol. II, p. 350, document A/6709/Rev.1, chap. II, D).

<sup>199</sup> *Ibid.*, *Twenty-first Session, Supplement No. 9 (A/6309/Rev.1)*, p. 88 (*ibid.*, 1966, vol. II, p. 260, document A/6309/Rev.1, part II, chap. II).

host State and the sending State under the present articles are not dependent upon recognition or upon the existence of diplomatic or consular relations at the bilateral level. The paragraph refers both to "non-recognition" and to "the non-existence or the severance of diplomatic or consular relations" because recognition does not necessarily imply the establishment of diplomatic or consular relations. When appropriate, the principle embodied in the paragraph applies also to the relations between two sending States—for instance, if a sending State participates, in accordance with the rules and practice of the organization, together with another sending State in the consultations mentioned in article 81.

(8) The provision in paragraph 2, which reflects existing law and practice, may appear to be self-evident. The Commission considered none the less a useful safeguard, particularly for host States, to state it in express terms. As indicated by the words "by itself", the establishment or maintenance of a mission, the sending or attendance of a delegation or any act in application of the present articles do not imply automatic recognition by the sending State of the host State or its government or by the host State of the sending State or its government. The provision, however, does not preclude that the host State and the sending State, if that is their will, consider that such measures constitute evidence of recognition. The phrase "or any act in application of the present articles" has been inserted because certain measures taken in application of the present articles, other than the establishment and maintenance of a mission or the sending or attendance of a delegation, might be interpreted as implying recognition—for instance, participation in consultations in accordance with article 81. The acts of application referred to in this paragraph being unilateral, there is no need to refer therein to diplomatic or consular relations. These relations, as provided for in article 2 of the Convention on Diplomatic Relations and article 2 of the Convention on Consular Relations, can only be established by "mutual consent".

#### **Article 80.<sup>200</sup> Non-discrimination**

**In the application of the provisions of the present articles no discrimination shall be made as between States.**

#### *Commentary*

(1) Article 80 is modelled on paragraph 1 of article 47 of the Convention on Diplomatic Relations, on paragraph 1 of article 49 of the Convention on Special Missions and on paragraph 1 of article 72 of the Convention on Consular Relations.

(2) A difference of substance between article 80 and the corresponding articles of the Convention on Diplomatic Relations, the Convention on Special Missions and the Convention on Consular Relations is the non-inclusion in article 80 of paragraph 2 of the relevant articles of the above-mentioned Conventions. These paragraphs refer to

cases in which, although an inequality of treatment is implied, no discrimination occurs, since the inequality of treatment in question is justified by the rule of reciprocity. In this connexion, it should be noted that, inspired by paragraph 1 *b* of article 41 of the Convention on the Law of Treaties, the Convention on Special Missions, adopted in 1969, has qualified the *inter se* modifications of the extent of the facilities, privileges and immunities regarded as non-discrimination by the addition of the words

provided that it is not incompatible with the object and purpose of the present Convention and does not affect the enjoyment of the rights or the performance of the obligations of third States.

(3) The Study of the Secretariat states that it has been the understanding of the Secretariat of the United Nations that the privileges and immunities granted should generally be those afforded to the diplomatic corps as a whole, and should not be subject to particular conditions imposed, on a basis of reciprocity, upon the diplomatic missions of particular States.<sup>201</sup> In his statement at the 1016th meeting of the Sixth Committee of the General Assembly, the Legal Counsel of the United Nations stated that:

The Secretary-General, in interpreting diplomatic privileges and immunities, would look to provisions of the Vienna Convention so far as they would appear relevant *mutatis mutandis* to representatives to United Nations organs and conferences. It should of course be noted that some provisions such as those relating to *agrément*, nationality or reciprocity have no relevancy in the situation of representatives to the United Nations.<sup>202</sup>

(4) In deciding not to include a second paragraph on the model of paragraph 2 of article 47 of the Convention on Diplomatic Relations, of article 49 of the Convention on Special Missions and of article 72 of the Convention on Consular Relations, the Commission took into account the fact that the extension or restriction of privileges and immunities applies as a consequence of the operation of reciprocity within the framework of bilateral diplomatic relations between the sending State and the receiving State. In the case of multilateral diplomacy, however, it is a matter of relations among States and international organizations and not a matter which belongs exclusively to the relations between the host State and the sending State.

(5) The inclusion of the article as a general provision should not be misinterpreted as suggesting that the various types of missions and delegations dealt with in the draft articles should be treated in the same manner. The rule on non-discrimination, as expressly stated in the opening words "In the application of the provisions of the present articles", is purely concerned with the application of the provisions contained in the various draft articles and such provisions establish a number of differences between those various types of missions or delegations.

(6) Article 80 is formulated in such broad terms as to make its field of application cover all the obligations provided for in the draft, whether assumed by the host State, the sending State, the organization or third States.

<sup>201</sup> Study of the Secretariat, *op. cit.*, p. 178, para. 96.

<sup>202</sup> *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98, document A/C.6/385, para. 4.

<sup>200</sup> Articles 44, 75 and 111 of the provisional draft.

(7) Finally, it should be pointed out that a non-discriminatory application of a particular rule implies that all States concerned are entitled to the same treatment under that rule. It should not be confused with the question of the means necessary for the implementation of the rule vis-à-vis each of those States. Such means may require to be different according to the various circumstances of each particular case.

**Article 81.<sup>203</sup> 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 (a) the host State, (b) the sending State or States concerned, and (c) 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 disposing of the dispute.

**Article 82.<sup>204</sup> 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. The appointment shall be made within a 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.

<sup>203</sup> Article 50 of the provisional draft.

<sup>204</sup> New article.

5. The Commission shall establish its own rules of procedure and shall reach its decisions and recommendations by a majority vote. If so authorized 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 parties 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 the establishment of another appropriate procedure for the settlement of disputes arising in connexion with the conference.

8. This article is without prejudice to provisions concerning the settlement of disputes contained in international agreements in force between States or between States and international organizations.

*Commentary*

(1) In the course of the consideration of the draft articles, the Commission recognized the need for adopting a general provision on the question of consultations between the sending State, the host State and the organization. The purpose of the consultations in question would be to seek solutions for any difficulties between the host State and the sending State in connexion with the interpretation or application of the present articles.

(2) Article 81 is intended to be sufficiently flexible to envisage the holding of consultations between the host State, the sending State or States concerned and the organization or, as the case may be, the conference. Moreover, the article provides that those consultations shall be held not only upon the request of the States concerned, but also upon the request of the organization itself. It applies, in particular, to the case where a dispute arises between the host State on the one hand, and several sending States, on the other. In such a case, the sending States concerned may join together in the consultations with the host State and the organization.

(3) As regards the duty of the organization to ensure the application of the provisions of the present draft, the Commission refers to article 22.

(4) The provision for consultations is not uncommon in international agreements. It may be found for example in article IV (section 14) of the Agreement of 26 June 1947 between the United Nations and the United States of America regarding the Headquarters of the United Nations and in article 2 of the Inter-American Treaty of Reciprocal Assistance, of 2 September 1947.<sup>205</sup>

<sup>205</sup> United Nations, *Treaty Series*, vol. 21, p. 93. For other examples, see P. Guggenheim, *Traité de droit international public* (Geneva, Librairie de l'Université, Georg et Cie, 1954), t. II, pp. 198-200.

(5) In their comments on the article on consultations in the provisional draft (article 50), some governments expressed the view that the provision on consultations was inadequate and a more effective procedure should be found to reconcile differences between sending and host States. In this connexion, one Government stated that the Commission's views on the possibility of inserting at the end of the draft articles provisions concerning the settlement of disputes arising out of the application of the articles deserved particular attention. Another Government suggested that the article on conciliation should be incorporated in a more detailed provision or in a protocol on the settlement of disputes, as might be appropriate. A third Government observed that the special nature of the relations between the sending State and the host State required the establishment of a tripartite body capable of coming to a decision in a very short time. It presented to this effect an elaborate suggestion embodying a conciliation machinery.

(6) The Commission re-examined the question of the inclusion in the draft articles of a provision on the settlement of disputes at its present session in the light of these comments and decided to adopt the settlement procedure laid down in article 82. This procedure envisages the utilization of any settlement procedure which may be established in the organization and, in the absence of any such procedure, the reference of the dispute to conciliation. The Commission further took into account evidence of recent State practice including article 66 of the Convention on the Law of Treaties and the annex thereto and the Claims Commission provided for in the draft convention on international liability for damage caused by space objects, adopted on 29 June 1971 by the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space.<sup>206</sup> The International Law Commission concluded that the conciliation procedure, as embodied in article 82, represents the largest measure of common ground that could be found at present among governments as well as in the Commission on this question.

(7) Paragraph 1 of article 82 provides that 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 have been established in the organization. The Commission considers that the logical steps following the consultations in case they prove unsatisfactory should be the utilization of any settlement procedure which may be available in the organization. The Commission presumes that the adoption of these articles may encourage the development of such process. If an international organization has not provided for a dispute settlement procedure to deal with problems of this character, then any State party to such a dispute having participated in the consultations may have recourse to the conciliation procedure provided in article 82.

(8) By paragraph 1 of article 82, the right to bring a dispute before a conciliation commission is limited to the

States parties to the dispute which have participated in the consultations; the organization and the conference itself are not entitled to do so, unlike the case of consultations which may be held upon their request. Paragraph 1, however, provides that written notice of the submission of the dispute to conciliation must also be given to the organization. This requirement is thought to be desirable in view of the general interest of the organization and its members in the settlement of a dispute on which consultations had been held with its participation and in view of the role that the organization may eventually play in the process of establishing the conciliation commission. Moreover, paragraph 1 sets up the time pattern which is essential for setting in motion the conciliation procedure.

(9) Paragraphs 2, 3 and 4 regulate the composition of the conciliation commission. The provisions of paragraph 2 reflect the standard practice followed in setting up conciliation panels. Furthermore, as it is likely that more than one sending State might be involved in a dispute, the paragraph provides for a procedure whereby two or more such States may agree to act together, in which case they shall jointly appoint the member of the conciliation commission. This provision leaves it open to the sending State to decide whether to act separately or jointly.

(10) Paragraph 3 is a safeguarding clause according to which the chief administrative officer of the organization is to appoint the member of the conciliation commission for the side which has failed to do so or, at the request of either side, the chairman of the commission in case no agreement is reached on his choice between the two members of the conciliation commission. The expression "chief administrative officer" is used in Article 97 of the Charter of the United Nations and in the constituent instruments of a number of international organizations, for example in the Constitution of UNESCO<sup>207</sup> (Article VI, para. 2) and in the Statute of IAEA<sup>208</sup> (Article VII, para. A). For the purposes of the present articles, that expression covers the chief administrative officer of the organization, whether designated Secretary-General, Director-General or otherwise. In order to ensure against a possible fear of bias as regards the appointment of a member or the chairman of the conciliation commission, given the organization's involvement as the prior stage of consultations, the last sentence of paragraph 3 sets forth three requirements for such an appointment.

(11) The word "decisions" used in the first sentence of paragraph 5 refers to such interlocutory decisions to be taken by the conciliation commission as those connected with the extension of time limits or with the request for an advisory opinion from the International Court of Justice provided for in the second sentence of paragraph 5. The conciliation commission is empowered to request such an opinion regarding the interpretation or application of the present articles, if so authorized in accordance with the Charter of the United Nations. In view of the time element involved, a general authorization might be convenient but the whole question of how the request for an

<sup>206</sup> *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 20 (A/8420)*, para. 31.

<sup>207</sup> United Nations, *Treaty Series*, vol. 4, p. 275.

<sup>208</sup> IAEA, *Statute (as amended up to 31 January 1963)*, March 1967.

advisory opinion is to be made must be left to the decision of the General Assembly of the United Nations. Finally, unlike section 30 (article VIII) of the Convention on the Privileges and Immunities of the United Nations, the present article does not provide that such an advisory opinion shall be binding.

(12) The provision of paragraph 7 is included in the article in view of the time factor, which would make a conciliation procedure impracticable within the relatively short existence of a conference.

(13) Paragraph 8 is intended to safeguard the procedures on the settlement of disputes established by any other existing bilateral or multilateral agreements between the parties. Those agreements may provide for other means of settlement such as arbitration or the compulsory jurisdiction of the International Court of Justice or the referral of the dispute to the competent organ of the organization. The Commission decided to include an express provision in paragraph 8 in order to leave no possible doubt on this point.

## ANNEX

### OBSERVER DELEGATIONS TO ORGANS AND TO CONFERENCES

#### General comments

(1) At the twenty-second session of the Commission, the Special Rapporteur submitted a working paper on temporary observer delegations and conferences not convened by international organizations<sup>309</sup> but the Commission did not consider that it should take up the matter at that time.<sup>310</sup> In the course of the consideration of the Commission's report by the Sixth Committee at the twenty-fifth session of the General Assembly, some delegations expressed themselves in favour of supplementing the draft articles with provisions regulating the status of observer delegations to organs and conferences. The matter was also raised by a number of Governments in their written comments. At its present session the Commission examined this question and instructed the Special Rapporteur to prepare for its consideration a set of draft articles. Accordingly, the Special Rapporteur submitted a working paper (A/CN.4/L.173).<sup>311</sup>

(2) 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.

One specialized agency indicated in its reply that temporary observers are invited to observe in accordance with the relevant rules of procedure, but are normally sent from a diplomatic mission accredited to the host State; diplomatic privileges and immunities are granted, to the Secretariat's knowledge, only to the extent that such persons are members of the diplomatic corps and otherwise entitled to privileges and immunities in the host State. Another specialized agency stated in its reply that the headquarters agreement is silent on the question of privileges and immunities of temporary observers of non-member States. The host State grants such representatives visas as a matter of courtesy and without the intervention of the organization.

Under the rules of procedure of the Assembly of WHO,<sup>312</sup> when a State applies for admission to membership of the Organization,

<sup>309</sup> A/CN.4/L.151.

<sup>310</sup> *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 10 (A/8010/Rev.1)*, p. 4, para. 14 (*Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, para. 14).

<sup>311</sup> To be printed in *Yearbook of the International Law Commission, 1971*, vol. II, part II.

<sup>312</sup> See WHO, *Basic Documents*, 22nd ed. (Geneva, April 1971), p. 97.

under article 6 of the Constitution of WHO,<sup>313</sup> it may, in accordance with rule 46 of the rules of procedure of the World Health Assembly, appoint an observer, who may attend any open meeting of the World Health Assembly or of its main committees and who may, upon the invitation of the President and with the consent of the Assembly or committee, make a statement on the subject under discussion. As a matter of practice, these observers have been treated in the same manner as other representatives.

The Conference of FAO has adopted certain principles relating to the granting of observer status to representatives of non-member nations. Annex C to the report of the ninth session of the FAO Conference reads as follows:

"Observers from nations admitted to meetings of the Organization may be permitted:

- "1. to make only formal statements in Conference and Council plenaries and in Commissions of the Whole, subject to the approval of the General Committee of the Conference, or of the Council;
- "2. to participate in the discussions of the session commissions and committees of the Conference and Council and in the discussions of technical meetings, subject to the approval of the chairman of the particular meeting and without the right to vote;
- "3. to receive the documents, other than those of a restricted nature, and the report of the particular meeting;
- "4. to submit written statements on particular items of the agenda.

" . . . " <sup>314</sup>

The Rules of Procedure of the General Conference of IAEA contain a provision relating to temporary observers on behalf of non-member States (Rule 30). Section 27 a, viii (Article XI), of the Headquarters Agreement between IAEA and Austria stipulates that, with respect to representatives of States not members of IAEA who are sent as observers, in accordance with rules adopted by IAEA, to meetings convened by IAEA, the host Government shall take all necessary measures to facilitate their entry into and sojourn in Austrian territory, place no impediment in the way of their departure from Austrian territory, ensure that no impediment is placed in the way of their transit to or from the headquarters seat, and shall afford them all necessary protection in transit.

<sup>313</sup> *Ibid.*, p. 1.

<sup>314</sup> See FAO, *Report of the Ninth Session of the Conference (2-23 November 1957)*, Rome, 1958, pp. 221-222.

As for the ILO, observers on behalf of non-member States may, following an invitation issued by the Governing Body of the ILO, be designated temporarily to the International Labour Conference or to Regional Conferences (see article 2, paragraph 3 *e* of the Standing Orders of the Conference<sup>215</sup> and article 1, paragraph 7, of the *Rules concerning the Powers, Functions and Procedure of Regional Conferences convened by the International Labour Organisation*.<sup>216</sup>

(3) On request of the Commission at its present session, the Secretariat of the Commission provided information on the practice both at the United Nations Headquarters in New York and at its European Office in Geneva regarding the question whether observer representatives submit credentials or letters of appointment and by what authorities of the sending State those documents are issued.

(4) After considerable examination, both in the Working Group and in the Commission, on the basis of the reports of the group (A/CN.4/L.174/Add.4-6),<sup>217</sup> the Commission decided to include in the draft articles provisions regarding observer delegations to organs and conferences. Some members of the Commission expressed doubts concerning the advisability of the final inclusion in the draft articles of provisions which did not pass through the usual process of submission to governments in a provisional form and subsequent re-examination in the light of those comments. The Commission concluded, however, that it would serve a useful purpose to present provisions which would enable any conference which might be convoked for considering the present draft to adopt a convention dealing as comprehensively as possible with the question of the representation of States in their relations with international organizations. The Commission considers that the presentation of draft articles on observer delegations to organs and to conferences would provide governments with a concrete basis for their consideration of this subject and thus facilitate the eventual adoption of an appropriate regulation, the absence of which may result in a lacuna in the draft articles. However, in view of the above-mentioned particular circumstances of the preparation by the Commission of the provisions on observer delegations to organs and to conferences, the Commission deemed it appropriate to attach them as an annex to the draft articles.

(5) In submitting this group of draft articles on observer delegations to organs and to conferences, the Commission wishes to draw particular attention to the following four points:

(a) The term "observer delegation to an organ" in paragraph *a* of article A is so formulated as to be confined to delegations which are sent by a State to observe on its behalf the proceedings of the organ. Its meaning becomes clear when it is taken in comparison with the broad meaning given to the use of the term "delegation to an organ" in sub-paragraph 9 of paragraph 1 of article 1. This latter term covers delegations sent by States to participate on their behalf in the proceedings of an organ, whether they are members of the organ or not. Participation would comprise any form of activity in the meeting, such as the right to speak without voting, as contrasted with the passive task of observing. The Commission has drafted article A on the use of terms so that it is capable of being integrated in article 1 of the draft in case any conference which might be convoked to consider this draft decide in favour of adopting provisions on observer delegations to organs and conferences.

(b) Article D provides simply for the issuance of letters of appointment of the observer delegates. Given their limited function, such observer delegates do not need, in the opinion of the Commission (which was based on the information provided by the Secretariat), letters of credentials.

<sup>215</sup> International Labour Office, *Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference* (Geneva, 1968), p. 31.

<sup>216</sup> ILO, Geneva, 1966.

<sup>217</sup> To be printed in *Yearbook of the International Law Commission, 1971*, vol. II, part II.

(c) In formulating article E on the composition of the observer delegation, the Commission has based itself on the assumption that, given its limited function of observing, such a delegation is usually composed of one or more observer delegates. Therefore the Commission adopted for article E a formulation different from the corresponding provisions relating to missions to international organizations and delegations to organs and to conferences respectively.

(d) In view of the restrictive manner in which article E is formulated, it has not been thought necessary to include a specific provision on the size of the observer delegation.

## Draft articles

### Article A. Use of terms

[For the purposes of the present articles:]

(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;

(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.

### Article B. 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.

### Article C. Appointment of the members of the observer delegation

Subject to the provisions of article 72,<sup>218</sup> the sending State may freely appoint the members of the observer delegation.

### Article D. Letter of appointment of the observer delegate

The letter of appointment of the observer delegate 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. It shall be transmitted, as the case may be, to the Organization or to the conference.

### Article E. Composition of the observer delegation

1. The observer delegation may consist of one or more observer delegates.

<sup>218</sup> Article 72 (Nationality of the members of the mission or the delegation) is one of the general provisions of the consolidated draft.

2. It may also, if necessary, include some administrative and technical staff.

*Article F. 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.

*Article G. Precedence*

Precedence among observer delegations shall be determined by the alphabetical order of the names of the States used in the Organization.

*Article H. 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.

*Article I. 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.

*Article J. Inviolability of archives and documents*

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

*Article K. 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 as is necessary for the performance of the task of the observer delegation.

*Article L. 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 sending State, its permanent 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 tasks.

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.

*Article M. Personal inviolability*

The person of the observer delegate shall be inviolable. He shall not be liable to any form of arrest or detention. The host State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

*Article N. 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 delegate shall be immune from search, requisition, attachment or execution.

4. The papers, correspondence and, except as provided in paragraph 3 of article O, the property of the observer delegate shall likewise enjoy inviolability.

*Article O. Immunity from jurisdiction*

1. The observer delegate shall enjoy immunity from the criminal jurisdiction of the host State.

2. The observer delegate shall enjoy immunity from the civil and administrative jurisdiction of the host State in respect of all acts performed in the exercise of his official functions.

3. No measures of execution may be taken in respect of the 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 accommodation.

4. The observer delegate is not obliged to give evidence as a witness.

5. The immunity from jurisdiction of the observer delegate does not exempt him from the jurisdiction of the sending State.

*Article P. Waiver of immunity*

1. The immunity from jurisdiction of the observer delegate 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 judgment, 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.

*Article Q. Exemption from social security legislation*

1. The observer delegate 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 provisions of this article shall not affect bilateral or multi-lateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

*Article R. Exemption from dues and taxes*

The observer delegate 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;
- (d) dues and taxes on private immovable property situated in the territory of the host State, unless he 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;
- (e) charges levied for specific services rendered;
- (f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property.

*Article S. Exemption from personal services*

The host State shall exempt the observer delegate 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.

*Article T. 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 delegate.
2. The personal baggage of the observer delegate 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 observer delegate or of his authorized representative.

*Article U. Privileges and immunities of other persons*

1. Members of the family of an observer delegate shall, if they accompany him, 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 specified in articles M, N, O, Q and S. They shall also enjoy the privileges specified in paragraph 1 b of article T in respect of articles imported at the time of their first entry into the territory of the host State for the purpose of attending the meeting of the organ or conference and exemption from dues and taxes on the emoluments they receive by reason of their employment.

*Article V. 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, an observer delegate who is a national 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 his 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.

*Article W. 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 for the purpose of attending the meeting of an organ or conference or, if 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 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 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.

*Article X. End of the functions of the observer delegate*

The functions of the observer delegate 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.