

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1965

Volume II

*Documents of the first part
of the seventeenth session
including the report of the Commission
to the General Assembly*

UNITED NATIONS



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New York, 1967



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LAW OF TREATIES

[Agenda item 2]

DOCUMENT A/CN.4/177 and Add.1 and 2

Fourth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur

[Original text : English]
[19 March, 25 March and 17 June 1965]

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Introduction

1. At its fourteenth, fifteenth and sixteenth sessions the Commission provisionally adopted parts I, II and III of its draft articles on the law of treaties, consisting respectively of twenty-nine articles on the conclusion, entry into force and registration of treaties, twenty-five articles on the invalidity and termination of treaties and nineteen articles on the application, effects, modification and interpretation of treaties.* In adopting each part the Commission decided, in accordance with articles 16 and 21 of its Statute, to submit it, through the Secretary-General, to Governments for their observations.

2. At the sixteenth session, while recalling its decision of 1958 that it should prepare its final draft only at the second session following that in which its first draft had been prepared, the Commission expressed the hope that the observations of Governments on part III of the law of treaties would be available to it before the commencement of its eighteenth session in 1966. It also asked the Secretariat to request Governments to submit their comments on part II by January 1965 at the latest, in order that the Commission might be in a position to consider them at its seventeenth session. The Commission further stated that it intended at its seventeenth session, after considering the comments received from Governments, to conclude the second reading of the first part, and of as many further articles as possible of the second part, of its draft on the law of treaties.

3. In connexion with its re-examination of the draft articles the Commission noted at its sixteenth session that certain of the articles already adopted required further consideration in order to ensure their proper co-ordination with other articles. It also noted that, while the juxtaposition of some topics had been convenient for purposes of study, it might not necessarily be appropriate in the final arrangement of the draft articles, and that in consequence some readjustment of the material in the different parts might be found to be desirable. At the same time it recognized that special attention would have to be given to ensuring as full consistency as is possible in the use of terminology in the final drafts.

4. At the same session the Commission decided that in its re-examination of part I it would give further consideration to the question whether it should include an article covering the making of treaties by one State on behalf of another or by an international organization on behalf of a member State.

The basis of the present report

5. By 1 March 1965 replies had been received from thirty-one Governments:

* The text of the draft articles to which this report refers will be found in *Yearbook of the International Law Commission, 1962*, vol. II, pp. 161-186 in the case of articles 1-29 and in *Yearbook of the International Law Commission, 1963*, vol. II, pp. 189-194 in the case of articles 30-32. The text of individual articles will also be found in the appropriate summary record in *Yearbook of the International Law Commission, 1965*, vol. I.

Afghanistan
Australia
Austria
Burma
Cambodia
Canada
Czechoslovakia
Denmark
Finland
Iraq
Israel
Jamaica
Japan
Jordan
Luxembourg
Madagascar

Malaysia
Netherlands
Nigeria
Pakistan
Poland
Portugal
Senegal
Sudan
Sweden
Syria
Turkey
Uganda
United Kingdom
United Republic of Tanzania
United States of America

Certain of these replies were confined to statements that the Government concerned did not have observations to make at the present stage of the work on the law of treaties. The majority of the replies, however, contained proposals and criticisms with regard to the substance or wording of the draft articles of part I or part II or of both parts. In addition, on 19 February 1965 the Secretariat furnished the Special Rapporteur with extracts from the records of the Sixth Committee at the seventeenth and eighteenth sessions of the General Assembly, setting out the comments of delegations on a number of the articles in part I. The above-mentioned comments of Governments and of delegations have been collected and reproduced by the Secretariat in a separate document (A/CN.4/175 and Add.1)* for use in conjunction with the present report.

6. The present report contains under each article the comments of Governments and delegations directed to that particular article, as well as an introductory summary of the views expressed by Governments regarding the general form to be given to the draft articles. The text of the report indicates in each case whether the source of the comment is the written reply of the Government or the statement of the delegation in the Sixth Committee. The Special Rapporteur has taken all these comments¹ into account in his re-examination of the draft articles, even although it has not been possible for him to deal with every comment in the text of his report. One question which confronted the Special Rapporteur was how much weight to attach to the absence of any comments from a Government or to the absence of any comment upon a particular article as an implied endorsement of the Commission's general treatment of the topic under examination. On this question the Special Rapporteur has made the best appreciation that he could of the relative weight of the various elements, including the opinions previously expressed in the Commission itself, and has dealt with the proposals and criticisms of Governments and delegations on what appeared to him to be their merits in relation to the subject-matter of the draft articles provisionally adopted by the Commission.

* Mimeographed.

¹ The comments of the Netherlands Governments were not received in time to be taken into account by the Special Rapporteur in his re-examination of part I.

7. The order in which the Commission studied the various topics of the law of treaties in parts I, II and III has necessarily determined the order in which Governments and delegations have commented upon those topics. In the present report, therefore, the Special Rapporteur is not in a position to submit the draft articles for re-examination by the Commission in what he thinks should be their final order. On the substance of the matters in question he is bound very largely to follow the order in which the articles were provisionally adopted by the Commission. On the other hand, the order in which the articles are ultimately to be placed may affect the final form of the drafting of certain articles,² and it seems desirable that before the end of the next session the Commission should reach some decision, however provisional, as to the final structure and order of the articles. The Special Rapporteur has not yet any fixed opinion on the question of the final order, because drafting and logical considerations may not invariably point to the same conclusion as to the desirable order. Subject to this reservation, however, he suggests that the following might be a possible scheme for the final arrangement of the draft articles:

Part I—General Provisions (article 48 and perhaps one or two further articles should be transferred to this part); *Part II*—Conclusion, Entry into Force and Registration of Treaties; *Part III*—Observance and Interpretation of Treaties, consisting of article 30 (possibly), article 55 (*pacta sunt servanda*) and articles 69-73; *Part IV*—Application of Treaties, consisting of articles 56-64; *Part V*—Invalidity of Treaties; *Part VI*—Termination of Treaties; *Part VII*—Procedure for invoking a ground of Nullity, Termination, Withdrawal from or Suspension of the Operation of a Treaty; *Part VIII*—Legal Consequences of the Nullity, Termination or Suspension of the Operation of a Treaty; *Part IX*—Modification of Treaties.

Revision of the draft articles in the light of the comments of Governments

The form of the draft articles

A. *Previous decisions of the Commission*

In its report for 1959³ the Commission stated that, without prejudice to any eventual decision to be taken by the Commission, it had not so far envisaged its work on the law of treaties as taking the form of one or more international conventions but rather as “a code of a general character”. Two principal arguments were mentioned as favouring a “code”:

“First, it seems inappropriate that a code on the law of treaties should itself take the form of a treaty; or rather, it seems more appropriate that it should have an independent basis. In the second place, much of the law relating to treaties is not especially suitable for framing in conventional form. It consists of enunciations

of principles and abstract rules, most easily stated in the form of a code; and this also has the advantage of rendering permissible the inclusion of a certain amount of declaratory and explanatory material in the body of the code, in a way that would not be possible if this had to be confined to a strict statement of obligation. Such material has considerable utility in making clear, on the face of the code itself, the legal concepts or reasoning on which the various provisions are based.”

Mention was also made of possible difficulties that might arise if the law of treaties were to be embodied in a multilateral convention and then some States did not become parties to it or, having become parties to it, subsequently denounced it. On the other hand, the Commission recognized that these difficulties arise whenever a convention is drawn up embodying rules of customary law.

In its report for 1961,⁴ however, the Commission decided that its aim should be to “prepare draft articles on the law of treaties” intended to serve as the basis for a convention. By this decision it changed the scheme of its work on the law of treaties from a merely expository statement of the law to the preparation of draft articles capable of serving as a basis for a multilateral convention. In its report for 1962 the Commission explained that two considerations had led it to make this change:

“First, an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and the consolidation of the law of treaties is of particular importance at the present time when so many new States have recently become members of the international community. Secondly, the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished; and their participation in the work of codification appears to the Commission to be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations.”⁵

At the same time, it decided to leave open the question whether the draft articles on the law of treaties should take the form of a single draft convention or of a series of related conventions. Pursuant to this decision, the Commission arranged the draft articles in three separate parts, in its reports for 1962, 1963⁶ and 1964,⁷ although deciding for reasons of convenience to number the articles of the three groups in a single consecutive series.

B. *Comments of Governments*

Austria. In the view of the Austrian Government, the law of treaties is complex and not easy to codify, despite

² For example, the order in which the articles on application, termination and revision of treaties are placed may necessitate adjustments of the drafting of the various articles.

³ *Yearbook of the International Law Commission, 1959*, vol. II, p. 91.

⁴ *Yearbook of the International Law Commission, 1961*, vol. II, p. 128.

⁵ *Yearbook of the International Law Commission, 1962*, vol. II, p. 160.

⁶ *Yearbook of the International Law Commission, 1963*, vol. II, p. 189.

⁷ *Yearbook of the International Law Commission, 1964*, vol. II, p. 174.

the uniformity of the underlying legal concepts and the relative clarity of the existing norms of customary law. The problems are problems not of substantive but of adjective law, since the norms to be codified will govern and define the procedure by which a rule of international law is legally created. The Austrian Government prefers the opinion expressed by the Commission in 1959 that "it seems inappropriate that a code on the law of treaties should itself take the form of a treaty". It considers that the norms of the law of treaties need to be codified, clarified, elucidated and progressively developed, but not to be enshrined in a treaty. It observes that the code would be a constitutional norm, laying down for the future the procedure for the creation of a norm, and would thus rank above other norms or at least take precedence over norms of equal rank; that, if given the form of a convention, it would be concluded in the same manner as any other multilateral treaty; and that there would be no way of distinguishing it from the other multilateral treaties to which, nevertheless, it would always thereafter be applicable. It further points out that, where there are elements of progressive development in the draft articles, the question will arise whether the pre-existing customary law or the new conventional rule should apply; and that difficulties may arise if later on a State which has accepted the new convention on the law of treaties concludes a treaty with a State which has not, and is bound to observe its rules. Finally, the Austrian Government lays particular stress on the probability that the new convention would for a long time lack the "universality" which ought to attach to the "law of treaties"; and that, even if universally acceded to, it might still lack complete universality as some States might accede to it only with reservations. In its view, the result might be to unsettle the existing customary law, which has the sanction of the whole international community, and increase the difficulties of concluding treaties. Austria, therefore, considers that a "code" on the law of treaties, perhaps in the form of a General Assembly resolution, would be preferable to a "convention".

Israel. The Government of Israel regards the Commission's general decision that its draft articles shall serve as the basis for a convention on the law of treaties as acceptable.

Japan. The Japanese Government is of the opinion that the draft articles in their ultimate form should be a "code" rather than a "convention". Although they purport to be concerned only with the international aspect of treaty-making, they will inevitably have repercussions also on the internal aspect; and if they are couched in the form of conventional norms, the effect will be to put a strait-jacket on the procedural formalities of treaty-making in each State. Secondly, an attempt to prescribe treaty-making procedures in great detail will, in its view, have the undesirable result of putting obstacles in the way of the parties' finding acceptable procedures for their actual needs. The Japanese Government does not, however, mean that the authority of an official "code" should be withheld from the draft articles. On the contrary, it has in mind that they should be adopted, after full examination and discussion by Governments, as an authoritative recommendation

regarding the procedures to be followed in concluding international agreements. This might, it thinks, be done by inserting in the draft articles the following general provision:

"States parties to the present code recognize that the provisions of the present code are generally declaratory of established principles of international law and practice, and declare that they shall endeavour to conform themselves to these provisions as a common standard of conduct."

In the event that the draft articles should take the form of a "convention" the Japanese Government would like to see it formulated on the basis of the following two principles:

(a) the provisions should be as concise as possible, leaving all the detailed technicalities to the decisions of the parties to any particular international agreement;

(b) a general provision should be included, empowering States to derogate from any of the provisions of the convention by mutual agreement of the parties to any particular international agreement.

The Japanese Government is also of the opinion that the three parts of the draft articles should be amalgamated as the parts are so closely interrelated with one another that it would serve no useful purpose to make them into three separate conventions independent of one another.

Luxembourg. The Luxembourg Government expresses the hope that the Commission's draft articles will soon result in the conclusion of a world-wide convention on the law of treaties.

Sweden. The Swedish Government has no objection to the Commission's decision in favour of a "convention". In its view, however, this decision entails important consequences in regard to the contents of the convention; for it considers that it would be out of place for a convention to contain descriptions of convenient practices and procedures, useful though such descriptions might be in a "code" of recommended practices. The Swedish Government thinks it advisable to omit any provisions of that character from the draft articles, since they appear to it to be unnecessary and capable of proving burdensome in the event of their becoming obsolete. Nor does it feel that there is any need for a convention to cover all the phases of the conclusion of treaties, if legal rules do not attach to all of them. The rules of the law of treaties, it observes, are largely dispositive, i.e., the parties may depart from them by agreement; and it is unnecessary to state examples of the various ways in which such departures may be made. The need is rather for statements of the residuary rules which govern a specific question when the parties have not resolved it and of the obligatory rules from which the parties may not depart at all, if any such there be. In the light of these considerations, the Swedish Government suggests that the following provisions of the draft articles might be omitted or transferred to a code of recommended practices, or else revised so as to state only residual legal rules: article 4, paragraph 6 (a); article 5; article 6 (b) and (c); articles 7 and 8; article 9, paragraph 3 (a); article 10; articles 13 and 14; articles 18 and 19; articles 26 and 27; and article 29, paragraphs 3 to 8.

C. Observations of the Special Rapporteur

1. Clearly, the ultimate decision as to the outcome of the Commission's work rests with States in the General Assembly and arguments can, no doubt, be adduced in favour of more than one solution. But, although the final decision will be a political one, it will necessarily have to take into account considerations that are mainly legal. In consequence, when it has completed its work on the law of treaties, the Commission may wish to examine whether it should express any views on the technical aspects of this question in its final report to the General Assembly. Meanwhile, the basis of the Commission's work must be its decision of 1961 that it should prepare "draft articles on the law of treaties intended to serve as the basis for a convention". In consequence, the Special Rapporteur does not think that it would serve any useful purpose for him to discuss in the present report the objections to a convention raised by the Austrian and Japanese Governments. It suffices at this stage to observe that, while some of these objections have always been recognized by the Commission to have a certain weight, others do not appear to have the weight given to them by the Government concerned.

2. The point made by the Swedish Government, on the other hand, appears to the Special Rapporteur to concern very directly the present stage of the Commission's work. That point is that the Commission's decision to prepare draft articles as a basis for a convention entails consequences as to the content of the articles. In brief, the Swedish Government maintains that the texts of the articles require considerable revision so as to eliminate the descriptive element and largely to confine the content of the articles to statements of residuary rules. The Special Rapporteur feels that there is substance in the point that the articles still contain some element of "code" and are not yet fully cast in the form required for a convention. On the other hand, some of the detailed suggestions may, it is thought, go too far in the other direction. The Vienna Conventions on Diplomatic and Consular Relations are not altogether lacking in provisions of an expository nature. With this reservation, the Special Rapporteur has sought to give effect to the Swedish Government's suggestion in his proposals for the revision of a number of the articles in part I.

Terminology and definitions

1. The Commission, as mentioned in paragraph 3 of the introduction to the present report, recognized at its sixteenth session that special attention would have to be given to ensuring as full consistency as is possible in the use of terminology in the final drafts. Governments, and more especially the Government of Israel, have drawn attention to points of terminology in their comments. In some cases slight differences in terminology may be due to the exigencies of the language or, more important, to small differences of nuance; in other cases the difference may merely be the reflection of transient difficulties in arriving at agreement on the substance and of insufficient opportunity at the time to co-ordinate the language with that used in other parts of the draft articles. The Special

Rapporteur, like the Commission, attaches high importance to achieving the maximum consistency and precision in the use of terms. On the other hand, there are still a considerable number of points of substance which, in the light of the comments of Governments, require full reconsideration. The Special Rapporteur accordingly feels that it would be premature for him to try to deal with questions of terminology point by point in the main body of the present report, before the texts on these matters of substance have been reformulated. To adopt that course might also overload and complicate the commentaries on the individual articles. The Special Rapporteur therefore proposes to deal with the questions of terminology in a separate addendum to the present report, where he will deal with the points made by Governments and any further points of his own. Amongst the latter are expressions such as "it appears from the treaty", the "treaty provides", etc., which occur with some frequency in the draft articles. The Special Rapporteur considers it to be of cardinal importance to re-examine these expressions in the light of rules for the interpretation of treaties adopted at the last session and to make it crystal clear in the drafts exactly whether reference is being made only to the text of the treaty or to the treaty as interpreted in the light of the preparatory work and surrounding circumstances, etc. It may be found that the meaning of the particular expressions used should be given precision by defining them in article 1. As to the general question of "definitions", it may be found advisable to add one or two other definitions to those in article 1, such as the term "party".⁸ For the reasons given above, the Special Rapporteur thinks it preferable to examine the question of adding new definitions in the separate addendum dealing with points of terminology. Accordingly, they are not discussed in the Special Rapporteur's observations on article 1.

Title — Draft articles on the Law of Treaties

Japan. The Japanese Government, while not holding a strong view on the title to be given to the draft articles, suggests that the term "treaties" should be replaced by "international agreements". Even when, as in the draft articles, the term "treaties" is used in a generic sense, it may, the Japanese Government believes, lead to misunderstanding — a view which it feels to be supported by the discussions in the Commission in its second and third sessions. Consequently, in spite of the proviso in article 1, paragraph 2, the Japanese Government suggests that it would be more appropriate in the title to employ a neutral term like "international agreements".

Observations and proposals of the Special Rapporteur

1. The question whether to use the term "treaty" or "international agreement" in the draft articles was carefully examined by the Commission at its eleventh and fourteenth sessions. On each occasion the Commission decided that several considerations point in favour of using the term "treaty" as the generic term to cover all forms of international agreement in writing. The Special Rapporteur does not feel that the considerations advanced by the

⁸ Suggested by the Netherlands Government.

Japanese Government are of such weight as to call for a reversal of those decisions. The use of the term "international agreement" would not remove any risks of misunderstanding which may exist in municipal law by reason of distinctions made in some systems between agreements and treaties. This point is taken care of in article 1, paragraph 2, of the draft articles, and the Special Rapporteur sees no reason for the Commission to alter its view that "the only real alternative [to the term treaty] would be to use for the generic term the phrase 'international agreement', which would not only make the drafting more cumbersome but would sound strangely today, when the 'law of treaties' is the term almost universally employed to describe this branch of international law".⁹

2. On the other hand, it seems desirable for the Commission to consider whether it should now take account in the title of its decision to confine the draft articles to the treaties of States. It is true that articles 1 and 3, as at present drafted, refer to the treaties of "other subjects of international law", and that article 3 also deals with the capacity of international organizations to conclude treaties. But all the remaining articles have been drafted for application in the context of treaties concluded between States, and the view of the Special Rapporteur is that for reasons of logic and relevance these two articles ought now to be brought into line with the rest of the draft.¹⁰ If the Commission accepts this view, the Special Rapporteur suggests that it may be advisable, in order to prevent any misconception, to amend the title to read: "Draft articles on the Law of Treaties concluded between States."

Part I: (The title describing its contents)

The Special Rapporteur proposes that the title to part I should become "General Provisions"; and that the existing title, "Conclusion, Entry into Force and Registration of Treaties" should be transferred to a new heading, "Part II", which should be inserted before the present article 4. The existing sub-title at that place, "Section II: Conclusion of Treaties by States", would then become "Section I: Conclusion of Treaties". The reason for these changes is, of course, that the "General Provisions" will now apply to all the "Parts" of the draft articles and not merely to the "Conclusion, Entry into Force and Registration of Treaties".

SECTION I: GENERAL PROVISIONS

Article I. — Definitions

Paragraph 1 (a). — "Treaty"

Comments of Governments

Australia. The Australian Government considers that the definition, as at present worded, may embrace a great quantity of informal understandings reached by exchange of notes which are not intended to give rise to legal rights and whose registration with the United Nations might

cause the registration system to break down. It does not think that the phrase "governed by international law" suffices to remove the difficulty, and proposes that the definition should include a reference to the intention of the parties to create legal obligations between themselves.

Austria. The Austrian Government considers that paragraph 1 (a) omits an essential characteristic of a "treaty", namely, the intention to create, and the actual creation of, rights and obligations under international law between the parties. It recalls that the definitions proposed both by Sir G. Fitzmaurice and Sir H. Lauterpacht included the element of intention to create rights and obligations, and proposes that this element should be added to the definition.

Finland. The Finnish Government observes that the definition in paragraph 1 (a) is for the purpose of the present articles only while the articles themselves deal exclusively with treaties concluded between States. It therefore sees no need to touch upon other subjects of international law and suggests the deletion of the words "or other subjects of international law" from paragraph (a).

Japan. Since the enumeration of the categories of international agreements in this paragraph cannot be exhaustive, the Japanese Government doubts its utility, and suggests its deletion.

Luxembourg. The Luxembourg Government questions whether it is advisable to give a definition of the term "treaty", and suggests that it may be better to state the idea and leave its definition to doctrine. Paragraph 1 (a), it observes, in essence defines a "treaty" as "any international agreement" but the term "agreement" is nothing else than a synonym of "treaty". A definition of the term treaty, if included, should in its view concentrate on three elements: (a) the consensual nature of a treaty; (b) the nature of the parties; (c) the binding effect sought by the parties. On the other hand, it doubts the correctness of including two of the elements mentioned in the Commission's text, namely, the written form and the reference to international law. It states that under paragraph (a), as at present worded, the question may be raised as to whether the written form should be regarded as a matter of substance affecting the validity of treaties or whether the paragraph is simply a way of saying that the future convention is to apply only to treaties in written form. If the latter interpretation is correct, the Luxembourg Government considers that it would be preferable to take the "written form" element out of the definition and to add a new paragraph at the end of the article stating: "The rules laid down by these articles relate only to international treaties in written form." As to the element "governed by international law", the Luxembourg Government doubts the need to mention it, as it seems to be implied from the very nature of the contracting parties, and international law could only be made inapplicable exceptionally by the insertion of a specific reference to another system of law or possibly by virtue of the very special subject of the particular agreement. This is such an exceptional case that in the view of the Luxembourg Government it would be better not to complicate the general definition of a "treaty" by a reference to that unlikely hypothesis. In the light of

⁹ See *Yearbook of the International Law Commission, 1962, vol. II, p. 162.*

¹⁰ See further the Special Rapporteur's observations and proposals on article 1, paragraph 1 (a), and article 3.

the above considerations it suggests that paragraph 1 (a) should be revised to read as follows:

"The expression 'treaty' means any agreement between two or more States or other subjects of international law designed to create a mutual obligation for the parties, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation etc."

United Kingdom. The United Kingdom Government doubts whether the list of expressions contained in the definition of the term "treaty" is either necessary or desirable, and suggests that it would be better for any examples to be mentioned in the commentary. On the other hand, it considers that an intention on the part of the States concerned to create legal obligations is an element which ought to be included in the definition of "treaty".

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur does not consider it possible to adopt the suggestion that the definition of "treaty" should be omitted from the draft articles and the term left to be defined in the writings of jurists. The suggestion appears to be based on the misconception that the definition in paragraph 1 (a) is intended to be an absolute definition of the term "treaty". But the purpose of the definition, as the opening words of the article make clear, is only to state the meaning to be assigned to the term in interpreting and applying the provisions of the draft articles. Nor does it appear to be correct to say that the term "agreement" is nothing else than a synonym of "treaty". On the contrary, while the word "treaty" may be susceptible of being used with that wide meaning, it may also be given a narrower meaning. The Charter itself, in Article 102, speaks of "every treaty *and* every international agreement". It was the very fact that the term may be used in more than one sense which led the Commission both at its eleventh and fourteenth sessions to define the sense in which it used the term in the draft articles.¹¹

2. Four points in the Commission's definition have been questioned in the comments of Governments. The first is the limitation of the term "treaty" to agreements in written form. The suggestion has been made that, as at present worded, paragraph 1 (a) may leave it doubtful whether the written form is a matter of substance affecting the validity of treaties or whether the paragraph simply provides that the future convention is to apply only to treaties in written form. That suggestion might perhaps have had some possible basis if it were not expressly provided in article 2, paragraph 2, that the exclusion of international agreements not in written form from the scope of the draft articles is not to be understood as affecting their legal force under international law. Having regard to this provision and to the opening words of article 1, it does not appear to the Special Rapporteur that there would be any justification whatever for interpreting the draft articles in the manner suggested.

3. Another suggestion made in the same connexion is that in any event it would be preferable to take the "written form" element out of the definition and instead to add a new paragraph at the end of the article stating: "The rules laid down by these articles relate only to international treaties in written form." This suggestion again seems to be inspired by a fear that paragraph 1 (a) may be interpreted as containing an "absolute" definition of the term treaty in international law and a wish not to appear in the draft articles to deny that oral agreements partake of the nature of treaties. However much one may sympathize with this point of view, it remains true that, as indicated above, the Commission has already taken account of it in the opening words of article 1 and in article 2, paragraph 2. The question is to some extent one of drafting technique. The suggested solution appears to be open to the objection that the term "treaty" would first be defined "for the purposes of the present articles" in broad terms of universal validity and then it would immediately be provided in the proposed new paragraph that the term is never in fact to have that broad meaning anywhere in the draft articles. Nor would it be an easy task to formulate a definition of the term treaty which would be universally valid. If no solution may be entirely satisfying, it seems preferable in paragraph 1 (a) to define the term as it is used in the draft articles and then, by appropriate provisions, to safeguard the legal position of other transactions falling within the concept of a "treaty" in other contexts. In order to tighten up these safeguards the Special Rapporteur will propose minor modifications of the second paragraphs both of the present article and of article 2, which will be further explained in his observations and proposals regarding those paragraphs.

4. The second point is the suggestion that the words "or other subjects of international law" should be deleted. The Special Rapporteur agrees with this suggestion for the same reasons as those given in the preceding paragraph for opposing the broadening of the definition to cover oral agreements. The Commission, as already mentioned in the Special Rapporteur's observations and proposals regarding the title to the draft articles, decided at its fourteenth session to confine the draft articles to the treaties of States. It rejected the idea of including a separate section dealing with the treaties of international organizations, preferring not to complicate the drafting of the present articles by trying to deal with the special case of treaties concluded by international organizations. It did not, however, fully draw the consequences which naturally followed from its decision to confine the draft articles to the treaties of States. It retained in article 1, paragraph 1, a reference to the treaties of "other subjects of international law" and in article 3, paragraph 3, it included an express provision regarding the treaty-making capacity of international organizations. The Commission was anxious, it is believed, to make it plain that it accepted the concept of treaty-making by international organizations, even while it preferred not to deal with their treaties in the draft articles. This has already been done in its 1962 report, and can appropriately be emphasized again in the commentaries to the final texts of the articles. But the Special Rapporteur considers that, as the articles are designed to

¹¹ See in particular paragraph (7) of the commentary to article 1 in the Commission's 1962 report (*Yearbook of the International Law Commission, 1962*, vol. II, p. 162).

provide the basis for a convention dealing only with the law of treaties concluded between States, the texts of the articles ought now at all points to be drafted with that design in view. Since the aim of paragraph 1 (a) is to define the term "treaty" for the purpose only of the "present articles", it seems necessary to eliminate from it the reference to treaties concluded by subjects of international law other than States.

5. The third point is the suggestion that the list of appellations given to treaties set out between brackets "(treaty, convention, protocol, etc.)" should be omitted. At the fourteenth session some members of the Commission felt that the passage between brackets was superfluous, but it was retained by the Commission at that stage of its work as having a certain value in aiding the understanding of the definition. At the present stage, however, when it is necessary to refine the text of the articles as far as possible, the Special Rapporteur considers that the list of appellations may, and should, be dispensed with. The words "whatever its particular designation" suffice to cover the point and the Special Rapporteur therefore proposes that this suggestion also should be adopted.

6. The fourth point concerns the words "and governed by international law", as to which there are two suggestions. One is that this element in the definition should be deleted because it is necessarily to be implied from the nature of the contracting parties, and cases of a specific reference to another system are too exceptional to be taken into account in framing the definition. The other is that the element of *intention* to create legal obligations should be added. Both these suggestions have previously been put forward and discussed in the Commission.¹² The previous Special Rapporteur proposed the inclusion of the phrases "intended to create rights and obligations, or to establish relationships, under international law", while the present Special Rapporteur's first draft contained the phrase "intended to be governed by international law". The object of these phrases was to distinguish treaties from (a) agreed statements of policy not intended to create legal obligations, and (b) agreements between States, not uncommon in practice, which the parties expressly make subject to the municipal law of a particular country. Some members of the Commission thought mention of the intention of the parties to be unnecessary, and some thought it to be actually undesirable, as they did not consider it always to be open to the parties to choose between international and municipal law, e.g., in a treaty of cession or a treaty concerning the high seas or territorial waters. Certain members thought it unnecessary to have any reference to international law, since in their view the nature of the contracting parties necessarily made the agreement subject, at any rate in the first instance, to international law. The Commission, both in 1959 and 1962, decided that the present articles must be confined to international agreements whose execution is governed by international law and that the phrase "governed by interna-

tional law" should be included in the definition in order to cover this point. At the same time it omitted any reference to the intention of the parties, considering that, in so far as this may be relevant in any case, the element of intention is embraced in the phrase "governed by international law". The Special Rapporteur considers that the phrase "governed by international law" should be retained. Although personally not opposed to the inclusion of a reference to the intention of the parties, he does not think that the comments of Governments introduce any new considerations which would justify him in formulating a fresh proposal on this point.

7. In the light of the above observations, the Special Rapporteur proposes that paragraph 1 (a) should be amended to read as follows:

"Treaty" means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation, concluded between two or more States and governed by international law."

Paragraph 1 (b). — "Treaty in simplified form"

Comments of Governments

Austria. The Austrian Government does not think that paragraph 1 (b) contains any real definition of a "treaty in simplified form". In its view, paragraph (11) of the commentary begs the question when it states in the French version "*La Commission a défini cette forme de traités en prenant pour critère sa forme simplifiée*". It contends that the essential characteristic of a treaty in simplified form is that it does not require ratification, and proposes that this should be adopted as the basis of the definition.

Japan. The Japanese Government considers the term "treaty in simplified form" to be unnecessary for the purpose of the draft articles.

Luxembourg. The Luxembourg, like the Austrian Government is of the opinion that paragraph 1 (b) does not amount to a real definition of the term; it merely enumerates various formal procedures characteristic of this kind of agreement. It notes that the only places where the term recurs in the draft articles are article 4, paragraph 4 (b), and article 12, paragraph 2 (d). From these provisions it deduces that the true definition of a "treaty in simplified form" is rather "a treaty concluded in circumstances which indicate the willingness of the parties to bind themselves without observing the formalities of full powers and ratification". It does not think, however, that it is possible to indicate with sufficient precision in what circumstances the parties should properly be considered to have manifested that intention. Accordingly, it proposes that the definition should be omitted from the draft articles.

United Kingdom. The United Kingdom Government expresses itself as not being entirely satisfied with the definition of "treaty in simplified form".

United States. The United States Government considers that the effect of paragraph 1 (b), if applied to article 4,

¹² See *Yearbook of the International Law Commission, 1959*, vol. I, 487th meeting, p. 34; *ibid.*, vol. II, p. 95, para. (3) of the commentary to article 2; *Yearbook of the International Law Commission, 1962*, vol. I, 638th and 655th meetings, pp. 50 and 168; *ibid.*, vol. II, p. 163, para. 9 of the commentary to article 1.

paragraph 4 (b), would be to make full powers necessary in connexion with many informal agreements which at present are signed without production of full powers. At the same time, it holds that even the forms of treaty mentioned in paragraph 1 (b) ought not to be regarded as informal treaties, if intended by the parties to be subject to ratification. It proposes that the following be substituted for paragraph 1 (b):

“‘*Informal treaty*’ means a treaty not subject to ratification or other subsequent approval that is concluded by an exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument.”

Observations and proposals of the Special Rapporteur

1. The fact that many treaties are today concluded “in simplified form” is well recognized, and the Commission felt that in one or two instances the distinction between “formal” and “informal” treaties needed to be drawn in setting out the rules governing the conclusion of treaties. In fact, as the Luxembourg Government points out, these instances are only two, article 4 (b) concerning the production of full powers by representatives other than Heads of State, Heads of Government and Foreign Ministers, and article 12, paragraph 2 (d), excepting such treaties from any presumption that they require ratification. Furthermore, the Commission did not find the distinction between formal and informal treaties easy to express, explaining the matter as follows:

“In general, treaties in simplified form identify themselves by the absence of one or more of the characteristics of the formal treaty. But it would be difficult to base the distinction infallibly upon the absence or presence of any one of these characteristics. Ratification, for example, though not usually required for treaties in simplified form is by no means unknown. Nevertheless, the treaty forms falling under the rubric ‘treaties in simplified form’ do in most cases identify themselves by their simplified procedure. The Commission has, therefore, defined this form of treaty by reference to its simplified procedure and by mentioning typical examples.”¹³

The five Governments which have commented upon the present paragraph are at one in thinking that the definition of an informal treaty which it contains is inadequate, either in general or as a basis for the rules formulated in articles 4 and 12.

2. On the other hand, none of the three definitions suggested in the comments of these Governments appears to the Special Rapporteur to provide a really satisfactory alternative. The Commission was, he believes, correct in considering that a treaty concluded in simplified form, such as an exchange of letters, is not converted into a formal treaty merely because production of full powers takes place or because it is made subject to ratification or approval. Otherwise, an exchange of letters by diplomatic representatives which is subject to ratification or approval would be a formal treaty, but a similar one by

Heads of State, Heads of Government or Foreign Ministers which is not so subject would be an informal treaty. Moreover, none of the definitions suggested by Governments would provide a serviceable basis for drawing distinctions in articles 4 and 12, where differentiating between formal and informal treaties might have facilitated the drafting of the rules.

3. The Special Rapporteur, having re-examined articles 4 and 12 in the light of the comments of Governments, is of the opinion that, if possible, those articles should now be reformulated without framing their provisions in terms of a distinction between formal treaties and treaties in simplified form. If the Commission endorses this conclusion, it will no longer be necessary to include a definition of “treaties in simplified form” in article 1. The Special Rapporteur therefore proposes the deletion of the present paragraph.

Paragraph 1 (c). — “General multilateral treaty”

Comments of Governments

Austria. The reference to “matters of general interest to States as a whole” appear to the Austrian Government to be rather indefinite, and it suggests that the sole criterion should be the establishment of general norms by the treaty (law-making treaty).

Japan. In the view of the Japanese Government, the term “general multilateral treaty” cannot be precisely defined, and its application will cause great difficulty. It considers that the term should be dispensed with.

Luxembourg. The Luxembourg Government observes that the term “general multilateral treaty” is used in only one other place in the draft articles, namely in article 8, paragraph 1, which provides that “every State” may become a party to such a treaty; and that in the present article the term is introduced without any previous definition of the term “multilateral treaty”. Moreover, the words “of general interest to States as a whole” are, in its opinion, much too vague a criterion to form the substance of a workable definition. The application of such a debatable criterion might, it thinks, give rise to insoluble conflicts concerning the general nature of the norms established by a multilateral treaty or the question whether they are of interest to States as a whole. It therefore advocates the deletion of paragraph 1 (c) from the definitions in article 1.

Colombian delegation. The delegation considers it doubtful whether the definition would be useful in applying the rules governing the various categories of treaties. For example, it is not clear to the delegation whether an agreement concerning a primary product such as sugar, in which all States have an interest as consumers or producers, would be covered by the definition.¹⁴

Observations and proposals of the Special Rapporteur

In the light of the comments of Governments and having regard to the purpose for which a distinction is

¹³ *Yearbook of the International Law Commission, 1962*, vol. II, p. 163, para. 11 of the commentary to article 1.

¹⁴ *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 741st meeting, para. 7.*

drawn in article 8 between "general multilateral treaties" and other treaties, the Special Rapporteur is inclined to think that the definition in paragraph 1 (c) is too broad. The justification for the thesis in article 8, paragraph 1, that general multilateral treaties should in principle be open to participation on as wide a basis as possible is almost invariably put on the ground that general law-making treaties ought in the interests of the international community as a whole to be of universal application. This ground of justification may not necessarily be present in the case of some treaties which might arguably be said to "deal with matters of general interest to States as a whole". This phrase of the definition, as some Governments have noted, may constitute too uncertain a criterion to provide a workable definition for the purpose of the draft articles. Moreover, article 8, paragraph 1, is the only provision in the draft articles where a distinction is made between general multilateral treaties and other treaties. The Special Rapporteur accordingly suggests that the words "or deals with matters of general interest to States as a whole" should be deleted from the definition.

Paragraph 1 (d). — "Signature", "ratification", "accession", "acceptance" and "approval"

Comments of Governments

Austria. The Austrian Government thinks that it might be useful to define the several terms which are listed baldly in this paragraph. In particular, it considers the absence of any definition of "ratification" to be unfortunate (see the Austrian comments on article 12). It suggests that the definition of this term could well be based on the wording of article 6, paragraph 1, of the draft articles submitted by Sir H. Lauterpacht in his report of 1953:

"Ratification is an act by which a competent organ of a State formally approves as binding the treaty or the signature thereof."¹⁵

Luxembourg. The Luxembourg Government observes that, as commonly understood, the term "approval" means the internal formalities to which an international treaty is subject and, more particularly, parliamentary approval of treaties; that it is only as a result of an unfortunate confusion of terms that "approval" has come to be used in international relations as the equivalent of "ratification"; and that a converse confusion has also arisen owing to the frequent use now of the term "ratification" in internal law to mean parliamentary approval. It suggests that advantage should be taken of the present opportunity to perfect the terminology once and for all. As the draft articles are concerned solely with the external and international aspect of the problem, it proposes that all references to "approval" should be systematically eliminated and only the terms "ratification" and "accession" retained.

Panamanian delegation. The delegation questions the inclusion of signature among the acts whereby a State expresses its consent to be bound. It considers that in

contemporary international law it is ratification, not signature, which expresses the consent of the State; that signature as a rule constitutes authentication and that consent by signature would be the rare exception. It also maintains that acceptance, approval and accession are merely forms of ratification.¹⁶

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur is unable to share the view that "consent by signature is the rare exception", since a very large number of treaties today are concluded in simplified form and in the case of these treaties consent by signature is the rule rather than the exception.¹⁷ On the other hand, having regard to the double use of "signature" in treaty practice, he is inclined to share the view of the delegation of Panama that it would be better to separate it from "ratification, accession, etc.". In that event the definition of "signature" might read as follows:

"Paragraph (d) (bis): 'Signature' means the act by which a representative affixes his signature to the text of a treaty on behalf of his State [with the object, according to the context, of merely authenticating the text or of both authenticating the text and establishing the consent of his State to be bound by the treaty]."

The Special Rapporteur considers that the words between brackets should be omitted, unless their inclusion is thought necessary in order to emphasize the double meaning given to the term signature in international practice. The difference in the legal effects of the two uses of signature is believed to be fully brought out in the provisions of articles 7, 10 and 11.

2. The original draft of the Special Rapporteur contained definitions of "ratification", "accession" and "acceptance". The Commission, however, felt that it was difficult to formulate a comprehensive definition of these terms without putting into it the substance of what is contained in articles 12, 13 and 14. Nor is the matter made easier by the fact that "acceptance" and "approval" are both found with a double use in treaty practice, one analogous to "ratification" and the other to "accession" or "signature". Accordingly, the Commission preferred to give the somewhat bald definitions of these terms contained in article 1, leaving their legal content to be further explained in the articles relating to the procedures in question. The Commission will, no doubt, wish to re-examine these definitions. If it were to contemplate a fuller formulation of the meaning of each term in article 1, the Special Rapporteur would not feel that the definition of ratification mentioned by the Austrian Government should be adopted, since it defines ratification in terms of "approval", and since the words "approves as binding the treaty or the signature thereof" leave much to be desired. The truth is that the somewhat loose use of terms in treaty practice and the complication introduced by the fact that the texts of some treaties are adopted by "resolution" in an international organization make it difficult to formulate a simple and

¹⁵ *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 741st meeting, para. 20.*

¹⁷ See also "Summary of the Practice of the Secretary-General as Depository of Multilateral Agreements" (ST/LEG/7), para. 41.

¹⁶ *Yearbook of the International Law Commission, 1953, vol. II, p. 112.*

at the same time precise definition of the terms in paragraph 1 (d).

3. As to the term "approval", the Special Rapporteur shares the regret of the Luxembourg Government at the confusion and duplication of terms which have arisen in international law through the introduction into the terminology of treaty-making on the international plane of expressions found in some systems of national law. But the view taken by the Commission, with which the Special Rapporteur concurs, is that the use of these expressions in treaty practice has now gone so far that it is scarcely possible to exclude them from the draft articles without appearing to disregard the established practice of States. The essential point, the Commission thought, was to distinguish clearly between the procedures of approval and acceptance as international acts operating between States on the international plane and any internal procedures having the same or similar appellations in some national systems. This is all the more essential because there is no exact or necessary correspondence between the use of the procedures in national and international law. Not only do many national systems know nothing of "approval" as a technical term, but in multilateral treaties the international term is often employed without direct or particular reference to internal constitutional requirements. The Special Rapporteur does not, therefore, feel able to endorse the proposal for the elimination of the term "approval" from the draft articles. On the other hand, having regard to the risk of confusion between the use of terms in national and international law, the Special Rapporteur suggests that the Commission should consider expanding the general reservation in paragraph 2 of this article in order to emphasize further that it is only the international procedures with which the present articles on the law of treaties are concerned (see further the Special Rapporteur's observations on paragraph 2).

Paragraph 1 (e). — "Full powers"

Comments of Governments

Japan. The Japanese Government considers that the distinction between the expressions "full powers" and "credentials" as used in article 4 is not very clear. It suggests that the terminology should be standardized by employing the term "instrument of full powers" in the present paragraph.

Observations and proposals of the Special Rapporteur

The Special Rapporteur agrees with the Japanese Government that in article 4 the unexplained difference of terminology between the expressions "written credentials" in paragraph 3 and "instrument of full powers" in paragraphs 4 and 6 should be remedied and the expression "instrument of full powers" used throughout. He accordingly proposes that in the present definition also "Instrument of full powers" should be substituted for "Full powers".

Paragraph 1 (f). — "Reservation"

Comments of Governments

Israel. The Government of Israel points out that the English text of the paragraph "... statement... whereby it purports to exclude or vary the legal effect of *some* provisions" does not fully correspond to the French text "... *déclaration... par laquelle il vise à exclure ou à modifier l'effet juridique de certaines dispositions*"; and it suggests that the English text should be brought into line with the French, which appears to be a more precise expression of the Commission's intention (compare the Spanish text "*de algunas disposiciones*").

Japan. The Japanese Government considers that the words "or vary" should be replaced by the words "or restrict" because, in its view, only a statement which restricts the legal effect of a provision properly falls within the meaning of the term "reservation".

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur doubts the advisability of changing the word "vary" to "restrict". A unilateral statement in which a State purports to interpret a provision as conferring upon it a larger right than is apparently created by the language of the provision, or purports to impose a condition enlarging its rights, would seem to require to be treated as a "reservation".

2. In accordance with the Government of Israel's suggestion, the Special Rapporteur proposes that the expression "some provisions" in the English text should be amended to "certain provisions".

Paragraph 1 (g). — "Depositary"

No Government has commented on this paragraph, and the Special Rapporteur does not propose any modification of the definition. He doubts whether the precedent of a trinity of depositaries in the Nuclear Test Ban Treaty requires the insertion of the words "or States" between "State" and "or international organization"; for the word "State" in the singular would seem sufficient to cover also "States" in the plural.

Paragraph 2. — Classification of international agreements under internal law

Comments of Governments

Israel. The Government of Israel considers that this paragraph may give rise to difficulties on the internal level, especially in countries in which duly ratified international treaties become part of the law of the land. It doubts whether the provision itself is fully appropriate to an international treaty, and suggests that the matter should be dealt with in the commentary.

United States. The disclaimer in paragraph 2 is considered by the United States Government to be satisfactory as far as it goes. It observes that, while the characterizations and classifications given in paragraph 1 are undoubtedly useful in international law, they might be misleading in

that they might be understood by some people as a part of international law that had the effect of modifying internal law. In view of this, it would like to see the paragraph expanded so as to read:

“Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any State or affect the requirements of that law regarding the negotiation, signature and entry into force of such agreements.”

Observations and proposals of the Special Rapporteur

1. The Luxembourg Government in its comments upon paragraph 1 (*d*) underlines the risk of confusion which arises from the transplanting of expressions used for treaty-making procedures in national law into the terminology of treaty-making in international law and *vice versa*. The Special Rapporteur in his observations on paragraph 1 (*d*) has suggested that, in order to meet the point of view of that Government to some extent, the Commission should expand the present paragraph so as to emphasize that it is only the international procedures with which the draft articles are concerned. It is not only the characterization and classification of international agreements in internal law for which a reservation needs to be made but also the terminology and requirements of treaty-making procedures. A similar preoccupation appears to have inspired the comment of the United States Government on the present paragraph and its proposal for an expansion of the reservation contained in paragraph 2 rather on the lines envisaged by the Special Rapporteur.

2. As to the doubts expressed by the Government of Israel, the Special Rapporteur does not feel that a paragraph which expressly negatives any impact of the present articles on the treaty-making terminology and procedures of individual States in their internal law could itself be the cause of difficulties in that law. The hypothesis is that the draft articles ultimately acquire the force of a convention on the law of treaties and that in some countries this convention itself acquires the force of internal law under the provisions of their constitutions. In that event, it would seem that difficulties might arise in internal law unless either in the convention or in internal law some provision were to be made to ensure that the convention would not affect the internal terminology and procedures of treaty-making. To leave the provision to be made in internal law, the Special Rapporteur feels, might be more awkward and inelegant than to cover the point in the convention. In the event contemplated, the opening words of article 1 “For the purposes of the present articles” would hardly suffice to achieve the object, nor a paragraph in the Commission’s commentary, which would, of course, not be attached in any way to the convention.

3. In the light of the above observations, it is proposed that the paragraph should be maintained in the following expanded form:

“Nothing contained in the present articles shall affect in any way —

(a) the characterization or classification in internal law of international agreements or of the procedures for their conclusion;

(b) the requirements of internal law regarding the negotiation, conclusion or entry into force of such agreements.”

Article 2. — Scope of the present articles

Comments of Governments

United States. The United States Government thinks the article to be useful (1) as calling attention to the need to consider the draft articles in their context and (2) as avoiding the question whether the absence of a written text affects the legal force of an international agreement.

Observations and proposals of the Special Rapporteur

No exception has been taken to this article by any Government. On the other hand, the final form of its text must clearly take into account both the decision already arrived at by the Commission to confine the draft articles to the treaties of States and the decision ultimately reached by it regarding the definition of the term “treaty” in article 1, paragraph 1 (*a*). If the Commission endorses the Special Rapporteur’s view that the words “or other subjects of international law” should be deleted from article 1, paragraph 1 (*a*), and also the provision in paragraph 3 of article 3 regarding the treaty-making capacity of international organizations, then it seems to him desirable that article 2 should contain a reservation respecting treaties concluded by “other subjects of international law” as well as concerning agreements not in written form. He accordingly suggests that article 2 should be revised to read as follows:

“1. The present articles apply to treaties as defined in article 1, paragraph 1 (*a*).

“2. The fact that the present articles do not apply —
 “(a) to international agreements not in written form,
 “(b) to international agreements concluded by subjects of international law other than States,

shall not be understood as affecting the legal force that such agreements possess under international law nor the rules of international law applicable to them.”

Article 3. — Capacity to conclude treaties

Comments of Governments

Austria. In paragraph 3 the Austrian Government considers that the restriction on the treaty-making capacity of international organizations resulting from the words “depends on the constitution of the organization concerned” is not absolutely necessary. In its view, the starting point might rather be that capacity to conclude treaties is an inherent right of any international organization which is a subject of international law; indeed, capacity to conclude treaties appears to it to be the essential criterion of the status of a subject of international law, so that an organization lacking such capacity would not be one. The

constitutions of many international organizations, it observes, do not contain any mention of the capacity of the organization to conclude treaties, yet its organs consider themselves competent to do so on its behalf. When, on the other hand, the constitution does contain provisions on the point, they either relate to the question which organ is competent for the purpose or limit the extent of the freedom to conclude treaties. Such restrictions assume that in principle the organization would possess an all-embracing capacity to conclude treaties. The Austrian Government thinks that paragraph 3 is incorrect if it means that the treaty-making capacity of an international organization is derived solely from its constitution. Nor does it think that there is anything to the contrary to be found in the opinions of the Court in the *Reparation for Injuries*¹⁸ and *Certain Expenses of the United Nations*¹⁹ cases. It suggests that paragraph 3 should be deleted; or that, at the very least, the words "depends on the constitution" should be revised so as to indicate that the constitution can only contain restrictions on the freedom of an organization to conclude treaties.

Finland. The Finnish Government recalls its proposal for the deletion of the words "or other subjects of international law" from the definition of "treaty" in article 1 (a) because the draft articles deal exclusively with treaties concluded between States. For the same reason it here proposes that the words "and by other subjects of international law" should be deleted from paragraph 1 of this article and that paragraph 3 should be omitted. Another possibility, it suggests, would be to drop the article altogether as superfluous, in accordance with the opinion expressed by some members of the Commission at its fourteenth session. In this connexion it observes that, if desired, statements could be included in the commentaries on certain articles indicating that they would apply by analogy to the Holy See and certain international organizations; and that a new draft convention regarding these bodies could be worked out later on. If the article is retained, it proposes that paragraph 1 should read: "Capacity to conclude treaties under international law is possessed by States which are subjects of international law"; for not all States possess international sovereignty. Paragraph 2 it would like to see read: "In a union of States, the capacity of its members to conclude treaties depends on its constituent treaty or constitution", because federations are not the only form of composite States the member States of which possess capacity to conclude treaties in certain fields.

Israel. The Government of Israel suggests that the question of capacity would be adequately covered by the article without paragraph 2.

Japan. The Japanese Government proposes the deletion of paragraph 2, which does not appear to it to add much to paragraph 1. Indeed, in its view, paragraph 2 may even be misleading in that it does not mention another element in international capacity to conclude treaties — the need for recognition of that capacity by the other contracting party or parties. The same may, it thinks, be said of paragraph 3, the deletion of which it also proposes.

Sweden. The Swedish Government observes that the rule in paragraph 1 is necessarily stated in broad terms and is evidently not very helpful. On the other hand, it feels that any detailed elaboration of this point is bound to encounter great difficulties and that it may be better to leave the development of the law to take place in the practice of States and international organizations and in the decisions of international tribunals.

United Kingdom. The United Kingdom Government considers that the article formulated by the Commission does not adequately define the expression "subjects of international law" and it would prefer a draft along the lines proposed in article 3, paragraph 1, of the Special Rapporteur's first report. It observes that many States and territories exist which possess less than full sovereignty but which have, in certain cases, enabled themselves to conclude treaties with foreign States by treaty entrustments and similar means. It notes that these means are not mentioned in the article or in the commentary.

United States. Unless paragraph 1 is given a wider meaning than that attributed to it in the commentary, the United States Government considers that it will constitute a narrow limitation on areas emerging to independence. To limit the scope of the term "other subjects of international law" to international organizations, the Holy See and cases such as an insurgent community would, in its view, be too restrictive; for colonies and similar entities given some measure of authority in foreign relations, especially when approaching statehood, should not have to be in a state of insurgency to be capable of concluding a valid international agreement. The United States Government observes that where a colony or other subordinate jurisdiction has been entrusted with authority to conduct its foreign relations with respect to certain matters, or to conclude a particular agreement, the new law of treaties should not preclude commitments entered into by it from constituting valid international agreements. It maintains that, so far as such a colony or entity is entrusted with a measure of authority by the parent State in the conduct of its foreign relations, it necessarily becomes a "subject of international law" for the purposes of paragraph 1 of the present article; and that it would be paradoxical if at the present time areas approaching independence could not be encouraged by being entrusted with authority to conclude agreements in their own names. In paragraph 3 the United States Government considers that the word "constitution" may be too limiting, especially in view of the apparently different sense in which it is used in the previous paragraph and of the explanation in the Commission's commentary (paragraph 4). In its view, a good measure of the treaty-making authority of an international organization can be found in the dictum of the International Court in the *Reparation for Injuries*, opinion mentioned in the commentary:

"Under international law, the organization must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."

It suggests that the word "authority" would be less likely to create confusion than the word "constitution",

¹⁸ *I.C.J. Reports, 1949*, pp. 174 *et seq.*

¹⁹ *I.C.J. Reports, 1962*, pp. 151 *et seq.*

which is generally understood to mean a written document. It further suggests that the paragraph should be so worded that its meaning would be clear without reference to the commentary; and that, in particular, the paragraph should be more specific as to what is meant by an "international organization".

Observations and proposals of the Special Rapporteur

1. The draft of this article in the Special Rapporteur's first report²⁰ dealt with the treaty-making capacity of federal States, Unions of States and international organizations somewhat more fully than the text adopted by the Commission, as well as including provisions concerning dependent States. Some members of the Commission, however, felt that to try to cover the question of capacity at all fully might necessitate an investigation of the whole law concerning "subjects" of international law, and that some of the questions involved were controversial.²¹ They also expressed doubts as to the need for an article on capacity in international law to conclude treaties, pointing out that capacity to enter into diplomatic relations had not been dealt with in the Vienna Convention on Diplomatic Relations. Other members felt that the question of capacity is more prominent in the law of treaties than in the law of diplomatic intercourse, and that at least some general provisions should be included on capacity to conclude treaties. The Commission decided not to enter into all the detailed problems of capacity which may arise but to confine itself to the three broad provisions set out in the present article.

2. After careful consideration of the comments of Governments and of the records of the Commission's previous discussion of this article, the Special Rapporteur is of the opinion that the entire article should be deleted. He shares the view of those who think that the question of capacity is more prominent in the law of treaties than in that of diplomatic intercourse. But he doubts both the value of the truncated treatment of the question which is found in article 3 as at present drafted and the possibility of formulating more extended provisions that would have a reasonable prospect in present circumstances of meeting with general acceptance. The text of paragraph 2 of the article was adopted by the Commission by the narrow majority of 9 votes to 7, with 3 abstentions; and even then it deals with only one of several similar problems. The text of paragraph 3 was adopted by the even narrower majority of 9 votes to 8, with 2 abstentions. Furthermore, the Commission having decided to confine the specific provisions of the draft articles to the treaties of States, the rules governing the capacity of international organizations to conclude treaties have only the most marginal, if any, claim to be included in the draft articles. Paragraph 1 commanded the almost unanimous support of the Commission, being adopted by 18 votes to none, with 1 abstention. However, the rule stated in the paragraph is already implied in the definition of "treaty" in article 1, para-

graph 1 (a) and, as the Swedish Government observes, the paragraph is not, in itself, very helpful in resolving the problems of capacity.

3. Accordingly, the Special Rapporteur proposes the deletion of the article.

Article 3 (bis). — Transfer of article 48 to the "General Provisions" (proposal by the Special Rapporteur)

At a number of places in the draft articles it is necessary to make a reservation regarding the application of the rule in question in the case of constituent instruments of international organizations and sometimes also of treaties drawn up within an organization. The Commission has inserted such a reservation in certain articles, and when dealing with the termination of treaties in part II, section III, it made a general reservation to the same effect in article 48 covering all the articles of that section. There are some articles, however, where such a reservation might be considered necessary or prudent but with regard to which the Commission has not made the reservation; for example, article 9, concerning the participation of additional States in treaties, and articles 65-68, concerning the modification of treaties. The Special Rapporteur suggests that the reservation in article 48 should be transferred to the "General Provisions" part and made to cover, in principle, the draft articles as a whole. In that event the only question that might arise would be whether to except specifically the articles contained in part II, section II, dealing with the invalidity of treaties, and article 45, dealing with the emergence of a new norm of *jus cogens*, or to leave that to be understood from the very nature of the articles. Although the present text of article 48 does not exclude article 45 from its scope, the Special Rapporteur is inclined to think that it would be more logical to except from the general reservation the rules in part II, section II, which include invalidity resulting from coercion and the violation of a norm of *jus cogens*. On this basis, article 3 (bis) might take the following form:

"The application of the present articles, with the exception of articles 31-37 and article 45, to treaties which are constituent instruments of an international organization or have been drawn up within an organization shall be subject to the established rules of the organization concerned."

SECTION II: CONCLUSION OF TREATIES BY STATES

Article 4. — Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty

Comments of Governments

Austria. The Austrian Government considers that mention should be made in this article of the principle that international law leaves it to the internal law of each State to determine the organs and procedures by which its treaty-making powers may be exercised. It does not think that the reference to this principle in paragraph 1 of the commentary is sufficient. It suggests that the principle should be expressed in the form of presumptions as to the competence of the various state organs mentioned in the

²⁰ *Yearbook of the International Law Commission, 1962, vol. II, pp. 35 and 36.*

²¹ The article was discussed at the 639th, 640th, 658th and 666th meetings; *Yearbook of the International Law Commission, 1962, vol. I, pp. 57-64, 193-5 and 240-3.*

article to represent their State in the conclusion of treaties; but that the presumption should be “a *praesumptio juris* and not a *praesumptio juris ac de jure*, thus allowing for the possibility of a disclaimer”.

Denmark. Paragraph 3 is thought by the Danish Government not to correspond with the general practice nor to be satisfactory as a new rule. In its view, the normal practice is for the parties to inform each other beforehand through the diplomatic channel of the names of the officials designated to represent them in the negotiations and for this to be regarded as a sufficient introduction of the representatives; in consequence, the question of credentials does not arise until the treaty is to be signed, and sometimes not even then. It proposes that, with the possible exception of treaties drawn up at general international conferences, credentials should not be required for the negotiation, drawing up and authentication of a treaty. As to paragraph 4, dealing with authority to sign, the Danish Government accepts it in substance but considers that it should be formulated differently. It expresses the view that the definition of “treaties in simplified form” in article 1, paragraph 1 (b), is inadequate for the purposes of paragraph 4 of the present article and that in current practice an essential part of the simplified procedure is, in fact, the omission of full powers. It proposes a formulation of the rule which would require the production of full powers only in cases where the other party so requires.

Israel. The Government of Israel considers that the representatives referred to in paragraph 2 (Heads of missions and Heads of permanent missions to international organizations) should be regarded normally as having implied authority not merely to negotiate, draw up and authenticate treaties of the kinds dealt with in that paragraph but also to conclude them, whether they are in solemn or simplified form. On the other hand, with regard to paragraph 4, it suggests that as a matter of principle full powers to conclude a treaty in simplified form should not normally be dispensed with. In the light of these considerations it proposes that in paragraph 4 (a) the word “shall” should be replaced by “may” and that paragraph 4 (b) should be deleted.

Japan. The Japanese Government advocates that in paragraphs 3 and 4 (a) it should be made clear that the requirement of furnishing evidence of authority may always be waived by the other negotiating State or States. It also suggests that paragraph 6 (b) and (c) would be more in accord with current practice if the requirement of the subsequent production of full powers were not made absolute.

Luxembourg. The Luxembourg Government thinks it necessary to underline that the article operates only on the international plane and does not affect the distribution of the treaty-making power in any State under its internal law. It would therefore like to see a further paragraph added at the end of the article as follows:

“The provisions of the present article shall not have the effect of modifying national constitutions, laws or usages of any State as regards the powers of organs of the State in foreign relations.”

The Luxembourg Government also takes the view that paragraph 4 (b) might lead to great uncertainty since, in its view, it might be almost impossible to distinguish between treaties which are irregular for lack of full powers and treaties which are valid as being treaties concluded in simplified form. The solution which it proposes is to delete paragraph 4 (b) and then amend paragraph 2 (b) by replacing the reference to “Heads of a permanent mission to an international organization” by the general term “representative”.

Sweden. The Swedish Government questions whether the general formulation of the article is wholly satisfactory because it feels that the legally relevant point is whether a representative is competent to bind the authority he purports to represent and that this point does not appear in the article. Paragraph 3 it considers to go too far in apparently requiring the production of full powers by the representative in all cases, saying that in practice they are often dispensed with. It proposes that the paragraph should be reformulated so as to state that the competence of the agents concerned depends upon their being authorized to bind the Governments they purport to represent, and that the existence of such authorization shall be deemed to be conclusively established by the presentation of full powers emanating from a competent authority. In its view, such a formulation would have the advantage of indicating that a State which accepts the signature of certain representatives without calling for their full powers takes the risk of the treaty's being denounced as having been concluded by one who lacked authority or who exceeded the authority granted to him. In paragraph 4 (b), the Swedish Government maintains that the legally interesting question is whether a State which concludes a treaty in simplified form without asking for full powers does this at its own risk, so that the State takes the risk of the treaty's being denounced by the other party on the ground of its agent's lack of authority to conclude the treaty; and it holds that the rule must place the risk on the State which omits to ask for full powers rather than on the State whose agent exceeds his authority. As to paragraph 6 (a), the Swedish Government suggests that it should be omitted as being a procedural recommendation rather than a rule. In paragraph 6 (b) it considers that the relevant question is whether a State which accepts telegraphic evidence of full powers without calling for their subsequent confirmation does so at its own risk. The answer, it suggests, depends on whether “telegraphic full powers” are considered to offer adequate guarantees of authenticity.

United States. In paragraph 3 the United States considers that the phrase “shall be required” is too strong and proposes that it should be replaced by “may be required”. In commenting upon paragraph 4 (b) it refers to its criticism of the definition of “treaties in simplified form” in article 1 (b). It states that, unless the definition of informal treaties is remodelled in the way which it there advocates, paragraph 4 (b) will have the effect that full powers will be required for many informal agreements which are now signed without the parties' calling for any documentary evidence of authority. Paragraph 5, the United States believes, may have the undesirable effect of encouraging

the preparation "in the field" of many instruments of ratification, accession, or approval. In paragraph 6 (b) it again proposes that the word "shall" should be replaced by "may". In its view, the acceptance of a letter or telegram pending receipt of full powers is a relatively recent innovation based purely on convenience and courtesy which should not be made a requirement of international law.

Italian delegation. In the view of the Italian delegation it is generally recognized that the declaration of a State's contractual intention is governed by its constitution, so that the conclusion of a treaty is not governed exclusively by the rules of international law. The delegation considers it essential that a convention codifying the law of treaties should contain very specific provisions as to how far and with what exceptions compliance with a State's constitutional law is necessary to enable its representative to conclude a treaty in valid form. It suggests that those provisions should be inserted in the section dealing with authority to ratify, accede to, approve or accept a treaty. It expresses concern that certain passages in the Commission's commentaries appear to look with disfavour on the proposition that a State's consent to be bound by a treaty must be governed by its constitution, a proposition which, in its view, represents the existing rule of international law. It maintains that both the rules of constitutional law and the rules of international law must be observed for a treaty to be validly concluded, and requests that this point be considered with the greatest care during the revision of the draft articles.²²

Venezuelan delegation. The delegation assumes that, as the article contains no provisions governing the grant of full powers to representatives, the matter is regarded as one of domestic law.²³

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur does not feel that it is either necessary or desirable for the article to make express mention of the principle that international law leaves it to the internal law of each State to determine the organs and procedures by which its treaty-making powers may be exercised. Mention of the principle is unnecessary because it goes without saying that it is for each State to determine the provision of its own constitution; and in fact there is considerable variety in the constitutional provisions of States affecting the exercise of their treaty-making powers. It is at the same time undesirable because it would be difficult to formulate the principle without appearing to incorporate by reference the provisions of internal law in international law and appearing to make internal constitutional provisions generally relevant in determining the validity of treaties in international law. The Commission in drafting article 31 (Invalidity — Provisions of internal law regarding competence to enter into treaties) has taken the position that provisions of internal law are to be regarded as irrelevant in international law except when the violation of internal law is "manifest". The considerations leading the Commission to adopt this view are fully

set out in its commentary to article 31.²⁴ They appear to the Special Rapporteur to have great weight and, while drawing the attention of the Commission to the observations of the Italian delegation, he considers that the Commission should maintain its position on this fundamental question.

2. The suggestion that the principle should be expressed in the form of presumptions which allow for the possibility of a "disclaimer" also appears to go too far if what is intended is that the presumption may always be rebutted by proof that in fact constitutional authority was lacking in the particular case. The position taken up by the Commission in drafting the present article and article 31 was that in international law the maintenance of the security of international agreements is a consideration which must prevail over internal constitutional requirements, except when a representative's lack of authority to conclude a particular treaty is so manifest that reliance on the authority normally attributed to such a representative under international law is inadmissible. Any weakening of that position would, it is thought, be regrettable, and at the fourteenth session some members of the Commission stated that they would have preferred not to qualify the rule in any way, even in cases of "manifest" lack of authority.

3. On the other hand, it may be desirable to have some recourse to presumptions in the article; for there seems to be some substance in the Swedish Government's suggestion that the article should be reformulated from the opposite point of view of when a State is entitled to rely on the competence of a representative to bind his State without requiring specific evidence of that authority. At present the article is formulated from the point of view of stating when a representative is under an obligation to produce evidence of his authority. Having regard to the way in which the questions of competence and authority are dealt with in articles 31 and 32, the course suggested by the Swedish Government appears logical. Moreover, if this course is adopted, it will become easier to meet some of the detailed points which have been made by Governments regarding paragraphs 3, 4 and 5. The provisions of the article will then define the cases when authority may be presumed from the character of the representative and the cases when it may be presumed only from the production of "full powers".

4. The Special Rapporteur therefore proposes that paragraph 1 should be revised so as to provide that the three State organs in question may in virtue of their office be considered as possessing authority to negotiate, draw up, etc., a treaty on behalf of their State, thus putting the onus on their State to bring home to other contracting States any restriction on that ostensible authority. The text, as at present drafted, does not mention the signature of instruments of ratification, accession, etc., which are left to be covered by implication from the wording of paragraph 5. The Special Rapporteur thinks that these other acts should be dealt with in paragraph 1, which will then cover the case of Heads of State, etc., completely. It will

²² *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 743rd meeting, paras. 21 and 22.*

²³ *Ibid.*, para. 29.

²⁴ See *Yearbook of the International Law Commission, 1963*, vol. II, pp. 190-193.

also have the advantage of making it possible to amalgamate paragraphs 4 and 5.

5. Paragraph 2 should, it is proposed, be revised in a similar manner. As to the suggestion of the Government of Israel that Heads of mission and of permanent missions to international organizations should be regarded as normally having implied authority to *conclude* treaties, this appears to go beyond what is usually conceived to be the rule, even though full powers may be dispensed with not infrequently. The question is not whether full powers may be dispensed with but where, in the event of an actual lack of authority, the risk is to lie: on the representative's State or on the State which does not call for full powers. Under the existing law it is believed to fall on the latter, and it does not therefore seem appropriate to extend the scope of the ostensible authority in paragraph 2 to the conclusion of treaties. At the same time, the Special Rapporteur thinks it preferable to confine paragraph 2 to authority to negotiate, draw up and "adopt", because authentication not infrequently involves signature, and it seems better to leave it to be covered in a later paragraph dealing with signature.

6. Paragraph 3 should again, it is proposed, be reformulated in terms of whether the representative may safely be considered as possessing authority, the answer in the present instance being in the negative. In addition, it is felt that this paragraph, like paragraph 2, should be confined to authority to negotiate, draw up and adopt; and that it should become sub-paragraph (c) of that paragraph. If the paragraph is reformulated in the manner proposed, this will meet the point made by four Governments that the rule is too strongly stated as full powers are not infrequently dispensed with in cases falling under this paragraph; for the production of credentials will no longer be presented as an obligatory requirement in these cases. It will also largely cover the particular suggestions of the Swedish and Danish Governments for the revision of the paragraph.

7. Paragraph 4, like the preceding paragraphs, should be reformulated in terms of whether the representative may safely be considered as possessing authority. It is more crucial than paragraphs 2 and 3 because, like paragraph 1, it concerns not merely the preparation of the text but the expression of the State's consent to be bound by the treaty. Here the general rule is believed to be that, except in cases falling under paragraph 1 (Heads of State, etc.), a representative may not be presumed to possess authority to commit his State to be bound by the treaty unless he produces full powers evidencing that authority. No doubt, full powers may sometimes be dispensed with even in the conclusion of formal treaties, but in that case the risk of any lack of authority lies with the State which fails to insist upon their production. The problem is whether any different rule applies in the case of what the Commission has referred to in paragraph 4 as "treaties in simplified form". When dealing with the matter from the point of view of whether a representative is required to produce full powers, the Commission did distinguish between "formal" treaties and treaties in simplified form. When, however, the matter is approached from the point of view of whether another State is entitled to presume the

authority of a representative to commit his State without the production of full powers, it does not follow that the same distinction needs to be made. The question is where the risk of lack of authority should lie. In 1962 the Commission was only prepared to say that in the case of treaties in simplified form a representative need not produce full powers, unless called for by the other negotiating State. In other words, it seems to have regarded the responsibility of deciding whether proof of authority is necessary as resting upon the other State, even in these cases.

8. A further consideration is that a number of Governments have questioned the sufficiency of the Commission's definition of a "treaty in simplified form", both generally and in the particular context of the present article. Indeed, the Danish and Luxembourg Governments maintain that the willingness of the parties to dispense with full powers is one of the elements determining the "informal" character of the treaty rather than the other way round. The Commission experienced difficulty in formulating a satisfactory definition of treaties in simplified form, and the Special Rapporteur considers that the criticisms made of that definition are not without substance; nor does it seem that a more viable definition will easily be found.

9. If paragraphs 1 and 4 are revised in the manner proposed, paragraph 5 will become unnecessary.

10. The Special Rapporteur shares the view of the Swedish Government that paragraph 6 (a) is more a procedural recommendation than a rule and should be omitted from this article. The substance of it is, in fact, already contained in the definition of "full powers" in article 1. The Special Rapporteur also shares the view of the Japanese and United States Governments that the word "shall" in paragraph 6 (b) (and therefore also in paragraph 6 (c)) is inappropriate and should be replaced by "may".

11. In the light of the observations in the foregoing paragraphs, the Special Rapporteur proposes that the text of article 4 should be revised on the following lines:

"1. A representative may be considered as possessing authority to act on behalf of his State in the conclusion of a treaty under the conditions set out in the following paragraphs, unless in any particular case his lack of authority is manifest.

"2. A Head of State, Head of Government and a Foreign Minister may be considered as possessing authority to negotiate, draw up, adopt, authenticate, or sign a treaty and to sign any instrument relating to a treaty.

"3. (a) A Head of a diplomatic mission may be considered as possessing authority to negotiate, draw up or adopt a treaty between his State and the State to which he is accredited.

"(b) The rule in paragraph (a) applies also to a Head of a permanent mission to an international organization in regard to treaties drawn up under the auspices of the organization to which he is accredited.

"(c) Other representatives may not be considered in virtue of their office alone as possessing authority to negotiate, draw up or adopt a treaty on behalf of their State; and any other negotiating State may, if it thinks

fit, call for the production of an instrument of full powers.

"4. Except as provided in paragraph 2, a representative may be considered as possessing authority to sign a treaty or an instrument relating to a treaty only if —

"(a) he produces an instrument of full powers or

"(b) it appears from the nature of the treaty, its terms or the circumstances of its conclusion that the intention of the States concerned was to dispense with full powers.

"5. (a) In case of delay in the transmission of the instrument of full powers, a letter or telegram evidencing the grant of full powers sent by the competent authority of the State concerned or by the head of its diplomatic mission in the country where the treaty is negotiated may be provisionally accepted, subject to the production in due course of an instrument of full powers, executed in proper form.

"(b) The same rule applies to a letter or telegram sent by the Head of a permanent mission to an international organization with reference to a treaty of the kind mentioned in paragraph 3 (b) above."

Question A. — Conclusion of treaties by one State on behalf of another or by an international organization on behalf of a member State

1. The Commission, as noted in paragraph 4 of the introduction to this report, decided at its sixteenth session to give further consideration to the question of including an article on the above-mentioned topic in the course of its re-examination of part I. The question had been raised by the Special Rapporteur in his third report in a draft article having the number 60 and the title "Application of a treaty concluded by one State on behalf of another".²⁵ As he there pointed out, the concept of agency has received comparatively little development in the law of treaties. Although it may not be uncommon for one State to use the diplomatic services of another for the conclusion of a treaty, this takes the form of the other State's conferring on the diplomatic agent specific authority to act for it as its representative in the particular case. It is not an example of one State acting on behalf of another but of the borrowing by one State of the services of another's diplomatic agent for the purpose of concluding a treaty. These are not the cases to which the present question relates, and it suffices to say that the Commission did not think it necessary to include any special provision to cover such cases. The phrase "any other representative of a State" in article 4 is completely general and does not exclude the possibility of the representative's being someone in the diplomatic service of another State.

2. The cases to which the present question relates are rather those where a State itself actually concludes a treaty on behalf of another under an authority conferred upon it by the other State. An example is the conclusion of treaties by Belgium on behalf of Luxembourg in matters touching the Belgo-Luxembourg Economic Union. Article 5 of the Belgo-Luxembourg Convention of 25 July 1921

provides: "Future commercial treaties and economic agreements shall be concluded by Belgium on behalf of the Customs Union."²⁶ In practice, however, the treaties made under this article appear to be concluded by Belgium on behalf of Luxembourg. A commercial agreement of 1950, for example, between the Union and Mexico speaks of the Belgian Government "*agissant tant en son nom qu'au nom du Gouvernement luxembourgeois en vertu des accords existants*". Similarly, in recent international commodity agreements, if the Belgo-Luxembourg practice in concluding these agreements may not be completely uniform, Luxembourg seems generally to have been accepted as becoming a party to the agreements in virtue of Belgium's ratification, accession, etc. Thus, in the case of the International Coffee Agreement of 1962, both Belgium and Luxembourg separately signed the agreement when it was drawn up but, later on, Belgium alone acceded to the agreement, while Luxembourg informed the depositary that it considered itself bound by the Belgian accession.²⁷ Another case that might conceivably arise would be the conclusion of a treaty by an international organization with a third State as agent for its members, with the object that they should severally become parties to the treaty. The organization might, in short, be used simply as a convenient "representative" of the member States for the purpose of concluding a treaty in which their interests were all the same.

3. A further special problem may be mentioned, if only to be dismissed. This is the case where an international organization enters into an agreement with one of its own members containing provisions for the benefit of the other members. Examples are mandate and trusteeship agreements, the legal nature and effects of which came under consideration in the *South West Africa* cases²⁸ and in the *Northern Cameroons* case.²⁹ The decisions of the International Court in these cases left open the question of the true juridical relation of Members of the Organization to the agreements in question; and the problems which they raise appear to be quite special and to belong to the law governing international organizations rather than to the general law of treaties. Accordingly, in the view of the Special Rapporteur, they can be left out of account in connexion with the present question.

4. On the more general question here under consideration, some members of the Commission at the sixteenth session noted that, although instances occurred of one State's being authorized by another to conclude a treaty on its behalf, they are infrequent; and they expressed hesitation about including specific provisions to cover this practice from the point of view of the principle of the equality and independence of States. Other members considered that the practice, if not extensive, has a certain importance with regard to economic unions. These members also felt that the expanding diplomatic and commercial activity of States and the variety of their associations with one another may lead to an increase in cases of this

²⁵ League of Nations, *Treaty Series*, vol. IX, p. 224.

²⁷ Subsequently, Belgium also informed the depositary that its accession was binding upon Luxembourg.

²⁸ *I.C.J. Reports*, 1962, p. 319.

²⁹ *I.C.J. Reports*, 1963, p. 15.

²⁵ See *Yearbook of the International Law Commission*, 1964, vol. II, p. 16; also the commentary to the article numbered 59 in that report.

type, and that it is, on the whole, desirable to provide for them in the draft articles. As to treaties concluded by international organizations with third States on behalf of their members, some members felt that this type of case is too closely connected with the general problem of the relations between an organization and its members to be dealt with conveniently as part of the general law of treaties. Other members took the view that in these cases the transaction may constitute the members actual parties to the treaties, and that the cases should therefore be covered in the general law of treaties.³⁰

5. The Special Rapporteur believes that, if on a limited scale and in particular connexions, the phenomenon of agency does exist in international law and does, in principle, belong to the general law of treaties. On the other hand, he feels that it may be difficult for the Commission to formulate wholly satisfactory rules covering the cases which arise under this head without becoming involved to a certain extent in controversial problems of international capacity and personality and without encroaching to a certain extent on the law governing international organizations. Accordingly, similar considerations to those which lead him to propose the deletion of article 3 regarding "capacity to conclude treaties" also lead him to propose the omission from the draft articles of the topic which is the subject-matter of the present question. The omission of the topic would not mean the taking of any position by the Commission on the substance of the matter. It would simply mean that the topic would be left aside for special treatment as and when that might be considered necessary or desirable. However desirable in principle it might be to prepare a complete and exhaustive statement of the principles governing every possible aspect of the law of treaties, the Special Rapporteur is of the opinion that, on practical grounds, the Commission should now confine its draft to the main principles governing treaties concluded between States. The Special Rapporteur accordingly proposes the omission of this question.

Article 5. — Negotiation and drawing up of a treaty

Comments of Governments

Japan and Luxembourg. The Governments of these States, having regard to the purely procedural character of the article, do not think that it serves any useful purpose.

Sweden. Though it does not refer specifically to article 5, the Swedish Government also appears to be in favour of its deletion, since in its "preliminary general observations" the Swedish Government proposes that all provisions of a purely procedural nature should be removed from the draft articles.

Israel. The Government of Israel, on the other hand, urges the retention of the article on the ground that, although descriptive in character, it deals with an essential phase in the treaty-making process which is also important for other aspects of the law of treaties.

³⁰ See *Yearbook of the International Law Commission, 1964*, vol. II, p. 176, para. 20.

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur's first report did not contain any article dealing specifically with the negotiation and drawing up of a treaty. At the fourteenth session some members of the Commission questioned the usefulness of the article.³¹ However, while recognizing that it is more descriptive than normative the majority felt that it serves a purpose as an introduction to the subsequent articles, and that it provides a logical connecting link between articles 4 and 6.

2. The Special Rapporteur has no strong opinion as to the desirability or otherwise of retaining article 5 in the draft articles. Admittedly, its provisions are of a primarily procedural and descriptive character. On the other hand, it may be doubted whether they are much more so than, for example, articles 5 and 9 of the Vienna Convention on Consular Relations.³² One reason for keeping the article might be that some later articles contain such expressions as "States participating in the negotiations" (article 6 (c) and article 17), "at the conclusion of the negotiations" (article 10), "in the course of the negotiations" (articles 12 and 46), "the negotiating States" (article 28), "treaty drawn up" (articles 6, 8 (c), 9). In other words, they refer to the procedural stage of treaty-making which is the subject of the present article. But some of these expressions may be changed in the course of the revision of the draft articles. Moreover, the expressions largely speak for themselves as to their meaning and the provisions of the present article can hardly be said to contain anything which is absolutely essential to their correct interpretation. At most, article 5 marks that the "negotiation and drawing up of a treaty" is a distinct phase of the treaty-making process and indicates the different modes in which this phase occurs. The article has a certain logic in the scheme of the draft articles, but its omission could hardly be said materially to detract from the force and effect of the other articles.

3. If the Commission maintains its decision to include article 5 in the draft articles, the Special Rapporteur considers that its wording should be revised. The wording was taken from the equivalent article in Sir G. Fitzmaurice's expository "code" and still bears some traces of its origin. The Special Rapporteur suggests that, in the event of its being retained, the article should read as follows:

"The negotiation and drawing up of a treaty take place:

"(a) through the diplomatic or other agreed channel, at meetings of representatives or at an international conference;

"(b) in the case of a treaty concluded under the auspices of an international organization, at an international conference convened either by the organization or by the States concerned, or in an organ of the organization in question."

³¹ *Yearbook of the International Law Commission, 1962*, vol. I, 666th meeting, p. 245.

³² See United Nations Conference on Consular Relations, *Official Records*, vol. II (United Nations publication, Sales No.: 64.X.1), p. 176 and 177.

*Article 6. — Adoption of the text of a treaty**Comments of Governments*

Israel. The Government of Israel suggests that in paragraph (b) it is necessary to insert the word "international" before "organization".

Japan. In the opinion of the Japanese Government this article is relevant to the procedure of conferences rather than to that of treaty-making. It suggests that the matters in question had better be left to the decision of the conference or of the States concerned, and proposes the deletion of the article.

Luxembourg. The Luxembourg Government thinks it inconceivable that a multilateral treaty—even one between a small group of States—could be concluded otherwise than at an "international conference"; that is, at some form of meeting of representatives of a number of Governments. In its opinion, therefore, paragraph (c) can apply only to bilateral treaties. Stressing that many multilateral treaties are concluded between the States of a particular region, it states that the rule proposed in paragraph (a) is ill-suited to the conditions obtaining in regional conferences in which, in its view, unanimity is the only acceptable voting rule. It considers that the only principle truly compatible with the consensual character of treaties, whether bilateral or multilateral, is that of mutual agreement; and that departures from this principle are admissible only in the case of multilateral treaties drawn up either within or under the aegis of an international organization. It also considers that account must be taken of the existence of some international organizations where decisions are taken by majority vote but the constituent instrument expressly makes certain questions subject to further agreement for the very purpose of safeguarding the principle of unanimity; and it cites as examples articles 220, 236 and 237 of the treaty establishing the European Economic Community.³³ In the light of the above considerations it proposes the following redraft of the article:

"1. The adoption of the text of a treaty takes place by the unanimous agreement of the States taking part in the negotiations.

"2. In the case of a treaty drawn up in an international conference, the adoption of the text takes place in accordance with the voting rules laid down in the rules of the conference in question.

"3. In the case of a treaty drawn up within an international organization, the adoption of the text takes place in accordance with the voting rule applicable to the decisions of the competent organ of the organization in question, unless otherwise provided in its constituent instrument."

Sweden. The Swedish Government considers that paragraph (a), although in itself perhaps not undesirable, may have complicated effects in cases where some of the States present at a conference are parties to the convention on the law of treaties but others are not. Paragraphs (b) and (c), in its view, merely provide that the manner in which

the text is to be adopted shall be governed by the agreement of the parties; and it thinks that they are redundant and should be omitted.

United States. The United States Government considers that the article serves a useful purpose by stating general rules for application in the absence of agreement upon any other procedure.

Brazilian delegation. While concurring with the choice of the two-thirds rule as the general rule for the adoption of the text, the delegation doubts whether the same rule ought to govern the preliminary vote on the voting procedure. If that rule were made compulsory for procedural decisions on the choice of the voting rule, it might appear as an undue constraint on States in international negotiations which, being primarily political, should not be subjected to any rigid rule. Nor, in its view, has the absence of such a rule caused any great difficulty in practice.³⁴

Mexican delegation. The delegation stresses the difficulty that may arise in the event that some of the States at a conference are not parties to the proposed convention on the law of treaties. It suggests that it may be better to leave it to each conference to settle for itself both the necessary majority and the procedure for the adoption of the text.³⁵

Observations and proposals of the Special Rapporteur

1. The suggestion that the whole article should be deleted appears to the Special Rapporteur to be too radical. The adoption of the text is an important part of the treaty-making procedure, being the stage at which the content of the treaty, the mode of its entry into force, the power to make reservations, etc., are determined and defined. In consequence, the voting rules governing the adoption of the text are very much a matter of substance, even though the commitment to be bound by the treaty may not be given until later. Nor does it seem to the Special Rapporteur that paragraph (b), which prescribes in certain cases the voting rule applicable in the competent organ of an international organization, is nothing but a statement that the adoption of the text is governed by the agreement of the parties and therefore redundant. No doubt, the agreement of the parties may be said to be expressed in the decision to draw up the treaty within the organization. But, the decision once made, the adoption of the text will be governed by a special procedure.

2. Three objections have been raised with reference to paragraph (a). The first is the possibility that some of the States at a conference may not be parties to the proposed convention on the law of treaties. This is an objection which really touches the whole question of the utility of codifying the law of treaties; and it is not in itself thought to be a valid objection to paragraph (a). In the event contemplated, paragraph (a) might not be applicable in the absence of the consent of the States not parties to it; but it might still be helpful as a point of departure for settling the voting rule.

³⁴ *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 737th meeting, para. 14.*

³⁵ *Ibid.*, 739th meeting, para. 21.

³³ United Nations, *Treaty Series*, vol. 298, p. 11.

3. The second objection is the suggested unsuitability of the two-thirds rule for "regional" conferences, where, it is said, unanimity is the only acceptable voting rule. This objection touches the delicate point of the distinction between general multilateral treaties and treaties between smaller groups of States. In his original draft of this article the Special Rapporteur sought to distinguish between "multilateral" and "plurilateral" treaties, applying the rule of unanimity for the latter. But the Commission³⁶ preferred not to make any such distinction in the present article, while not disputing that unanimity should be the general rule for "treaties drawn up between very few States". It considered that for other multilateral treaties the rule in paragraph (a) should be specified although it would always be open to the States concerned to apply the rule of unanimity in a particular case, should they so decide. In answer to the Luxembourg Government's objection, which has a certain force, it can be urged that, if in a "regional" conference unanimity is the only acceptable voting rule the States participating will have no difficulty in arriving at a decision, by the two-thirds majority procedural vote envisaged in paragraph (a), to apply the unanimity rule. The Commission's purpose was simply to provide a residual procedural rule on the basis of which the voting rule of the conference may be speedily resolved, should no other procedure be agreed. It felt that a rule based on a two-thirds majority ought sufficiently to take account of the interests of minority groups at a conference. At the same time it noted that the procedural vote is in practice not infrequently taken by a simple majority.

4. The third objection is the suggestion that to lay down a compulsory two-thirds majority rule for procedural decisions on the choice of the voting rule may be to place an undue restraint on the freedom of States to conduct their international negotiations as they think fit; and that this is a matter which should be left entirely to the decision of the conference. Here the question is the basic one whether the inclusion of the residual rule proposed by the Commission *de lege ferenda* is or is not desirable. Considerations may be advanced in favour of either view, and the Commission will certainly wish to re-examine its proposal in the light of the comments of Governments. On the other hand, the Commission had these considerations in mind in 1962, and the Special Rapporteur does not, therefore, feel called on in the present report to propose that the rule adopted by the Commission in paragraph (c) should be changed.

5. There remains the point made by the Luxembourg Government that in paragraph (c) account should be taken of the existence of organizations under whose constituent instrument decisions are taken by majority vote but certain questions are expressly made subject to unanimity. While the general point that a reservation is needed to safeguard such cases may be accepted, it is not clear to the Special Rapporteur that the example given —

³⁶ For the discussion of this article in the Commission, see *Yearbook of the International Law Commission, 1959*, vol. II, pp. 99-100, commentary to article 6, para. 4; *Yearbook of the International Law Commission, 1962*, vol. I, 642nd, 643rd, 659th, 660th and 666th meetings, pp. 77-86, 199-202, 204 and 245; *ibid.*, vol. II, p. 166-167, commentary to article 6.

articles 236 and 237 of the European Economic Community Treaty³⁷ — is a case of a treaty drawn up in a conference convened under the auspices of an organization rather than of one drawn up within an organ of an organization. Possibly, both types of case may occur, so that it may be advisable to cover the point in both paragraphs (a) and (b).

6. Finally, the Special Rapporteur shares the view of the Luxembourg Government that it may be preferable to begin the article with paragraph (c) and to give the paragraphs separate numbers. On this basis, and subject to the Commission's decision regarding paragraph (a), he suggests that the article might be revised along the following lines:

"1. The adoption of the text of a treaty takes place by the mutual agreement of the States participating in its drawing up, subject to paragraphs 2 and 3.

"2. In the case of a treaty drawn up at an international conference, adoption of the text takes place by the vote of two-thirds of the States participating in the conference, unless —

"(a) by the same majority they shall decide to adopt a different voting rule;

"(b) in the case of a conference convened by an international organization a different rule is prescribed by the established rules of the organization.

"3. In the case of a treaty drawn up within an international organization, the adoption of the text takes place in accordance with the voting rule applicable in the competent organ."

Article 7. — Authentication of the text

Comments of Governments

Japan. In the view of the Japanese Government a general rule on authentication of texts applicable to both bilateral and multilateral treaties is not easy to formulate. In the case of bilateral treaties it is not unusual for the negotiating parties to add minor changes of substance to the text already authenticated. The Japanese Government suggests that the present article should be omitted and the substance of paragraphs 1 and 2 incorporated in articles 10 (Signature and initialling) and 11 (Legal effects of signature).

Sweden. The Swedish Government considers the article to be directed more to giving procedural advice than to stating a rule of law; and that it could not be said to have any legal content unless it were intended to mean that in case of doubt signature *ad referendum*, initialling, etc., constitute an authentication of the text. It also doubts whether an act of authentication has any legal effect. In this connexion it refers to the Commission's statement in paragraph 4 of its commentary that "after authentication, any change in the wording of the text would have to be brought about by an agreed correction of the authenticated text (see articles 26 and 27)", and it asks whether even before authentication any modification can be made in a text except by agreement.

³⁷ Article 220 is also mentioned by the Luxembourg Government, but it does not appear to be relevant.

United States. The United States Government questions whether this article is at all necessary, and expresses the view that, as at present worded, the article may be more confusing than helpful.

Observations and proposals of the Special Rapporteur

1. In effect, the three Governments question the decision made by the Commission in 1959³⁸ and in 1962³⁹ to recognize authentication of the text as a distinct element in the treaty-making process: distinct, that is, from adoption of the text, on the one hand, and from signature and initialling on the other. By "authentication" of the text is meant an act or procedure which identifies and certifies the text as the correct, definitive and authentic text of the treaty. Admittedly, in the case of bilateral and of a good many multilateral treaties authentication is implied from signature or initialling, and the act of authentication merges in the act of signature. In other cases, however, authentication is a distinct process taking the form of the incorporation of the text in the final act of a conference or in a resolution of an international organization or of a signature by an official of an international organization. Again, although the legal effects of authentication may not appear considerable, it is not thought justifiable to regard them as negligible, particularly in the case of multilateral treaties. No doubt, as the Swedish Government observes, even before authentication an adopted text cannot be modified except by "agreement". But it does not follow that in the case of multilateral treaties an agreement to modify a text will be negotiated under the same conditions before and after authentication; for unanimity is required for any modification of a text after authentication, and that might not necessarily be the case before it. Moreover, authentication also has legal consequences in the sphere of interpretation in bilateral no less than in multilateral treaties. The text may be adopted in two or more language versions, but it is only the text or texts which have been made authentic that constitute the treaty (see paragraphs 1-4 of the commentary to articles 72-73). The text may itself state which language versions are to be considered authentic; otherwise, the matter will be governed by the provisions of the present article.

2. The Commission may feel, on the other hand, that there is substance in the point that, as at present worded, the article takes the form of procedural advice rather than of rules of law. In addition, the treatment of initialling and of signature and signature *ad referendum* as a means of authentication in separate paragraphs may be unduly complex and justify the observation of the United States Government. As for the point that in the case of bilateral treaties it is not unusual for the negotiating States to add minor changes of substance to a text already authenticated, this does not appear to affect the substance of the rule, since the change in the text must itself be authenticated. On the other hand, it may perhaps be underlining the

"definitiveness" of the text after authentication too much by dealing with it in a separate paragraph.

3. The Special Rapporteur accordingly proposes the following revised version of the article:

"1. Unless the text itself prescribes otherwise or the States participating in the adoption of the text otherwise agree, a text shall be considered to be authentic as the definitive text by —

"(a) its incorporation in the final act of the conference in which it was adopted;

"(b) its incorporation in a resolution of an international organization in which it was adopted or any other procedure employed specifically for that purpose by such organization;

"(c) in other cases, the initialling, signature or signature *ad referendum* of the text by the representatives of the States concerned."

Article 8. — Participation in a treaty

Comments of Governments

Austria. The Austrian Government endorses the rules proposed in article 8, which it regards as being in accord with present-day State practice and international law.

Canada. The Canadian Government observes that with regard to many multilateral treaties the current practice is to open them to participation by Members of the United Nations and specialized agencies, parties to the Statute of the International Court of Justice and, frequently, to such other States as may be invited by the General Assembly; and notes that the rule recommended in article 8 would only apply in cases where the parties have not expressed themselves in the treaty on the question of participation. It presumes that the recommended rule would not have retroactive effect.

Denmark. The Danish Government agrees that general multilateral treaties should be open to participation on as wide a basis as possible.

Japan. The Japanese Government holds that the question of participation in a treaty should always be left to the decision of the States participating in the conference; it proposes that the article should simply be deleted.

Luxembourg. The Luxembourg Government recalls its criticism of the term "general multilateral treaty" in its comments upon article 1 on the ground that it does not provide a satisfactory basis upon which to distinguish between different categories of treaties. As to article 8, it considers that the parties to a multilateral treaty have the sovereign right to decide on the participation of States which were not original parties. In addition, it says that it is impossible to lay down *a priori* what is the right solution to give to the question of participation in any given case, as this depends on the object of the particular treaty and the political and legal aims of the original parties. It maintains that the rules contained in paragraph 2 of the text are sufficient and that paragraph 1 should be deleted.

Poland. The Polish Government proposes the deletion from paragraph 1 of the words "unless it is otherwise

³⁸ *Yearbook of the International Law Commission, 1959*, vol. II, pp. 102-104.

³⁹ *Yearbook of the International Law Commission, 1962*, vol. I, 643rd, 659th and 666th meetings, pp. 86, 202-203 and 245; *ibid.*, vol. II, p. 167.

provided by the terms of the treaty... etc.”. It considers that general multilateral treaties should be open to the participation of all States without exception. In the Sixth Committee, its delegation further maintained that the restrictions which exist in practice, or which are advocated by some members of the Commission, are inconsistent with the principle of article 1, paragraph 1 (c). It says that *mutatis mutandis* its comment apply to paragraph 2. Any limitation on the scope of general multilateral treaties is, in its view, a disservice to the cause of peace and friendly relations among States.⁴⁰

Sweden. The Swedish Government, while recognizing that arguments exist for including a residuary rule of the kind proposed in paragraph 1, thinks that its introduction would be open to objection unless at the same time corresponding provision were made for means to determine which entities purporting to be States are to be considered as possessing statehood. In any event, the Swedish Government thinks it desirable for the draft of the article to be arranged so as to make it clear that the rule in paragraph 2 also is a residuary rule which applies only in the absence of an express provision in the treaty. It suggests that the two paragraphs should be amalgamated on the following lines:

“In the absence of express provisions to the contrary in a treaty or in the established rules of an international organization:

“(a) a general multilateral treaty shall be deemed to be open for every State;

“(b) other treaties shall be deemed to be open for States which took part in the adoption of the text or which, although they did not participate in the adoption of the text, were invited to attend the conference at which the treaty was drawn up.”

United Kingdom. The United Kingdom Government considers the presumption formulated in paragraph 1 to be unsatisfactory. In the Sixth Committee its delegation further said that the article does not represent current practice or a well-established rule; and that, on the contrary, the almost universal practice is to define the States which may accede. In its view, there is nothing contrary to international law in such a limitation, nor in the consistent practice in the United Nations of restricting conventions concluded under its auspices to its Members and those of the specialized agencies. It observes that it is a fact of international life that there are entities purporting to be States but by no means universally recognized as such; and that if multilateral conventions are thrown open to participation by “all States”, without any definition or limitation of that term, a most unpleasant duty, calling for subjective decisions, would fall upon the depositary.⁴¹ Commenting on paragraph 2, the United Kingdom Government says that, in its opinion, it requires clarification on three points: first, as to which cases the phrase “in all other cases” relates; second, as to what constitutes taking part in the adoption of the text; and third, as to whether the final expression “unless the treaty

otherwise provides” applies only to paragraph 2 (c) or also to paragraphs 2 (a) and 2 (b). And with regard to the third point, it considers that the final expression should at least be made applicable to paragraph 2 (a).

United States. The presumption formulated in paragraph 1 is opposed by the United States Government, which considers that it is a fundamental rule of treaty-law that, in the absence of a provision allowing additional parties to participate, it is impossible for them to do so, except by the agreement of the parties. It further observes⁴² that paragraph 1 (a) seems to permit the admission of additional States to participation in a multilateral treaty without regard to the provisions of that treaty; and that the two-thirds rule in paragraph 1 (a) appears to conflict with the provisions of Article 4 of the Charter of the United Nations (see United States comments on article 13 of the draft articles). The United States Government is equally opposed to paragraphs 2 (a) and 2 (c). It does not think that the mere fact that a State participated in formulating and adopting a treaty, or that it was invited to attend the conference, necessarily entitles it to become a party. It believes that adoption of the rules proposed in paragraphs 2 (a) and 2 (c) might result in States introducing into future multilateral treaties provisions limiting the States that may become parties or reservations designed to ensure that they have a voice in the later participation of States which did not join in the actual development of the application of the treaty.

Cameroonian delegation. The delegation endorses the importance of articles 8 and 9. It considers that there should be no restriction on the right to become a party to an existing treaty as the international community is moving towards universality, and more especially in connexion with multilateral treaties affecting the interests of all.⁴³

Colombian delegation. The delegation considers that articles 8 and 9 are based on current practice, and reflect the evolution of the law. Nevertheless, in its view, it is essential in determining the participation of States in a treaty to consider the purposes of the treaty, its subject-matter and the attitude of the State wishing to participate towards the provisions of the treaty. These elements, it thinks, can only be appreciated by the parties or the competent organ of an organization. In the same connexion, the delegation is doubtful of the usefulness of the definition of “general multilateral treaty” in article 1, paragraph 1 (c), for applying the rules governing the various categories of treaties.⁴⁴

Delegation of Cyprus. The delegation considers that general multilateral treaties should be open to universal participation. It adds, however, that this is subject to the existing rule that the problem of participation in general multilateral treaties is quite distinct from that of the recognition of States.⁴⁵

⁴⁰ This comment appears to relate to paragraph 1 of article 9, rather than of the present article.

⁴¹ *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 740th meeting, para. 12.*

⁴² *Ibid.*, 741st meeting, para. 7.

⁴³ *Ibid.*, 741st meeting, para. 32.

⁴⁰ *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 740th meeting, para. 26.*

⁴¹ *Ibid.*, 745th meeting, para. 21.

Czechoslovak delegation. The delegation considers that in the case of treaties whose objectives are universal it is not proper to limit their participation to member States. In its view, the codification of the law of treaties offers a good opportunity to reconsider what it conceives to be the "unlawful practice" of the United Nations. The delegation accordingly endorses the principle of the universality of general multilateral treaties contained in paragraph 1. At the same time it expresses a fear lest the words "unless it is otherwise provided by the terms of the treaty itself or by the established rules of an international organization" should result in a denial of that principle. The delegation therefore proposes that the words should be deleted. It also considers that paragraph 2 should be amended to enable a State to become a party to a treaty in which it has a legal interest, a point which, in its view, is highly important to new States.⁴⁶

Hungarian delegation. The delegation endorses the principle in paragraph 1 that general multilateral treaties, because of their special character, should be open to participation on as wide a basis as possible. It considers that any measure tending to restrict participation in such treaties is adverse to the codification and progressive development of international law.⁴⁷

Indonesian delegation. The delegation notes that the article, as formulated, includes the possibility of cases of limited participation in general multilateral treaties and advocates that the limiting words should be deleted.⁴⁸

Mongolian delegation. The delegation comments that, owing to what it describes as a policy of discrimination on the part of certain Western Powers, Mongolia was prevented until recently from acceding to any general multilateral treaties. It endorses the view that, in principle, such treaties should be open to participation on as wide a basis as possible, and hopes that no provision contrary to the spirit of universality would be inserted in the article.⁴⁹

Romanian delegation. The delegation urges that article 8 should be redrafted to include specific recognition of the principle of universality of access to general multilateral treaties. It says that a State which is not permitted to participate in a general multilateral treaty, in which it is interested, is in effect prevented from taking part in the development of international law. The universality of general treaties is, in its view, essential to the stability of the international legal order, the maintenance of peace and security and the development of co-operation between States.⁵⁰

USSR delegation. The delegation states its approval of the view expressed in paragraph 2 of the Commission's commentary that general multilateral treaties should be open to participation on as wide a basis as possible.⁵¹

Venezuelan delegation. The delegation endorses the distinction drawn in the Commission's commentary between the problem of participation in general multilateral treaties and the problem of recognition of States. In its view, it is desirable to embody this distinction in an article and not relegate it to the commentaries.⁵²

Yugoslav delegation. The Yugoslav delegation considers that general multilateral treaties should be open to participation on as wide a basis as possible, because that is in the interests both of the international community as a whole and of the contracting States themselves. Moreover, in its view, the exclusion of certain States would be at variance with the principle of the sovereign equality of all nations and constitute a discrimination incompatible with the purposes and principles of the Charter. In this matter it considers that the Commission should abandon traditional concepts, which it thinks are now outdated.⁵³

Observations and proposals of the Special Rapporteur

1. Opinion was divided in the Commission at its fourteenth session⁵⁴ on the question of participation in general multilateral treaties, and paragraphs 2-4 of the commentary to the present article summarize in broad terms the different positions adopted by members. The comments of Governments reflect similar differences of view on this question. Some Governments criticize the rule stated in paragraph 1 as going too far, either on the ground that it disregards the sovereign right of contracting States to determine the States to be admitted to participation in a treaty or on the ground that the "every State" formula may create serious difficulties for depositaries if entities whose statehood is disputed seek to accede to a treaty under the terms of paragraph 1. Some Governments endorse the rule stated in the paragraph, or endorse the principle that general multilateral treaties should be open to the widest possible participation, without calling for any change in the text of the paragraph. Other Governments criticize the rule stated in the paragraph as not going far enough, on the ground that the phrase "unless it is otherwise provided", etc. derogates from the principle of universality of participation in general multilateral treaties.

2. Three precedents which have occurred in State practice since the fourteenth session require mention. The first is the Vienna Convention on Consular Relations of 24 April 1963,⁵⁵ a general multilateral treaty codifying the law relating to consular relations. The accession clause of this Convention was in the form usual in treaties concluded under the auspices of the United Nations, namely, "all States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention". The second precedent is the

⁴⁶ *Ibid.*, 743rd meeting, para. 5.

⁴⁷ *Ibid.*, 736th meeting, para. 4.

⁴⁸ *Ibid.*, 740th meeting, para. 20.

⁴⁹ *Ibid.*, 742nd meeting, para. 1.

⁵⁰ *Ibid.*, 742nd meeting, para. 25.

⁵¹ *Ibid.*, 738th meeting, para. 5.

⁵² *Ibid.*, 743rd meeting, para. 15.

⁵³ *Ibid.*, 743rd meeting, para. 15.

⁵⁴ See *Yearbook of the International Law Commission, 1962*, vol. I, 648th-650th, 660th, 666th and 667th meetings, pp. 118-136, 207-211 and 246-252; *ibid.*, vol. II, pp. 168 and 169.

⁵⁵ See United Nations Conference on Consular Relations, *Official Records*, vol. II (United Nations publication, Sales No.: 64.X.1), p. 175.

Nuclear Test Ban Treaty of 5 August 1963, a treaty drawn up between three States but made open to signature or accession by "all States". In the case of this Treaty, in order to minimize the problems of recognition which might arise from the use of that formula, it was provided in article III, paragraph 2, of the Treaty that each of the three Governments should act as a depositary of instruments deposited under the Treaty. The third precedent is resolution 1903 (XVIII) relating to the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations, which was adopted by the General Assembly on 18 November 1963. This question had been before the Commission at its fourteenth⁵⁶ and fifteenth sessions⁵⁷ and it had suggested a General Assembly resolution as a simplified procedure by which certain League of Nations treaties might be made open to wider participation. Resolution 1903 (XVIII)⁵⁸ is the outcome of this suggestion, and provides for the transfer to the General Assembly of the "power conferred by multilateral treaties of a technical and non-political character on the Council of the League of Nations to invite States to accede to those treaties". In paragraph 4 of the resolution the General Assembly "further requests the Secretary-General to invite each State which is a Member of the United Nations or member of a specialized agency or a party to the Statute of the International Court of Justice, or has been designated for this purpose by the General Assembly, and which otherwise is not eligible to become a party to the treaties in question, to accede thereto...". Clearly, this paragraph adopts what is simply a variant of the formula employed in the Vienna Convention on Consular Relations and in other general multilateral treaties concluded under the auspices of the United Nations. During the debates in the Sixth Committee certain delegations put forward a proposal for the use of "any State" formula instead of the one adopted in the resolution; in other words, they preferred that the Secretary-General should be requested simply to invite "any State" to accede which is not already eligible to become a party to the treaties in question. In support of their proposal they urged that the principle of universality should govern accession to general multilateral treaties. On the other side, stress was placed on the existing practice of the United Nations in regard to general multilateral treaties, the extremely wide participation which this practice permits and the difficult political decisions with which the Secretary-General would be faced as depositary of the treaties if entities not recognized as States by many Members of the United Nations sought to accede to them. The Secretariat intervened to advise the Sixth Committee that, if an "any State" formula were adopted, the Secretary-General could not undertake to make these political decisions and would require specific instructions from the General Assembly designating the countries to which he was to send invitations to accede. This advice was confirmed by the Secretary-General him-

self at the 1258th meeting of the General Assembly.⁵⁹ Resolution 1903 (XVIII) was adopted at the 1259th meeting.

3. Paragraph 1, as at present drafted, is designed to be a purely residuary rule applicable only in the absence of any provisions in the treaty defining the categories of States to which participation in the treaty is open. This being so, the scope for its application is evidently very narrow, since modern multilateral treaties of a general character almost invariably do in fact contain such provisions. Some Governments in effect advocate that the residuary principle formulated in paragraph 1 should be made absolute — a rule of *jus cogens* overriding the expressed will of the contracting States. Invoking the principle that general multilateral treaties should be universal in their application, they urge the deletion from the paragraph of the words "unless it is otherwise provided etc.". The Commission, while unanimous in thinking that these treaties, because of their special character, should in principle be open to participation on as wide a basis as possible, did not feel justified in setting aside, even in the case of general multilateral treaties, so fundamental a principle of treaty law as the freedom of the contracting States to determine by the clauses of the treaty itself the States which may become a party to it. The thesis that a general multilateral treaty must be considered as open to participation by any State regardless of the provisions of its final clauses appears to be in conflict not only with the traditional law but with contemporary international law and practice. Accordingly, the Special Rapporteur does not think that the Commission should adopt it for the purpose of the draft articles, even on the footing of a measure of progressive development. He also feels that, if the concept of universality in the application of general multilateral treaties were to be considered as a rule of *jus cogens*, it might be necessary for the Commission to re-examine a number of other articles, such as those dealing with reservations and with the modification of treaties, in the light of this concept.

4. Paragraph 1 has also been objected to by some Governments from the quite opposite point of view that no presumption of universality of participation should be laid down in the draft articles, even as a residuary rule for cases when the treaty is silent on the question of participation. Arguments adduced in favour of this view are that the question should be left to be settled by agreement of the "parties" or, more exactly, the States which participate in the conference; and that the "every State" formula of paragraph 1 would impose on depositaries the unpleasant task of making subjective decisions regarding entities whose statehood is disputed. At the fourteenth session the Special Rapporteur was among those members who did not feel able to support the presumption adopted in paragraph 1, having regard to the clear evidence in recent practice, and especially in United Nations practice, of a contrary intention on the part of States with respect to general multilateral treaties. These members also thought that the rule in paragraph 1 might give the Secretary-General and other depositaries the embarrassing task of

⁵⁶ *Yearbook of the International Law Commission, 1962, vol. II*, p. 169, para. 10 of the commentary to articles 8 and 9.

⁵⁷ *Yearbook of the International Law Commission, 1963, vol. II*, chap. III of the Commission's report to the General Assembly, p. 217.

⁵⁸ Adopted by 79 votes to none, with 22 abstentions.

⁵⁹ See *Official Records of the General Assembly, Eighteenth Session, Plenary Meetings, 1258th meeting, paras. 99-101.*

having to make delicate decisions as to the statehood of entities applying to accede to general multilateral treaties. They considered that the Commission should not go beyond the formula employed in general multilateral treaties drawn up under the auspices of the United Nations and of the specialized agencies as well as in a number of other modern treaties. They favoured confining article 8, dealing with the question of original participation in treaties, to paragraph 2, and leaving the question of opening general multilateral treaties to additional States to be covered by article 9, paragraph 1.

5. On the question of the embarrassing position of the depositary, the Special Rapporteur thinks it right to draw the attention of the Commission to a recent statement evidencing the practice of depositary Governments in this connexion. In an opinion⁶⁰ submitted to the Foreign Relations Committee of the United States Senate in 1963, the Legal Adviser of the State Department recalled that, when confronted as depositary with a notice of accession from a Government which it did not recognize, the United States accepted the notification and circulated it to the other States concerned, at the same time putting on record its position with regard to the non-recognition of the Government in question; and that the United Kingdom had followed a similar course as depositary of the Load Line Convention. The Legal Adviser further stated that it is understood among the original parties to the Nuclear Test Ban Treaty that no depositary need accept a signature or communication from a régime that it does not recognize. He also underlined, with supporting evidence, the now well-established principle that a State's participation in a multilateral treaty with an entity or Government which it does not recognize will not imply recognition of it. The evidence of practice contained in this opinion suggests that the possible embarrassment of a depositary Government in face of an unrecognized entity may not be an insuperable obstacle to the operation of the rule formulated in paragraph 1. On the other hand, it equally shows that the delicacy of the position of a depositary Government is real enough, and this is confirmed, so far as concerns secretariats acting as depositaries, by the attitude adopted by the Secretary-General in regard to the "any State" formula in 1963.

6. On balance, the Special Rapporteur remains of the view that to confine article 8 to paragraph 2 and to leave the question of opening general multilateral treaties to additional States to be covered by article 9, paragraph 1, is the solution which is most consonant with existing treaty-practice and with the consensual basis of treaty relations. However, he recognizes that the majority of the Commission arrived at a different conclusion in 1963; and that a number of Governments express their support for the rule adopted by the Commission. Accordingly, he feels that his proper course is to confine himself to placing the above observations before the Commission in order to assist it in its re-examination of paragraph 1 of the present article.

7. Paragraph 2, which deals with treaties other than general multilateral treaties, has been criticized by a

number of Governments on the ground that it does not sufficiently indicate that the rules which it lays down in sub-paragraphs (a) and (c) are intended to be residuary and to apply only in the absence of specific provisions in the treaty itself. This criticism appears to the Special Rapporteur to be well founded. It also appears necessary, in this paragraph, no less than in paragraph 1, to take account of the established rules of an international organization as well as of the provisions of the treaty.

8. If paragraph 2 is formulated as a purely residuary rule, sub-paragraph (b), which concerns cases where the treaty contains express provisions on the matter, will necessarily disappear. The Special Rapporteur also shares the view of the Swedish Government that, always assuming that the Commission retains the present substance of paragraph 1, it is desirable to combine paragraphs 1 and 2 in a single paragraph, in order to avoid the rather heavy repetition of the opening phrase. On this basis the article might take the following form:

"If it does not appear from a treaty which States may become parties to it —

"(a) in the case of general multilateral treaties, any State may become a party;

"(b) in other cases, any State may become a party which took part in the drawing up of the treaty or which was invited to the conference at which it was drawn up."

Article 9. — The opening of a treaty to the participation of additional States

Comments of Governments

Australia. The Australian Government considers paragraphs 1 and 2 to be rather obscure. In its view, the expression "a small group of States" is particularly vague, and it asks whether a regional collective defence treaty would fall under paragraph 1 or 2. It feels that paragraph 1 should be restricted to general multilateral treaties. It also thinks that the wording of paragraph 3 (a) should be improved, since it assumes that paragraph 1 and paragraph 2 are meant to be mutually exclusive. Paragraph 3, it further points out, raises the difficulty for a depositary of determining what is a State, and it suggests that this should be avoided by substituting some other wording in the second line. Paragraph 4 it considers to be inadequate on two grounds: (a) such notification might be considered to be tantamount to recognition, and notification to the depositary should be an alternative; and (b) this provision should also apply to article 8, paragraph 1.

Austria. The Austrian Government considers that paragraph 1 (a) of this article goes beyond the existing law and is unacceptable because it amounts to authorizing amendment of a multilateral treaty without the consent of some of the parties. In its view, the paragraph violates the principle of sovereignty, and it proposes that paragraph 1 (a) should be revised, if not deleted. It notes that the difficulty will not arise in cases where the treaty itself contains a clause providing for its amendment by a two-thirds majority.

⁶⁰ *American Journal of International Law*, vol. 58 (1964), pp. 170-5.

Canada. Referring to paragraph 3 (b), the Canadian Government notes that “the arguments against such a presumption of consent are well known, as is the very real difficulty that occasionally exists at present of eliciting any expression of opinion from States”.

Denmark. The Danish Government thinks that the article goes too far in opening multilateral (as distinct from general multilateral) treaties to States other than the original parties. Paragraph 3 should not, in its view, apply to treaties concluded between a small group of States or between States belonging to a particular region. In the case of such treaties other States should not be allowed to become parties, except by invitation of the original parties. An outside State should not, in its view, be able to intrude and possibly bring pressure to bear on the original parties to refrain from objecting. The initiative, it considers, should in these cases belong to the original parties. In general, it observes that the article should not apply to constituent instruments of international organizations, since otherwise it would be possible to circumvent the provisions regarding the admission of new members.

Israel. In paragraphs 1 (a) and 2 the Government of Israel feels that a period of five years might be sufficient as the period during which it would still be necessary to consult the States which drew up the treaty as distinct from the parties. In paragraph 2 it notes the use of the phrase “concluded between a small group of States”; and it observes that in article 1 a different phrase, “limited number of States” is used to express a distinction which the Commission seeks to draw between a general multilateral treaty and a treaty between a “small group of States”. It suggests that the smooth application of the law would be facilitated if the commentary were to give greater precision to this concept. In paragraph 3 (b) it feels that a period of twelve months might prove too brief for raising a presumption of tacit consent to a request to be admitted to participation in a treaty. Noting that article 19, paragraph 4, refers to a period of two years, it suggests that a more extended period should be considered in the present paragraph. In general, it suggests that further consideration should be given to uniformity in the periods of time laid down in the different articles.

Japan. As in the case of article 8, the Japanese Government considers that it would be better to leave the whole matter to the decision of the States participating in the conference; and that the present article should be deleted in its entirety.

Luxembourg. The Luxembourg Government draws attention to the debatable nature of the concept of a “small group of States” on which the distinction between paragraphs 1 and 2 is founded. It observes that, wherever a multilateral treaty is not opened to any State whatsoever, it could be claimed that one was dealing with a “small group of States”. In any event, for reasons similar to those given in its comments on article 6, it considers the procedure suggested in paragraph 1 of the present article to be inadmissible. What is involved in paragraph 1 is really the amendment of the accession clauses of treaties and, in its view, the opening of a multilateral treaty to additional States should in principle be subject to the same

requirements as the amendment of the treaty. It proposes that article 9 should be replaced by a clause, which could be combined with paragraph 2 of article 8 to form a new article, simply providing that:

“A multilateral treaty may be opened to the participation of States other than those to which it was originally open, subject to the provisions regarding revision of the treaty.”

In that event, the provisions of paragraph 3 of the present article might, *mutatis mutandis*, it thinks, provide a model for a simplified procedure for giving effect to the amendment provisions of the treaty without convening another international conference. The Luxembourg Government considers that such a solution, while respecting the consensual nature of treaties, would provide a sufficient element of flexibility in the opening of multilateral treaties to additional States.

Sweden. The Swedish Government observes that, should the proposed convention on the law of treaties not meet with universal adherence, it might complicate very much the application of the present article.

United Kingdom. The United Kingdom, like the Swedish Government, thinks that the article may be difficult to operate in practice, because it may be many years before a convention on the law of treaties comes into force for all States. A proposal to open a multilateral treaty to new States in accordance with the present article might, it points out, be opposed by States which were not parties to the convention on the law of treaties and were not therefore bound by the present article. The United Kingdom Government also thinks it to be unclear as to what would be the effect of the article in the case of a treaty which is the constituent instrument of an international organization and which contains express provisions on membership of the organization. In addition, it finds the expression “a small group of States” to be imprecise and to require clarification both here and elsewhere in the draft articles.

United States. The United States Government observes that its comments on paragraphs 1 and 2 (a) of article 8 apply equally to paragraph 1 of the present article. In addition, it considers the terms “multilateral treaty” and “small group of States” to be altogether too indefinite for the purposes of the article. It asks whether the members of the Organization of American States, or the parties to the Antarctic or North Atlantic Treaties constitute a “small group of States”. If not, it says that article 9 would render meaningless the provisions of those treaties regarding the States which may participate in them. Paragraph 1 (b) would in effect, it observes, permit the amendment of treaties by international organizations. Such a provision, in its view, rather than giving flexibility to the negotiation and application of treaties, might have the reverse effect of eliciting reservations by any States in approving both the proposed convention on the law of treaties and new treaties afterwards concluded. Paragraph 4 it considers to be open to the objection that it assumes that all treaties are divisible as to their parties and can be applied between certain of them while some are at the same time not in treaty relations with each other. This, it

maintains, is not the case in many instances, such as treaties establishing international organizations and treaties for defence. The Charter, it points out, is a prime example of a treaty where all members must be in treaty relations with each other.

Cameroonian delegation. The delegation stresses the importance of the article.⁶¹

Colombian delegation. For the delegation's views see its comments on article 8.⁶²

Delegation of Cyprus. The delegation considers that the application of paragraph 1 has the advantage of relieving the Secretary-General or any other depositary of having to take delicate, and perhaps controversial, political decisions.⁶³

Hungarian delegation. For the delegation's views, see its comments under article 8.⁶⁴

Irish delegation. While appreciating the need for precision, the delegation does not think it desirable that time-limits such as those stipulated in article 9 should be imposed in such important matters, since they place an additional burden on Foreign Offices which are lightly staffed.⁶⁵

Mexican delegation. The delegation has some doubts regarding paragraph 1 (a). By what authority, it inquires, would the provision for the subsequent consent of two-thirds of the States which drew up the treaty to the participation of additional States be applicable where States not parties to the convention on the law of treaties are at the conference? In its view, it would be more prudent to recommend that all treaties drawn up at an international conference should lay down the conditions for the participation of additional States.⁶⁶

Polish delegation. The delegation states that its observations on the restrictions in article 8, paragraph 1, on the principle of universal participation in general multilateral treaties apply *mutatis mutandis* to paragraph 1 of the present article.⁶⁷

USSR delegation. For the delegation's views see its comments on article 8.⁶⁸

Observations and proposals of the Special Rapporteur

1. Clearly, the point made by some Governments that, whatever may be the rules ultimately adopted in the present article, a reservation ought to be made in regard to treaties which are constituent instruments of an international organization is well founded. If, however, the Commission adopts the Special Rapporteur's suggestion for the inclusion of a new article amongst the "General Provisions", making the application of the draft articles

to constituent instruments and to treaties drawn up within an organization generally subject to the established rules of the organization concerned, the point need not be further taken into account in drafting the present article.

2. Paragraph 1 was drafted by the Commission primarily with general multilateral treaties in mind, though it felt that the paragraph might also serve a useful purpose in connexion with other large multilateral treaties. A number of Governments have expressed objections to the application of paragraph 1 to such a wide range of treaties, and have suggested that it should be confined to general multilateral treaties. The Special Rapporteur considers that the Commission should adopt this course, which has the added advantage of making it unnecessary to attempt to give precision in this article to the distinction between "multilateral treaties" and "treaties concluded between a small group of States". A few States have suggested that paragraph 1 (a) should be deleted altogether on the ground that it amounts to authorizing the amendment of multilateral treaties without the consent of some of the parties. This ground does not appear to the Special Rapporteur to be one which necessarily should lead the Commission to drop paragraph 1 (a), if this paragraph is otherwise considered to be desirable. Multilateral treaties frequently contain no provision regarding their amendment. Moreover, as pointed out in paragraph 4 of the Commission's commentary to article 66, which deals with the amendment of multilateral treaties, there is now a well-established practice of bringing amendments of certain types of multilateral treaties into force for States accepting the amendments without obtaining the consent of all parties — let alone the consent of all the States which took part in drawing up the treaty. General multilateral treaties, above all others, are treaties where this practice is found.

3. The question remains, however, whether the special provisions in paragraphs 1 and 3 should be retained, or whether the whole question of participation by additional States should be left to be covered by the provisions of articles 65 and 66 concerning the modification of treaties. When the Commission adopted articles 8 and 9, it had in the forefront of its mind the problem of facilitating the opening of certain categories of closed multilateral treaties to the new States. In paragraph 10 of its commentary to these articles it recognized that, owing to delays in ratifications, etc., and the possibility that the proposed convention on the law of treaties might not become binding on all the parties to the treaties in question, article 9 might be of limited effectiveness in achieving the objective. It accordingly suggested that consideration should be given to trying to obtain the necessary consents to the accession of the new States by using the depositary of each treaty as a channel for requesting the consents of the parties to the treaties in question. At the fifteenth session, as already noted in the Special Rapporteur's observations on article 8, the Commission re-examined the question of opening multilateral treaties to the new States in the particular context of League of Nations treaties containing closed participation clauses. These clauses had special features which enabled the problem to be solved in that instance by the General Assembly's assuming by resolution the power formerly vested in the Council of the League to

⁶¹ *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 740th meeting, para. 12.*

⁶² *Ibid.*, 741st meeting, para. 7.

⁶³ *Ibid.*, 741st meeting, para. 32.

⁶⁴ *Ibid.*, 736th meeting, para. 4.

⁶⁵ *Ibid.*, 743rd meeting, para. 13.

⁶⁶ *Ibid.*, 739th meeting, para. 22.

⁶⁷ *Ibid.*, 740th meeting, para. 26.

⁶⁸ *Ibid.*, 738th meeting, para. 5.

invite additional States to accede to the treaties. The precedent is therefore a very special one, limited to the particular League of Nations treaties, and does not touch the more general problem of opening multilateral treaties to additional States.

4. The Special Rapporteur, without wishing to become involved in any way in the topic of State succession, observes that the problem of the participation of new States in earlier multilateral treaties appears to be finding a certain measure of solution through the fact that in a now quite considerable number of cases new States have by notifications to the depositaries couched in varying terms purported to establish or recognize that they are parties to multilateral treaties to which the predecessor sovereign of the territory is already a party or signatory; and that these notifications have been communicated to the other parties to the treaties by the depositaries without meeting with any objection. This practice, if it may suggest that the problem of the new States has not perhaps the magnitude which it appeared to possess in 1962, seems to confirm the practicability of the procedural solution outlined in paragraph 3 of the present article. Against this must be weighed the consideration, mentioned in the Commission's commentary and emphasized by certain Governments, that the legal efficacy of accessions made in accordance with the present article might be doubtful or limited in cases where parties to a multilateral treaty had not all become bound by the present article.

5. The opening of a treaty to additional States is evidently tantamount to an amendment of one of its "final clauses". Accordingly, the choice before the Commission is either to deal with the extension of participation in a treaty simply as a case of amending the treaty or to regard it as a special matter to be dealt with on its own principles. When the Commission adopted article 9, it had not yet examined the subject of modification of treaties. It therefore seems desirable to consider what would be the position if the question were treated simply as a case of amendment falling under articles 65 and 66. Under the former article amendment of a treaty takes place by agreement between "the parties" and there is no proviso either in that article or in article 66, as there is in the present text of article 9, giving a voice in the matter for a limited period to signatory States. Again under article 65 the conclusion of any amending agreement, if in writing, is to be governed by the rules laid down in part I for the conclusion, entry into force and registration of treaties, unless the treaty or the established rules of an international organization otherwise provide. In other words, if the amending agreement were to be concluded at an international conference, the two-thirds majority rule would be the rule employed for the adoption of the agreement, unless otherwise decided by the parties or otherwise provided in the original treaty; and in the case of a treaty drawn up within an organization the voting rule of the organization would apply. Thus the basic position under articles 65 and 66 is not far removed from that contemplated in article 9 so far as concerns the modification of a participation clause through the ordinary procedure of an amending protocol. Equally, there is nothing in articles 65 and 66 or in part I to preclude the modification of a participation clause by an agreement

reached through the medium of communications made to and circulated by a depositary.

6. Having regard to the comments of Governments, and to the provisions of articles 65 and 66 concerning the amendment of treaties, the Special Rapporteur feels that it may be sufficient to cover the extension of participation in treaties other than general multilateral treaties by a reference to those articles. As to general multilateral treaties by a reference to those articles. As to general multilateral treaties, the Commission has recognized that these treaties because of their special character should, in principle, be open to participation on as wide a basis as possible. This principle could, it is true, be given effect by the ordinary procedures of amendment contemplated in articles 65 and 66. But, as pointed out in chapter III of its 1963 Report⁶⁹ dealing with participation in League of Nations treaties, the normal procedure of amending protocol has certain disadvantages and is likely both to involve delay and to give incomplete results. As also pointed out by the Commission in chapter III of its 1963 Report⁷⁰ and earlier in paragraph 10 of its commentary to the present article, it appears to be established that in international law all that is required for the opening of a treaty to additional States is the agreement of the States entitled to a voice in the matter, and that this agreement may in principle be expressed in any form. In the case of general multilateral treaties, the difficulty of reconvening a diplomatic conference for the sole purpose of extending the right of participation and the importance of facilitating agreement to its extension seem to justify the proposal of a simplified procedure in the case of these treaties. On the other hand, it would be more in conformity with general principles to make such a simplified procedure subject to any specific provisions contained in the treaty regarding its amendment. Certain Governments, it is true, have in the present connexion advocated a complete departure from the principles governing amendment of treaties on the basis that general multilateral treaties ought to be regarded as necessarily open to participation by every State regardless of the terms of their final clauses. The Special Rapporteur, while sharing the view that general multilateral treaties should be open to participation on as wide a basis as possible, does not think it admissible to go so far in overriding the expressed will of the States which drew up the treaty. One alternative might be, as suggested by the Luxembourg Government, to cover the extension of participation in all kinds of treaties by a reference to articles 65 and 66 and then to specify the simplified procedure in paragraph 3 as applicable to general multilateral treaties. Many general multilateral treaties, however, contain no provisions regarding their own amendment, and a simple reference to articles 65 and 66 would not provide any voting rule except after the convening of a new conference. Accordingly, it may still be useful to retain the essence of paragraph 1, but to state it as a residuary rule applicable in the event of the treaty's being silent about its own amendment. Similarly, it is thought that it may also be useful to state that, except as

⁶⁹ *Yearbook of the International Law Commission, 1963*, vol. II, p. 221, paras. 39 and 40.

⁷⁰ *Ibid.*, para. 41.

provided in the present article, the provisions of articles 65 and 66 apply. This would, *inter alia*, cover the point now contained in paragraph 4 of the present article.

7. In the light of the above observations, the Special Rapporteur suggests that article 9 might be reformulated on the following lines:

"1. Subject to any provisions contained in the treaty regarding its amendment, a general multilateral treaty may be opened to the participation of States other than those to which it is open under article 8 —

"(a) in the case of a treaty drawn up at a conference convened by the States concerned or by an international organization, by the subsequent consent of two-thirds of the parties;

"(b) in the case of a treaty drawn up in an international organization, by a decision of the competent organ of the organization in question adopted in accordance with the applicable voting rule.

"2. In other cases, a treaty may be opened to the participation of States other than those to which it is open under article 8 in accordance with the provisions of articles 65 and 66.

"3. If the depositary receives a request from a State desiring to be admitted to participation in a treaty under the provisions of paragraph 1, the depositary:

"(a) in a case falling under paragraph 1 (a), shall communicate the request to the other parties to the treaty;

"(b) in a case falling under paragraph 1 (b), shall bring the request as soon as possible before the competent organ of the organization in question.

"4. The consent of a State to which a request has been communicated under paragraph 3 (a) above shall be presumed after the expiry of two years⁷¹ from the date of the communication.

"5. Except as provided in the foregoing paragraphs, articles 65 and 66 shall apply to the opening of a general multilateral treaty to additional States."

Article 10. — Signature and initialling of the treaty

Comments of Governments

Japan. The Japanese Government thinks it desirable that paragraph 3 should take into account certain cases where, in its view, initialling may be equivalent to signature, as where the initialling is by a Head of State, Prime Minister or Foreign Minister.

Luxembourg. In paragraph 1 the Luxembourg Government finds the words "in the treaty itself or in a separate agreement" not to be entirely clear. It states that a treaty is often embodied in several documents, including proto-

cols annexed to the treaty and protocols of signature, and that the term "treaty" in its legal sense denotes the whole group of documents. Accordingly, in its view, the above-mentioned words are unnecessary. In paragraph 2 it does not think that the distinction between a signature *ad referendum* and a signature "subject to ratification" emerges very clearly. In order to remove any risk of misunderstanding it suggests that the word *définitive* should be deleted from the French text of paragraph 2 (c),⁷² as that word might give the impression that confirmation of a signature *ad referendum* would amount to a final commitment to be bound by the treaty.

Sweden. The Swedish Government considers that the article should be revised so as to confine it to residuary rules applicable in the absence of agreement between the parties. With this object it proposes the deletion of paragraph 1 and paragraph 2 (a) and the rewording of the remaining provisions of the article to make it clear that they are to operate only in the absence of agreement between the parties. As to paragraph 2 (b), while expressing the view that a rule limiting the legal effect of signature *ad referendum* to an act of authentication may be desirable, the Swedish Government draws the Commission's attention to a practice which it believes to exist of sometimes attaching to this act the meaning of a signature "subject to ratification". Paragraph 3 (a) it considers to be drafted in too absolute a form in stating that initialling can only function as an act of authentication as, in its view, this is not true in all instances.

United States. The United States Government considers that paragraph 1, as at present worded, may give the impression that it rules out the procedure of bringing treaties into force without any signature by the parties which is used, for example, in the conclusion of ILO Conventions. In order to obviate such an interpretation of the paragraph, it proposes the insertion of the phrase "but with respect to which signature is contemplated" between the words "adopted" and "the States". It also considers that the provision in paragraph 2 (c) by which, on confirmation, signature *ad referendum* operates from the date when it was affixed to the treaty, may cause difficulty for States having requirements of their national law to satisfy before they can agree to be bound. It accordingly suggests that the following phrase should be added at the end of paragraph 2 (c) "unless the State concerned specifies a later date when it confirms its signature". As to paragraph 3 (a), it feels that this provision may give rise to some question in the case of documents, such as a memorandum or minutes of interpretation, which are intended to be binding solely on the basis of initialling; and it points out that such documents sometimes accompany a more formal document that is brought into force by signature. In any event, it would like to see the following general reservation made to the article by adding a new subparagraph in the following terms:

"Nothing in this article shall prevent the initialling of any document, particularly a subsidiary one, from having a final effect when the parties intend that such

⁷¹ The Special Rapporteur does not feel that the argument adduced by one Government against the inclusion of any time-limits in the draft articles is persuasive. Numbers of multilateral treaties already contain time-limits for one purpose or another, and usually time-limits shorter than those proposed by the Commission. The Special Rapporteur himself feels that the original period of twelve months was appropriate for the present purpose; but in the light of the comments of Governments he has tentatively substituted two years.

⁷² It is to be noted that in the English text the word "full" is used.

“initialling completes the document without any signature.”

Observations and proposals of the Special Rapporteur

1. Title. The Special Rapporteur considers that the title of the article should be changed to read “Signature and initialling of the text”. Although the distinction between signature which merely authenticates the text and signature which establishes consent to be bound by the treaty is, it is believed, made clearly enough in articles 10-12, the double sense in which the term signature is used carries an inherent risk of misinterpretation. In order to minimize this risk the Special Rapporteur thinks that it may be better to speak in article 10 of signature of the text, rather than of the treaty. It is only the procedural act of signing the text with which article 10 is concerned, the differing legal effects of signature being dealt with in article 11. Accordingly, it is suggested that “text” should be substituted for “treaty” in the title and in the provisions of the present article.

2. The Special Rapporteur shares the view of the Swedish Government that some revision of the article is desirable because, as at present worded, paragraphs 1 and 2 (a) are too expository in character, but he doubts whether these paragraphs ought to be deleted altogether. He suggests that paragraph 1 should be shortened and confined to a provision that signature must take place regularly, that is in accordance with the procedure laid down in the text or in a related instrument or otherwise decided by the States concerned. However obvious this rule may be, it has legal content, since it implies that an irregular signature is not a signature unless the other States choose to accept it as such. Similarly, he suggests that paragraph 2 (a) should be amended to state that a signature is to be considered unconditional unless the contrary is indicated at the time of signature. Such a rule would again have legal content but would, of course, have to be made subject to the provisions of articles 12 and 14, dealing with ratification and approval.

3. Paragraph 2 (b) could, it is thought, safely be omitted. The authenticating effect of signature is already covered in article 7 and article 11, while the point that the effects of a signature *ad referendum* are less than those of a simple signature is implied in paragraph (c).

4. In paragraph 2 (c), it is thought that, in order to minimize the risk of confusion between the procedural act of signature and signature giving consent to be bound, the expression “unconditional signature” should be used in place of the expression “full (*définitive, definitiva*) signature”; and that this paragraph, like paragraph 2 (a), should be stated to be subject to articles 12 and 14. It is also thought that the phraseology should be slightly modified as shown in the revised version proposed in paragraph 6 below. The Swedish Government, while favouring the limitation of the effects of signature *ad referendum* to an act of authentication, draws attention to a practice which it believes to exist of sometimes attaching to this act the meaning of “subject to ratification”. The United States Government at the same time observes that paragraph 2 (c), under which a confirmed signature *ad referen-*

dum operates from the original date of signature, may cause difficulty for States having requirements of their national law to satisfy before they can agree to be bound; and it suggests that the rule in paragraph 2 (c) should be qualified by the words “unless the State concerned specifies a later date when it confirms its signature”. The proposed addition goes close to converting signature *ad referendum* into a disguised form of signature “subject to ratification” and confuses still further the ambiguities already surrounding the act of signature. Accordingly, the Commission may feel reluctant to endorse the proposed addition, unless it is felt to fill a real gap in treaty procedures. Normally, a State would protect its position under its internal law by making its signature subject to ratification or approval; nor does there appear to be anything to prevent a State, when confirming a signature *ad referendum*, from making it subject to ratification or approval. In the case of a treaty which is expressed to come into force on signature, there does not appear to be any time-limit within which a signature *ad referendum* may be confirmed. Consequently, signature *ad referendum* may, as it is, be used to serve one purpose of ratification — delay to allow the completion of constitutional procedures. On the other hand, in these cases signature *ad referendum*, as formulated in paragraph 2 (b), would not suffice to protect a State against being held to have violated the treaty if changes in its internal law were necessary before its practice could be said to conform to the treaty; for confirmation of the signature would make the State a party to the treaty *ab initio*. This being so, the Special Rapporteur feels that it may be justifiable to leave open the possibility of a State’s specifying the date when its signature is to be effective. The addition proposed by the United States is therefore included in the revised draft set out below.

5. As to paragraph 3 (a), the Special Rapporteur feels that there is substance in the point that an exception should be made in the case of initialling by a Head of State, Head of Government or Foreign Minister. Such an exception was provided for in the Special Rapporteur’s original draft of the article. Although some opposition was expressed in the Commission to considering initialling by a Head of State, etc., as necessarily committing the State to be bound by the treaty, it is not thought that the Commission intended to go so far as to put initialling by those State organs on the same level as initialling by a mere representative. The appropriate rule, it is suggested, would be to treat initialling by them as the equivalent of signature. The Special Rapporteur also feels that there is substance in the point made by two Governments that cases sometimes occur where other representatives indicate that their initialling of the text is intended to be equivalent to signature and that allowance should be made for these cases.

6. In the light of the above observations, the Special Rapporteur proposes the following revised text of the article:

“1. Signature of the text takes place in accordance with the procedure prescribed in the text or in a related instrument or otherwise decided by the States participating in the adoption of the text.

"2. Subject to articles 12 and 14 —

"(a) signature of the text shall be considered unconditional unless the contrary is indicated at the time of signature;

"(b) signature *ad referendum*, if and when confirmed, shall be considered as an unconditional signature of the text dating from the moment when signature *ad referendum* was affixed to the treaty, unless the State concerned specifies a later date when confirming its signature.

"3. (a) If the text is initialled, instead of being signed, the initialling shall —

"(i) in the case of a Head of State, Head of Government or Foreign Minister, be considered as the equivalent of signature of the text;

"(ii) in other cases shall operate only as an authentication of the text, unless it appears that the representatives concerned intended the initialling to be equivalent to signature of the text.

"(b) When initialling is followed by the subsequent signature of the text, the date of the signature, not of the initialling, is the date on which the State concerned shall be considered as becoming a signatory of the treaty."

Article 11. — *Legal effects of a signature*

Comments of Governments

Denmark. The Danish Government considers that the legal effects attributed in paragraph 2 to a signature which is subject to ratification have no significance *per se*; for where a treaty is subject to ratification the signature of the treaty is, in its view, a mere formality having little rational justification in modern international relations. On the other hand, it recognizes that formal signature is a procedure so deeply embedded in practice that proposals for reform would have little chance of acceptance.

Luxembourg. The Luxembourg Government recalls its observations on the term "approval" in its comments upon article 1 (*d*). It there stated that the term properly denotes the internal procedure of parliamentary approval of treaties and urged the elimination of the term from the phraseology of the draft articles, using only the terms "ratification" and "accession" for the international procedures of the conclusion of treaties. Accordingly, it would like to see the term omitted from paragraph 2 of the present article.

United States. The United States Government supports the provisions of this article, which it considers to be in conformity with long and widely accepted practices and procedures of treaty-making.

Argentine delegation. The delegation feels that, despite the hesitations expressed by the Commission on the point in paragraph 4 of the commentary, a clause should be included in the article, by way of a progressive development of international law, placing a signatory State under an obligation to examine in good faith whether it should become a party to the treaty. The inclusion of such a

clause would, in its view, provide an element of security in the relations between States.⁷³

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur, for the reasons given in his observations on article 1, paragraph 1 (*d*), does not favour the deletion of the references to approval in paragraphs 2 and 3 of the present article.

2. In paragraph 1, the reference to article 7, paragraph 2, will require to be altered if that article is revised in the manner proposed by the Special Rapporteur.

3. In paragraph 2 (*b*) the Special Rapporteur proposes the deletion of the words "confirm or as the case may be". These words were inserted in the light of the fact that under article 17, paragraph 1, as adopted by the Commission, the obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty was to attach to a State participating in the negotiations or in the drawing up or adoption of the text. Under that provision, the obligation would already be in existence before signature and would thus only be "confirmed" by the latter. That provision has, however, met with what the Special Rapporteur conceives to be well-founded criticism in the comments of Governments, and he is accordingly proposing an appropriate modification of article 17, paragraph 1. If that proposal is accepted by the Commission, the deletion of the above-mentioned words from the present article will follow automatically.

4. The reasons leading the Argentine delegation to propose the inclusion of a provision placing a signatory State under an obligation to consider in good faith whether it should proceed to become a party are fully appreciated. The Special Rapporteur included a provision of this kind in his first report,⁷⁴ and the question was closely discussed in the Commission at the fourteenth session.⁷⁵ However, for the reasons explained in paragraph 4 of the commentary to the present article, the Commission decided not to include the provision. Accordingly, while drawing the Commission's attention to the view of the Argentine delegation, the Special Rapporteur does not feel that he should formulate any proposal on the point which it raises.

Article 12. — *Ratification*

Comments of Governments

Austria. The Austrian Government is in full agreement with the basic rule stated in the article that treaties in principle require ratification. In addition, it reiterates the regret expressed in its comments on article 1, paragraph 1 (*d*), that the draft articles do not define ratification (see the observation of the Special Rapporteur on article 1, paragraph 1 (*d*)).

⁷³ *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 744th meeting, para. 4.*

⁷⁴ *Yearbook of the International Law Commission, 1962, vol. II, pp. 46-47.*

⁷⁵ *Ibid.*, vol. I, 643rd—645th, 660th and 668th meetings, pp. 88-100, 204-205 and 255.

Denmark. The Danish Government considers that the basic rule stated in the article is not in conformity with international practice, and that the article is unduly complicated. The article should, in its view, be simplified by reversing the presumption on which it is based. Ratification should be required only if the necessity appears from the text, from the full powers issued to the representatives, from statements made in the course of negotiations, or from other circumstances evidencing an intention to that effect. These circumstances, it adds, may include the constitutional necessity of ratification. Furthermore, it is of the opinion that the question whether or not ratification is required should not necessarily be answered in the same way with respect to both parties. In this connexion it comments that in Danish practice cases have occurred where the signature of one party has been considered to be immediately binding, while that of the other has been subject to ratification (acceptance or approval); and it maintains that this procedure should not be precluded by the wording of the article.

Finland. The substance of the article does not, in the view of the Finnish Government, call for comment. On the other hand, it finds the form of the article defective in that the two types of treaties — formal and informal — are not always dealt with separately and that the drafting of paragraphs 2 and 3 contains elements of contradiction. It proposes that the article should be revised as follows:

“All treaties which are not concluded in simplified form require ratification, unless the treaty otherwise provides or a contrary intention of the signatory States clearly appears from statements made in the course of negotiations or the signing of the treaty, from the credentials, full powers or other instrument issued to the representatives of the negotiating States, or from other circumstances evidencing such an intention.”

Israel. The Government of Israel does not consider it necessary, for the purpose of drawing up practical rules, to adopt in principle on the controversial question of the necessity or otherwise in general international law for ratification of treaties which are themselves silent on the question. In its view, it is essentially for the negotiators to establish whether ratification is necessary or not. The question of ratification, it observes, may itself be part of the negotiation, or conclusively determined by the terms of the full powers of one or both of the negotiators. Such a pragmatic approach would, it suggests, enable the article to be simplified.

Japan. The Japanese Government considers that the basic presumption should be reversed, so as to make ratification unnecessary unless expressly provided for; and that the only exception for which it would then be necessary to cater would be the one mentioned in paragraph 3 (c). Moreover, it thinks that “approval” should be transferred from article 14 to this article and dealt with on the same principles.

Luxembourg. Recalling its comments on the definition of “treaties in simplified form” in article 1, paragraph 1 (b), the Luxembourg Government proposes the deletion of paragraph 2 (d) of the present article. It considers that the substance of paragraph 2 (d) is already implied in para-

graph 2 (c), where it refers to “other circumstances evidencing such an intention”. The deletion of paragraph 2 (d) would, it thinks, enable the whole of paragraph 3 to be dispensed with. The only cases which, in its view, could conceivably then arise under paragraph 3 would be cases where the treaty was expressed to come into force upon signature, but was nevertheless made subject to ratification; such cases would, it feels, be too unrepresentative to justify a special provision in the draft articles. The question of treaties that come into force provisionally, raised in paragraph 8 of the Commission’s commentary, is, in its view, quite a different one. The application of the treaty in those cases it considers to be subject to the treaty’s subsequently coming into force and to be a matter within the normal limits of the powers of Governments.

Sweden. The Swedish Government would prefer to see the basic presumption reversed and the rule stated in the simple form that ratification is not necessary, unless expressly agreed upon by the parties, perhaps with the additional qualification that ratification would also be required in cases where there is a clear implication that the parties so intended. There would be no dangers in such a residuary rule, it suggests, as States may always by express clauses prescribe ratification.

United Kingdom. The United Kingdom Government considers that as a practical matter there is much to be said for the contrary rule that a treaty does not require ratification and comes into force on signature unless the treaty itself otherwise provides. It fears that the complicated provisions of the article, as at present worded, may give rise to difficulties which do not at present exist.

United States. As the principal effect of the article is that treaties require ratification in the absence of certain circumstances, the United States Government proposes that the cases requiring ratification should be stated before the exceptions. It also proposes that the phrase in paragraph 3 (b) “other circumstances evidencing such intention” should be clarified by including as an example the fact that similar treaties concluded by the parties with each other or by either with third States have been subject to ratification. In the light of these proposals it puts forward an alternative version of paragraphs 2 and 3 (see the United States Government’s comments on the present article).⁷⁶

Italian delegation. The Italian delegation expresses concern that certain passages in the Commission’s commentaries appear to look with disfavour on the proposition that a State’s consent to be bound by a treaty must be governed by its constitution. In particular, it notes that in the commentary to the present article the Commission differentiates between “parliamentary ratification of a treaty under municipal law” and “ratification on the international plane”, thus implying that it is the latter which counts. The commentary, it says, does not make it clear that constitutional law and international law both contribute to determining the conditions governing the conclusion of treaties.⁷⁷

⁷⁶ In document A/CN.4/175 (mimeographed).

⁷⁷ *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 743rd meeting, para. 22.*

Observations and proposals of the Special Rapporteur

1. The opinions of Governments are divided on the question whether the basic residuary rule should be that ratification must be presumed to be necessary unless the contrary appears or *vice versa*. Four Governments would prefer to see the presumption in paragraph 1 reversed; one Government would like to state the law pragmatically without taking any position as to the residuary rule; the remaining five Governments appear either to endorse or not to dissent from the rule as it appears in paragraph 1. In addition, certain of the Governments urge that the article should be simplified. At the fourteenth session certain members of the Commission would have preferred that the rule should be stated in the reverse way, or that the requirement of ratification should be formulated simply as a question of intention. Another group considered that the existing residuary rule is the presumption stated in paragraph 1; a third group felt that, although that presumption survives as the basic rule for "formal" treaties, the reverse presumption applies in the case of treaties in simplified form.⁷⁸ The article adopted by the Commission contains elements of compromise which reflect this division of opinion. Paragraph 1 states the classical rule that treaties in principle require ratification; paragraph 2 reverses it for treaties in simplified form; paragraph 3 makes allowance for cases where, despite the use of a simplified form, the parties intend the treaty to be subject to ratification.

2. The article, as at present constructed, thus hinges upon the drawing of a distinction in law between formal and informal treaties; and this in turn hinges upon the establishment of adequate legal definitions of formal and informal treaties. In article 1, paragraph 1 (b), the Commission has sought to define a "treaty in simplified form" by naming examples, "exchange of notes, exchange of letters, etc.", and adding the words "or other instrument concluded by any similar procedure". In paragraph 11 of its commentary on that article, the Commission explained that these treaties in general "identify themselves by the absence of one or more of the characteristics of the formal treaty"; but it went on to say that "it would be difficult to base the distinction infallibly upon the absence or presence of any one of these characteristics". In particular, it said that ratification, "though not usually required for treaties in simplified form, si by no means unknown". Governments, as already noted in the Special Rapporteur's observations on article 1, paragraph 1 (d), do not regard the Commission's definition of "treaties in simplified form" as adequate. At the same time, for the reasons there given, the Special Rapporteur does not think that the definitions suggested by certain Governments provide viable alternatives. In addition, those Governments all include the fact that the treaty is not intended to be subject to ratification as one of the elements of the definition of an "informal" treaty. In consequence, their definitions would be of no assistance in the drafting of the present article.

3. The Special Rapporteur considers that the article should be recast and the law governing ratification restated

⁷⁸ See *Yearbook of the International Law Commission, 1962*, vol. I, 645th, 646th, 660th and 668th meetings, pp. 100-110, 205-207 and 255-256; *ibid.*, vol. II, p. 172, commentary on article 12.

without specifically basing the rules on a distinction between "formal" and "informal" treaties. The question then arises whether a residuary rule should be laid down for cases where the intention of the parties is not clear and, if so, whether it should require or dispense with ratification. The suggestion of the Government of Israel that the Commission should refrain from taking any position on the question of principle and should adopt a purely pragmatic approach is superficially attractive. But the Special Rapporteur is not convinced that this is the course which the Commission should follow. No doubt, it is essentially for the negotiators to establish whether ratification is necessary or not; no doubt also, the question of ratification may be part of the negotiation or conclusively determined by the terms of the full powers of one or both of the negotiators. The fact remains, however, that there is quite a large residue of cases where the intention of the parties is a matter of inference rather than of direct evidence. If States always gave clear indications of their intentions on this point, there would be no problems; but that is not so. A pragmatic approach would only solve the problem if the rules which it furnished sufficed to cover exhaustively the inferences to be drawn in this residue of cases. It is certainly possible to set down pragmatically — as in effect the Commission sought to do in paragraphs 2 and 3 — cases in which ratification is and cases in which it is not required. The risk is, however, that either the resulting rules may in some degree overlap and contradict each other or leave a certain number of cases outside any rule. If, on the other hand, the Commission sets down pragmatically only the cases where ratification is required or, alternatively, only the cases where it is not required, it will by implication leave the remaining cases outside the application of the article and, by implication will take a position on the residuary basic rule.

4. If the Commission decides to maintain the presumption in paragraph 1 as the basic rule without formally laying down a contrary presumption in the case of treaties in simplified form, it will still be necessary to make a large allowance for inferences of a contrary intention from the nature, form and circumstances of the treaty. Otherwise the article would not, in the Special Rapporteur's view, be consistent with modern practice. On the assumption that the rule in paragraph 1 remains the basis of the article, the Special Rapporteur proposes that the text should be revised on the following lines:

"1. A treaty in principle requires ratification by the States concerned unless —

"(a) the treaty itself provides that it shall come into force upon signature or specifically provides for a procedure other than ratification;

"(b) a contrary intention appears from the nature of the treaty, the form of the instrument or instruments in which it is embodied, the terms of instruments of full powers, the preparatory work of the treaty or the circumstances of its conclusion."

In the above draft the expression "preparatory work of the treaty or the circumstances of its conclusion" is used in preference to the expression "statements made in the course of the negotiations or other circumstances evidenc-

ing such an intention", in order to keep the terminology in line with that used in article 70.

5. If, on the other hand, the Commission should decide that the classical rule has now been so far eaten into by the enormous growth of treaties concluded by simplified procedures that it should not be maintained as the basic rule, the Special Rapporteur suggests that the article should simply state the rules determining the cases where ratification is required. Then, by implication, ratification would not be required in any case not covered by these rules, so that the residuary rule would, in effect, be that ratification is not required unless a contrary intention appears. In this event, the Special Rapporteur proposes that the text of the article should be revised on the following lines:

"1. A treaty requires ratification where —

"(a) the treaty itself expressly contemplates that it shall be subject to ratification;

"(b) the intention that it shall be subject to ratification appears from the nature of the treaty and the form of the instrument in which it is embodied, the terms of the representatives' instruments of full powers, the preparatory work of the treaty or the circumstances of its conclusion."

6. Either of the solutions outlined in the two preceding paragraphs can, in the Special Rapporteur's opinion, be plausibly argued to reflect the existing legal position, even although they may contain opposite residuary rules. Practice has gone so far in the use of simplified treaty-making procedures that different opinions may reasonably be held as to what should now be regarded as the underlying presumption as to the intention of contracting States. In other words, the problem is one of choice, and in 1962 the majority of the Commission appeared to incline towards a solution on the lines of the one in paragraph 4.

7. Two questions remain. The first is raised by both the Danish and United States Governments, and concerns the relevance of the constitutional practice of individual States. The Danish Government considers that amongst the circumstances evidencing an intention to require ratification should be included "the constitutional necessity of ratification". The United States Government proposes that the expression "other circumstances evidencing such an intention" should be clarified by mentioning as examples the fact that similar treaties concluded by the parties with each other, or by either party with third States, have been subject to ratification. The Special Rapporteur recognizes that there may be cases where the joint and regular practice of two States in concluding bilateral treaties, or the well-established practice of one State known to the other, may provide evidence of their common understanding regarding the requirement of ratification in the case of certain types of treaties. It seems necessary for the Commission to be cautious, however, in admitting the general relevance of the constitutional practice of individual States in the present connexion, having regard to the rules which it has laid down in article 4 concerning the authority of representatives and in article 31 concerning the irrelevance of a violation of internal law except in cases where the violation is manifest. The point in the present

article is a distinct one relating to the intention of the parties at the time of the conclusion of the treaty. But too broad a reference to the constitutional practice of individual States as evidence of intention might be interpreted as, in effect, bringing the requirements of internal law regarding the validity of treaties into international law by the back-door. For this reason the Special Rapporteur doubts whether it would be advisable to refer specifically to the practice of a single signatory State in concluding treaties with third States as evidence of the common intention of all the signatories with respect to the requirement of ratification. The question of the practice of individual States should, it is thought, be dealt with separately in the manner suggested in the next paragraph of these observations. The Special Rapporteur suggests that the Commission should not go beyond inserting, immediately after paragraph 1 of the alternative texts proposed above, a second paragraph on the following lines:

"2. Among the circumstances which may be taken into account under paragraph 1 (b) is any established practice of the States concerned in concluding prior treaties of the same character between themselves."

8. The second question which remains is the point made by the Danish Government that the article should not rule out the possibility that a treaty may be subject to ratification by one party while coming into force for the other party immediately on signature. Instances where this happens are certainly found in practice, particularly where the constitution of one of the parties, as in the case of the United Kingdom, does not contain specific provisions respecting the ratification of treaties, while that of the other party does contain such provisions. The existing text of the article already recognizes in paragraphs 2 (b) and 3 (c) the possibility that a treaty may be subject to ratification by some parties but not necessarily by all. The obvious cases are where the full powers issued by a particular State or statements made by its representative indicate clearly that its signature is intended to be binding or, alternatively, to be subject to ratification. In these cases, it is thought, the intention of the individual State must prevail, unless the treaty contains an express provision in the opposite sense. Accordingly, it is suggested that the point made by the Danish Government should be met by adding a third paragraph to the revised draft, which might be on the following lines:

"Notwithstanding anything in the foregoing paragraphs:

"(a) Unless a treaty expressly provides that it shall be subject to ratification, a particular State may consider itself bound by its signature alone where it appears from the terms of the instrument of full powers issued to its representative or from the preparatory work of the treaty that the other States concerned were informed that its signature was intended to be binding without ratification.

"(b) Unless a treaty expressly provides that it shall come into force upon signature, a particular State may consider the treaty as subject to ratification by that State, where it appears from the terms of the instrument of full powers issued to its representative, or from the preparatory work of the treaty, that the other States

concerned were informed that its signature of the treaty was intended to be conditional upon a subsequent ratification."

Article 13. — Accession

Comments of Governments

Japan. The Japanese Government observes that, if articles 8 (Participation in a treaty) and 9 (The opening of a treaty to the participation of additional States) are deleted as it proposes, it will be necessary to incorporate in the present article the provisions of paragraph 2 of article 9.

Sweden. Given the provisions in articles 8 and 9, and the freedom of States to prescribe in a treaty the applicable procedures for participation in it, the Swedish Government doubts the need to retain the present article.

United States. The United States Government stresses that the acceptability of this article is dependent on the acceptability of articles 8 and 9 to which it is linked. It further observes that the article, as at present worded, may raise a question whether article 11 would permit the admission of new States to membership in the United Nations in disregard of the provisions of the Charter, more especially in the light of the rules formulated in article 9 of the draft articles. In this connexion it advances certain criticisms of paragraph 1 (a) of article 9, which are set out in the Special Rapporteur's comments on that article.

Argentine delegation. The delegation concurs in the Commission's decision not to deal specifically in the draft articles with the anomalous case which has occasionally occurred in practice of an "accession" expressed to be "subject to ratification".⁷⁹

Colombian delegation. While recognizing that articles 8, 9 and 13 are based on current practice, the delegation makes certain observations with respect to articles 8 and 9 (see its comments under article 8).⁸⁰

Romanian delegation. The delegation concurs in the Commission's decision not to endorse the doctrine that accession is impossible before the treaty has come into force; and also in its treatment of the problem of "accession subject to ratification".⁸¹

Syrian delegation. The delegation proposes that in the terminology of the article a distinction should be drawn between "accession" and "adherence" to a multilateral treaty. In its view, the former should be restricted to cases of admission to a closed multilateral treaty, where specific formalities would have to be fulfilled, and the latter to cases of admission to an "open" multilateral treaty, where there would be no such formalities.⁸²

Observations and proposals of the Special Rapporteur

1. While appreciating the distinctions made by the Syrian delegation, the Special Rapporteur doubts whether there

⁷⁹ *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 744th meeting, para. 5.*

⁸⁰ *Ibid.*, 741st meeting, para. 7.

⁸¹ *Ibid.*, 742nd meeting, para. 28.

⁸² *Ibid.*, 739th meeting, para. 18.

is any such general usage in the employment of the terms "accession" and "adherence" as would justify the Commission in introducing into the article the refinement suggested by that delegation.

2. Clearly, the general acceptability of the present article is linked to the acceptability of articles 8 and 9. But the intention in the present article is to state when the procedure of accession is the procedure used for exercising a right to become a party to a treaty rather than when a substantive right to become a party attaches to a State. Thus the article is designed to fit into the scheme of the draft articles whatever may be the rules ultimately adopted for articles 8 and 9.

3. No doubt, as the Swedish Government indicates, the substantive right to become a party will be covered, in one form or another, in articles 8 and 9, while the negotiating States are completely free to prescribe the procedures by which a State is to exercise that right. Accession, however, is one of the three basic procedures of treaty-making, and in a codifying convention it seems necessary to refer to it even if in a primarily descriptive article. Nor will the article lack legal content, since it touches the regularity of the act by which a State seeks to become a party to a treaty. A depositary, for example, will feel bound to insist upon an instrument of accession rather than of ratification if accession is the procedure prescribed for the State in question (see article 29, paragraph 4).

4. On the other hand, the article, as at present drafted, tends perhaps to suggest too much that the article is concerned with the substantive right to become a party to a treaty, which is the subject-matter of articles 8 and 9. This is due to the use of the expression "become a party" in the opening phrase of the article and in paragraph (a). This expression is also unsatisfactory for another reason, in that "accession" may not in modern practice at once constitute the acceding State a "party", if the treaty is not yet in force. "Accession", as is indeed expressly provided in article 16, establishes the consent of the State to be bound by the treaty, and may or may not also make it at once a party to the treaty.

5. The Special Rapporteur accordingly proposes that the text of the article should be revised to read as follows:

"Subject to articles 8 and 9, a treaty may be acceded to when a State has not signed the treaty and

"(a) the treaty specifies accession as a procedure which is open to that State; or

"(b) the treaty has subsequently become open to accession by that State."

Article 14. — Acceptance or approval

Comments of Governments

Japan. The Japanese Government advocates that the article should be confined to "acceptance". In its view, "approval" is employed in practice in most cases as a simplified procedure of ratification, and should be included in article 12, not the present article. (See the Japanese Government's comments on article 12.)

Luxembourg. The Luxembourg Government reiterates its view that the use of the notion of "approval" in international law as a substitute for either ratification or accession merely creates confusion, and that the term "approval" should be eliminated altogether from the draft articles. It also considers that "acceptance" should not be dealt with in the present article or in the three following articles as a distinct treaty-making procedure. Regarding "acceptance" simply as another name given to what is really either "ratification" or "accession", it proposes that the notion of "acceptance" should be dealt with in a new article to be inserted later — after the present article 17 — and to be worded as follows:

"The provisions of the foregoing articles concerning ratification shall be applicable to treaties signed subject to acceptance; the provisions concerning accession shall be applicable to treaties containing the provision that they shall be open to participation by simple acceptance, without prior signature."

It is equally to be inferred from these proposals that the Luxembourg Government desires to see the present article disappear completely.

Sweden. Given the provisions of articles 8 (Participation in a treaty) and 9 (The opening of a treaty to the participation of additional States) and the freedom of States to prescribe in a treaty applicable procedures for participation in it, the Swedish Government doubts the need for this article.

United States. The United States Government stresses that the acceptability of the article depends on the acceptability of articles 8 and 9. It also observes that the article, which does not mention the requirements of the particular treaty, appears to make its own provisions paramount over the requirements of the treaty.

Italian delegation. In commenting upon the relation between constitutional and international procedures respecting the exercise of the treaty-making power (see article 4), the delegation expresses its concern at the sharp distinction made by the Commission between the constitutional and international procedures of "approval".⁸³

Observations and proposals of the Special Rapporteur

1. The Commission explained its reasons for treating "acceptance" and "approval" as specific treaty-making procedures in its commentary to the present article. The Special Rapporteur does not feel that the observations of the Luxembourg and Japanese Governments should lead the Commission to reverse its decision to the extent either of eliminating "approval" from the draft articles or of transferring it to article 12 as a simplified procedure of ratification. The Commission is not concerned with the constitutional concepts or procedures of individual States; it is concerned with codifying international treaty-making procedures as they actually appear in treaties. "Approval" seems to have become established in treaty practice and, when used, applies to the contracting States regardless of whether "approval" is a term known to their own constitutional law. Nor was "signature subject to approval"

introduced as merely another name for ratification, but as a simplified procedure akin to ratification. Moreover, although more often used in that form, the procedure of approval is also found as simple "approval" without prior signature. Accordingly, it does not seem correct either to eliminate the procedure of approval or simply to equate it with ratification.

2. The further suggestion of the Luxembourg Government that "acceptance" should not be accorded recognition as a distinct procedure side by side with ratification and accession, but should be dealt with in a later article simply providing that it is to be governed either by the rules concerning ratification or by those governing accession, is not without its attractions. The subsidiary and derivative character of acceptance would be emphasized and the wording of one or two other articles might be slightly lightened by deleting the word "acceptance". Moreover, the suggested later article might deal with "approval" in the same way. The Special Rapporteur considered this possibility when preparing his first report. But it seems more correct to refer to "acceptance" and "approval" as distinct procedures because they are used as such in treaties and may even appear alongside ratification and accession in one and the same treaty. Indeed, it also seems somewhat safer to do so because acceptance, at least, is sometimes used rather as a substitute for simple signature than for either of the other two procedures. Accordingly, it is felt that "acceptance" and "approval" should be retained, where they are in the scheme of the draft articles.

3. The opening phrase of the article, on the other hand, appears to the Special Rapporteur to require modification in the same manner as the corresponding phrase of article 13. He accordingly proposes that it should be revised so as to read:

"Subject to articles 8 and 9, a treaty may be accepted or approved when..."

Article 15. — The procedure of ratification, accession, acceptance and approval

Comments of Governments

Japan. The Japanese Government considers that paragraphs 1 (b) and 1 (c) are too technical and trivial to merit inclusion; and that paragraph 2 merely states what is obvious and should be omitted. It further considers that paragraph 3 should be transferred to Section V (Correction of errors and the functions of depositaries). In result it proposes that the whole article should be deleted, the substance of paragraph 1 (a) being incorporated in article 16 (see its revised draft, article 16).

Luxembourg. The Luxembourg Government, as explained in its comments on article 1 (d) and article 14, considers that all references to "acceptance" and "approval" should be deleted from this article. It also proposes that in paragraph 1 (c) the expression "two alternative texts" should be used instead of "two differing texts". In paragraph 2 (a) it points out that in the French text the word *certifiés* (similarly in the Spanish text the word *certificados*) refers to the exchange of instruments and ought to be in the

⁸³ *Ibid.*, 743rd meeting, paras. 21 and 22.

singular. In addition, the Luxembourg Government draws attention to the relation between paragraph 2 of the present article and article 23 (Entry into force of treaties). In its view, a distinction must be drawn between the procedure used to achieve ratification, accession or acceptance (with which article 15 is concerned) and the moment at which the treaty produces its effects (with which article 23 is concerned). On the latter point it thinks that a further distinction must be drawn between the time of the engagement of the parties (which occurs on the meeting of wills recorded in the exchange or deposit of formal documents) and the time of the entry into force of the treaty (which may occur at a later date). It considers that articles 15 and 23 should be revised so as to take account of these distinctions.

Sweden. The Swedish Government observes that, while some provisions of this article contain important legal rules, others are exclusively procedural. In paragraph 1 (c), for example, it is provided that, where a treaty offers two alternative texts, the instrument of ratification must indicate to which text it refers, but nothing is said as to the legal position in case of a failure to do so.

United States. In general, the United States Government favours the inclusion of this article, subject to certain drafting suggestions. In paragraph 1 (a) it proposes that the phrase "a written instrument" should be expanded so as to read "a signed written instrument" or "a written instrument signed by an appropriate authority". Otherwise, paragraph 1 (a) might be understood as authorizing the practice which is occasionally encountered of submitting an instrument that bears merely a stamped seal; such an instrument the United States Government considers to be insufficient evidence of a State's intention to ratify, accept or approve an international agreement. Paragraph 3, it thinks, should specifically require the depositary to notify signatory States not merely of the fact but also of the date of the deposit of an instrument of ratification, accession, etc., as depositaries sometimes fail to include this important point in the notification. On the other hand, it considers that the requirement that the depositary should notify signatory States of "the terms of the instrument" of ratification, accession, etc., goes beyond existing practice and might both be burdensome to depositaries and delay transmission of the notification. The general practice of depositaries, it believes, is to notify the deposit of the instrument on a certain date together with the text of any reservation or understanding included in or accompanying the instrument when it is deposited. It suggests that the final clause of paragraph 3 should be revised so as to read "and the other signatory States shall be notified promptly both of the fact and of the date of such deposit".

Mexican delegation. The delegation⁸⁴ suggests that it may be advisable to insert a provision that ratification must be unconditional, such as appears in article 6 of the Convention on Treaties prepared by the Sixth International Conference of American States.⁸⁵

⁸⁴ *Ibid.*, 739th meeting, para. 23.

⁸⁵ *Treaties and Conventions signed at the Sixth International Conference of American States*: Panamerican Union, *Law and Treaty Series No. 34*, Washington, 1950, p. 21.

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur shares the view of the Japanese Government that paragraph 3 should be transferred to section V, dealing with the functions of depositaries; or, more exactly, he thinks that paragraph 3 is otiose, having regard to the provisions of article 29, paragraph 3 (d), which covers the same point. Paragraphs 1 and 2, however, he considers, should be maintained, subject to the modifications mentioned below.

2. In paragraph 1 (a) the Special Rapporteur suggests that the proposal of the United States Government should be adopted, but in the form of the addition at the end of the paragraph of the words:

"signed by a representative possessing or furnished with the necessary authority under the provisions of article 4".

While not dissenting from the point made by the Mexican delegation, the Special Rapporteur doubts whether it would be appropriate to include a specific reference to it in the present article. The term "unconditional" is susceptible of more than one interpretation, and might be thought to embrace "reservations", the making of which is governed by article 18. Moreover, the point which the delegation seeks to include in the articles seems to be covered by implication in article 16, which provides that the communication of an instrument of ratification etc. establishes the consent of the State to be bound by the treaty.

3. In paragraph 1 (b), the Special Rapporteur feels that in order to avoid any appearance of inconsistency with the provisions of article 18 regarding reservations, it may be desirable to insert at the beginning of the paragraph the words: "Subject to article 18 and".

4. In paragraph 1 (c), the Special Rapporteur shares the view of the Luxembourg Government that the expression "two alternative texts" is preferable to "two differing texts"; and he considers that an appropriate addition should also be made to the paragraph in order to meet the objection of the Swedish Government that it does not state the legal position in the event of the instrument's failing to indicate the text to which it relates. He suggests that the paragraph should be revised to read as follows:

"If a treaty offers to the participating States a choice between two alternative texts, the instrument of ratification must indicate the text to which it relates. In the event of a failure to do so, the ratification shall not be considered as effective unless and until such indication has been given by the State concerned."

5. In paragraph 2, as the Luxembourg Government points out, the word "*certifiés*" ought to be in the singular; and the same applies to "*certificados*" in the Spanish text. There remains the point made by the Luxembourg Government as to the distinction between the procedure to achieve ratification, accession, etc., the moment at which the treaty produces its effects, and the moment at which the engagement of the parties occurs. The Special Rapporteur doubts whether anything more is needed to establish these distinctions in the draft articles. The Luxembourg Government refers only to articles 15 and 23. But the distinction

between the time of the engagement of each individual contracting State and the entry into force of the treaty is also made in article 11, paragraph 3, article 16, paragraph (b), article 17, paragraph 2, and article 20, paragraph 2 (a); and paragraph 4 of article 23 makes it clear that, although the entry into force of the treaty will normally make the rights and obligations of the treaty immediately applicable, this will not be so if the treaty otherwise provides. In the present paragraph the neutral expression "the instrument becomes operative" (*cet instrument produit effet; el instrumento surtirá efecto*) is used deliberately in order to underline that it is the instrument, and not its legal effects, with which the article deals. Moreover, the distinction is further underlined by the fact that the very next article is specifically devoted to the legal effects of ratification, accession, etc. If all the articles are read together, as they must be, it is thought that they sufficiently cover the point made by the Luxembourg Government.

6. As stated above, paragraph 3 is really covered by article 29, paragraph 3 (d), and it is proposed that the paragraph should be omitted. If this is done, the point made by the United States Government that paragraph 3 goes too far in requiring a depositary to notify the terms of the instruments will automatically be met, since this requirement does not appear in article 29, paragraph 3 (d). The other point made by that Government, that notification of the date of deposit should be required, is not, however, covered in article 29, paragraph 3 (d). The point is thought to be a valid one, and the Special Rapporteur proposes that it should be met by an appropriate modification of article 29, paragraph 3 (d).

Article 16. — Legal effects of ratification, accession, acceptance and approval

Comments of Governments

Finland. The Finnish Government raises the question whether or not a provision should be included regarding the possibility of revoking a ratification, accession, etc. It observes that a revocation may have a harmful effect on the position of other signatories, but that equally it may be unjust not to allow revocation under any conditions; for example, it would seem anomalous if the treaty itself provided for a right of denunciation but a ratifying State during the period before the treaty came into force could not withdraw its ratification.

Luxembourg. The Luxembourg Government, as it explains in its comments on article 1 (d) and article 14, considers that the references to "acceptance" and "approval" should be deleted from the present article.

United States. While expressing its general agreement with the article, the United States Government points out that in the opening phrase the reference to article 13 is incorrect and should be to article 15. (This remark applies to the English and Spanish texts; the reference in the French text is correct.)

Argentine delegation. The delegation agrees with the Commission's decision to exclude, in connexion with this

article, the doctrine of the retroactive operation of ratification.⁸⁶

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur, for reasons already given in his observations on article 1, paragraph 1 (d), and article 14, does not favour the deletion of the references to "acceptance" and "approval" from the present article.

2. The force of the point made by the Finnish Government regarding the revocation of ratification, accession, etc., is recognized; but this point appears to arise under article 17 rather than under the present article.

3. As pointed out by the United States Government, the article mentioned in the opening phrase has to be corrected to article 15 in the English and Spanish texts. In addition, the opening phrase of the article is thought to require a small modification. Article 15, paragraph 2 (b), provides that, where there is a depositary, the instrument is to become operative not upon "communication" but upon "deposit" with the depositary. Accordingly it is suggested that the opening phrase of the present article should be revised to read:

"The communication or, as the case may be, deposit of an instrument of ratification, accession, acceptance or approval in conformity with the provisions of article 15, paragraph 2."

Article 17. — The rights and obligations of States prior to the entry into force of the treaty

Comments of Governments

Australia. The Australian Government considers that the article goes too far, as it feels that, if a State leaves a conference or votes against adoption, it can have no obligation with respect to the outcome of the conference or vote. It proposes that the words "negotiation, drawing up or adoption of a treaty or which" should be deleted from paragraph 1.

Finland. The Finnish Government considers it doubtful whether the rule in paragraph 1 should apply to States which have only taken part in the negotiation or a treaty or in the drawing up or adoption of the text. In addition, as noted by the Special Rapporteur in his observations on article 16, the point made by the Finnish Government with respect to that article, that it may be unjust not to allow revocation of a ratification, accession, etc., under any conditions, really concerns the present article. The Finnish Government there emphasizes how anomalous it would be if a treaty provided for a right of denunciation but a ratifying State were unable to withdraw its ratification during the period prior to the treaty's coming into force.

Japan. In the view of the Japanese Government paragraph 1 places too great an obligation on States which have not yet decided to become parties to a treaty; and it proposes the deletion of the paragraph. It also doubts the wisdom of including any article of this character. It con-

⁸⁶ *Official Records of the General Assembly, Seventeenth Session Sixth Committee, 744th meeting, para. 5.*

siders that in paragraph 2 the criterion for refraining from acts calculated to frustrate the objects of the treaty is too subjective and difficult of application. It would prefer to leave the matter entirely to the good faith of the parties and to omit the whole article.

Poland. The Polish Government is of the opinion that paragraph 1 goes too far in extending the obligation of good faith to States which only took part in the elaboration of the draft treaty or in the negotiations. Such a rule, it suggests, might lead some States to refrain from taking part in the negotiations for the conclusion of international treaties.

Sweden. The Swedish Government raises the query whether the rule which requires a State taking part in the negotiation of a treaty to refrain from acts calculated to frustrate its objects should be so widely framed as to cover States which have taken part in the negotiation reluctantly and expressing the strongest reservations about it. In general, it considers that the article goes too far in imposing obligations on States; for example, where a State only takes part in the drawing up of a treaty text within an international organization and perhaps even votes against the adoption of the text.

United Kingdom. Whilst considering the principle of the article to be sound, the United Kingdom Government thinks that it may give rise to difficulties in practice unless the drafting is made more precise. Phrases which it finds unclear are: in paragraph 1, "takes part in the negotiation" and "signified that it does not intend"; and in paragraph 2 "unduly delayed".

United States. The article appears to the United States Government to be highly desirable. So far as concerns action after signature or deposit of an instrument of ratification, accession, etc., it regards the provisions of the article as reflecting generally accepted norms of international law. Broadening the article to cover the period of negotiation and drawing up until the time of adoption, in its view, goes beyond what is generally considered to be the existing position, though it thinks this to be a desirable improvement in the law.

New Zealand delegation. The delegation has misgivings about extending the obligation to all States associated with the treaty-making process. In its view, it is *prima facie* inequitable to apply it to a State which participates in the whole treaty-making process with the strongest reservations.⁸⁷

Observations and proposals of the Special Rapporteur

1. The view that paragraph 1 may go too far in extending the legal obligation of good faith to States which only took part in the negotiation or drawing up of the treaty appears to have some substance. In truth, the objects of a treaty cannot be said to be finally defined or legally established until its text has been "adopted" by the negotiating States. Consequently, it may not be justifiable to fix a negotiating State with an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty unless it positively associates itself with those objects

by signing the text or otherwise giving its vote to the adoption of the text. Politically and morally it is certainly desirable that negotiating States should be able to have a feeling of mutual confidence that they will not so act during the period of the negotiations as to frustrate the performance of the obligations which they may ultimately undertake towards each other. The question is, however, whether any legal obligation attaches to them unless and until they have in some degree associated themselves with the actual provisions of the treaty. In the *Polish Upper Silesia case*⁸⁸ the treaty had entered into force and the State concerned had ratified the treaty; moreover, the Court itself appears to have approached the matter from the point of view of whether the acts done prior to ratification constituted a breach of the treaty. One point of view might therefore be that the "good faith" obligation of a negotiating State not to frustrate in advance the objects of the proposed treaty is merely inchoate until the treaty enters into force with respect to that State; but that then it becomes complete on the State's entering into the obligations of the treaty. In drafting article 17, however, the Commission took the position that an independent obligation not to frustrate the objects of a proposed treaty attaches to a State when it takes part in the negotiations or in the drawing up or adoption of the text; and *a fortiori* when it ratifies, accedes to, accepts or approves the treaty.

2. No doubt paragraph 1, as drafted by the Commission, places the obligation of good faith on a State only "unless and until it shall have signified that it does not intend to become a party to the treaty". But it is arguable that this proviso may not suffice to exempt from the obligation a State which withdraws from the negotiations or votes against the adoption of the text, but to which under the terms of the treaty it nevertheless remains open to become a party. Thus under the existing draft, the obligation of good faith may appear to attach to such a State unless and until it afterwards signifies that it does not intend to avail itself of its right to become a party. The Special Rapporteur shares the view of those Governments which feel that paragraph 1 should be revised so as not to appear to place the obligation of good faith on a State which dissociates itself from the text of the treaty.

3. The Special Rapporteur also considers that in paragraph 2 effect should be given to the suggestion of the Finnish Government that, where a treaty is subject to denunciation, a State which has bound itself by signature, ratification, etc., should equally be able to withdraw from the treaty during the period before it comes into force.

4. In order to meet the United Kingdom Government's criticism of the expression "signified that it does not intend" in paragraph 1, the Special Rapporteur suggests that it be replaced by the expression "notified the other signatory States that it renounces its right to ratify... the treaty". As to the expression "unduly delayed", which that Government also criticizes as wanting in precision, its object was simply to put a reasonable limit on the duration of the obligation, should the treaty continue more or less indefinitely to lack the number of signatures, ratifications, etc., necessary to bring it into force. It is not

⁸⁷ *Ibid.*, 742nd meeting, para. 5.

⁸⁸ *P.C.I.J.* (1926) Series A, No. 7, p. 30.

easy to give further precision to the expression except by specifying a definite period of years. The Special Rapporteur tentatively suggests ten years as a reasonable period, having regard to the fact that the rule is intended to be of general application. He also suggests that the question of a time-limit arises under paragraph 1; and that the appropriate solution may be to cover the point in a separate paragraph placing a time-limit on the application of both paragraphs 1 and 2.

5. In the light of the above observations, the Special Rapporteur suggests that article 17 should be revised to read as follows:

"1. Prior to the entry into force of a treaty —

"(a) a State which has signed the treaty subject to ratification, acceptance or approval is under an obligation of good faith to refrain from acts calculated to frustrate its objects unless such State shall have notified the other signatory States of the renunciation of its right to ratify or, as the case may be, to accept or approve the treaty;

"(b) a State which, by signature, ratification, accession, acceptance or approval, has established its consent to be bound by the treaty is under the same obligation, unless the treaty is subject to denunciation and that State shall have notified the other States concerned of its withdrawal from the treaty.

"2. However, the obligations referred to in the preceding paragraph shall cease to apply ten years after the date of a State's signature, ratification, acceptance, or approval of the treaty if the treaty is not then in force."

SECTION III: RESERVATIONS

Title to the Section. Assuming that "General Provisions" becomes a separate "part" and that the "Conclusion of Treaties" becomes part II, it will be necessary to rename the present title "section II". In addition, the Special Rapporteur shares the view of the United States Government that it would be more appropriate to call the subject of the section "Reservations to multilateral treaties". The articles which it contains are directed to reservations to multilateral treaties, while the notion of a reservation to a bilateral treaty is legally somewhat meaningless. In law, a reservation to a bilateral treaty appears purely and simply as a counter-offer and, if it is not accepted, there can be no treaty. However, in order to remove the slightest possible risk of misunderstanding, it is proposed that the title to the section should explicitly confine its contents to reservations to *multilateral* treaties.

Article 18. — Formulation of reservations

Article 19. — Acceptance of and objection to reservations

Article 20. — The effect of reservations

Comments of Governments

Australia. The Australian Government considers that article 19, paragraph 3, may in practice be unworkable. In its view, a non-party should not be obliged to formulate objections within twelve months of the making of a reser-

vation if that occurs before the treaty is in force; indeed, it feels that no State should be obliged to object to a reservation before it becomes a party itself, and that States do not do so in practice. It believes that the Commission's proposal may lead to many "interim" objections put in to safeguard a State while it determines its final position, and that paragraph 3 should apply to existing parties only; any other State should be regarded as accepting if it does not object either on becoming a party or within some reasonable time thereafter. Paragraph 4 it thinks undesirable; for a State may have a number of reasons for delaying ratification, and its objection should still be enforceable at whatever date it does so. It concedes that delay in ratification would cause difficulties in treaties falling under article 20, paragraph 3; and it suggests that paragraph 4 of article 19 should be transferred to article 20, paragraph 3, as sub-paragraph (c). On the other hand, it thinks that much the preferable solution would be to adopt its proposed amendment of article 19, paragraph 3, which, in its view, would make it possible to dispense with paragraph 4 altogether.

In article 20, the Australian Government finds two problems. First, paragraph 2 (a) appears to it to make the reserving State a party vis-à-vis an accepting State at a stage when the reserving State, because a reservation may be made at signature, may not be a party to the treaty. It also suggests that on its face paragraph 2 (a) may appear to make a failure to object to a reservation formulated by an unrecognized State have the result of specifically creating a bilateral treaty relationship with that State. It would accordingly prefer the paragraph to read: "constitutes the reservation a part of the treaty in its application between the reserving and the accepting State." It also feels that it may be desirable in this or in some other article to deal with the effect of a reservation on the status of the reserving State as a party to the treaty both before and after acceptance of the reservation. Secondly, paragraph 2 (b) it thinks is unsatisfactory in appearing to treat as ineffective an objection on grounds other than incompatibility with the object and purpose of the treaty. Such a provision appears to it unacceptable in principle and inconsistent with article 19, paragraph 1 (d). It proposes that the words "which considers it... purpose of the treaty" should be deleted.

Austria. The Austrian Government considers that, while the opposition of one single State to a reservation should not have the effect of preventing the accession of the reserving State, equally a reservation opposed by a larger number of States — perhaps even the majority — should not be regarded as admissible. In addition, it thinks that the provisions on reservations, and particularly article 20, should make it clear that, on acceptance of a reservation by another party, the treaty will come into force for the two States concerned excluding the provisions to which the reservation relates. In its view, the articles in their present form leave it doubtful as to whether the treaty applies in full to the State which accepted the whole text and the doubt ought to be cleared up by a reference to the principle of reciprocity.

Canada. The Canadian Government observes that, as the articles are at present drafted, a question might arise as

to whether compatibility with the object and purpose of the treaty is to be the basis on which a State may *make* a reservation (article 18 (1) (d)) or on which it may *object* to a reservation (article 20 (2) (b)). If the former, the contracting States would still be entitled to object to reservations on other grounds. Interpreting the Commission's intention to be to make compatibility with the object and purpose of the treaty both a prerequisite for the admissibility of a reservation and the only ground upon which an objection can be taken to it, the Canadian Government suggests that the latter point should be more clearly stated in order to remove any basis for an argument that States may still object to reservations on other grounds. It further suggests that consideration should be given to extending the criterion of "compatibility with the object and purpose" equally to reservations made pursuant to express treaty provisions in order not to have different criteria for cases where the treaty is silent on the making of reservations and cases where it permits them. In addition, the Canadian Government suggests that in article 19 it is desirable to consider whether the presumption of a State's consent to a reservation should not be excluded in the case of a State which does not recognize the State making the reservation.

Denmark. While welcoming the Commission's proposals as a constructive attempt to solve the intricate problem of reservations, the Danish Government suggests that the scheme followed in articles 18-20 may have complicated unduly the wording of the articles. It also makes certain observations on the texts as they stand.

In article 18, paragraph 1, it considers that the words "when signing, ratifying, acceding to, accepting or approving a treaty" are unnecessary as they are spelled out in paragraph 2. Nor does it think that paragraph 1 (d) ought to be dealt with as a case of inadmissibility of reservations. The criterion of "compatibility with the object and purpose of the treaty" is subjective, and depositaries, whose functions do not include adjudicating upon the validity of a reservation, may feel uncertain under paragraph 1 (d) as to their obligation regarding the communication of a reservation which they consider to be clearly inadmissible.

Article 19 may, the Danish Government thinks, give the impression that it applies to any reservation, including those which are inadmissible. Where, however, a reservation is such as is prohibited by the treaty, expressly or impliedly, another party cannot accept it and equally is not called upon to object to it in order to prevent it from becoming effective. It also suggests that paragraph 2, which it considers to be self-evident, could safely be omitted.

Article 20, paragraph 2, the Danish Government considers defective in that it appears to leave open the question as to the effect of an objection to a reservation which is not considered to be incompatible with the object and purpose of the treaty but which is objected to on another ground, in particular, on the ground of the importance attached by the objecting State to the provision to which the reservation relates. It advocates the inclusion in the article of the rule mentioned in paragraph 13 of the

Commission's commentary, namely, the rule that "a State which within a reasonable time signifies its objection to a reservation is entitled to regard the treaty as not in force between itself and the reserving State". In addition, it advocates that paragraph 2 should deal explicitly with the objective question of the status of the reserving State in relation to the treaty, i.e., the conditions under which it is to be regarded as a "party" for purposes of clauses dealing with the entry into force, revision, etc., of the treaty. As to paragraph 3 concerning treaties between a small group of States, the Danish Government considers that in these cases express acceptance should always be required. In paragraph 4, having regard to the decisive weight to be attached to the integrity of constituent instruments of international organizations, the Danish Government considers that the admissibility of every reservation, whether or not another party has lodged an objection, should be submitted to the competent organ for decision. In its view, the possibility of implied or tacit acceptance should not be left open in these cases.

Finally, in the light of the above observations and with the object of simplifying the general structure of the articles, the Danish Government presents for consideration a redraft of articles 18-20 the text of which appears on pages 34-38 of the "Comments by Governments".⁸⁹

Finland. In the view of the Finnish Government, article 18, paragraph 1, could be simplified either by combining sub-paragraphs (a), (b) and (c) into one paragraph or by regarding sub-paragraph (a) as sufficient by itself.

Japan. The Japanese Government does not accept the rules proposed in these articles. In its view, the basic rule should be the reverse: that a State may make a reservation only if the parties do not intend otherwise. It fears that reservations may provide a means through which the whole system of the agreement embodied in the treaty may be brought to the ground; and it considers that the proposed rule would encourage the making of reservations. It also underlines that the proposed rule must be regarded as residual in nature and applicable only when the treaty itself is silent upon the making of reservations. The Japanese Government further finds an inconsistency between article 18, paragraph 1 (d), under which a reservation incompatible with the object and purpose of the treaty appears to be regarded as null and void, and article 20, paragraph 2 (b), which appears to leave the application of the text of compatibility to the discretion of the individual parties. It holds that it would be more logical to have a system under which the general intention of the parties as a whole would be ascertained, whether by a majority decision or by unanimity. In this connexion, it observes that the opinion given by the International Court in the *Reservations to the Genocide Convention* case⁹⁰ was limited to that particular Convention and to the intention of the parties with regard to that Convention; and that there is no need, in proposing a rule *de lege ferenda*, to follow the line adopted by the Court in that opinion. Finally, the Japanese Government notes that not infrequently a difficulty arises in practice of determining whether a statement

⁸⁹ In document A/CN.4/175 (mimeographed).

⁹⁰ *I.C.J. Reports, 1951*, p. 15.

is in the nature of a reservation or of an interpretative declaration. It suggests that a new provision should be inserted in paragraph 2 of article 18 in order to overcome this difficulty (see article 18, paragraph 2, of Japan's suggested revised version of the articles).⁹¹ Under this provision a declaration not entitled as a reservation would not be governed by the rules about tacit acceptance contained in article 19.

Poland. The Polish Government raises the question whether the formula in article 18, paragraph 1 (d), "incompatible with the object and purpose of the treaty", which it regards as very wide, would not lead in practice to a considerable restriction of the right of States to make reservations to treaties. It suggests that such a restriction might in turn reduce the possibility of their participation in certain treaties, which would, it thinks, be particularly undesirable in the case of general multilateral treaties.

Sweden. In general, the Swedish Government thinks that articles 18-20 represent a respectable effort to cover the problem of reservations but that further analysis is necessary and perhaps even more differentiation between the various types of treaties. At the same time, it feels that articles 18 and 19 contain much that simply exemplifies what the parties may prescribe or that merely amounts to procedural rules which would fit better into a code of recommended practices.

United Kingdom. The United Kingdom Government notes that article 18 deals only with reservations and assumes that the related question of statements of interpretation will be taken up in a later report.

Articles 19 and 20 it feels not to be completely satisfactory. It thinks that there may be difficulty in applying them in detail in practice, and more especially in applying paragraphs 3 and 4 of article 19 and paragraphs 2 and 3 of article 20. In general, it considers that a reservation which is incompatible with the object and purpose of a treaty should not be capable of being accepted under article 19; and that the provisions of articles 19 and 20 might be more readily acceptable if their interpretation and application were made subject to international adjudication.

United States. The United States Government considers that there may be a risk of confusion unless it is made clear that articles 18-20 are intended to apply only to multilateral treaties. It proposes that section III should therefore be given the title not simply of "Reservations" but of "Reservations to multilateral treaties".

In article 18 the United States Government thinks that the word "formulate" is not clear and that it is really intended "to permit a State to propose a reservation and to become a party to a treaty with that reservation". Paragraph 1 (d) it interprets as being completely subject to article 20, with the result that any State could become a party to a multilateral treaty under article 20, paragraphs 2 (a) and (b), if any one party accepts the reservation, regardless of objection by other parties and regardless of the "object and purpose of the treaty". Under such an interpretation, it suggests, States could have become

parties to the Charter with reservations which seriously weakened its structure. It also feels that paragraph 1 (d) does not take into account the nature or character of a multilateral treaty which in itself would preclude ratification with a reservation not accepted by all or at least by a large majority of the parties. It therefore proposes that paragraph 1 (d) should be revised as follows:

"In the case where the treaty is silent concerning the making of reservations, the reservation is incompatible with the object and purpose of the treaty, or the treaty is of such a character that each party to it must be in treaty relations with every other party."

Article 19, paragraph 3, regarding tacit acceptance of reservations is considered by the United States Government to have merit so far as concerns admission to a treaty of States making reservations. It questions, however, whether a State should be presumed to be bound by a new treaty relation that it never expressly approves. In its view, a State failing to object should be precluded from preventing the reserving State's participation in the treaty but should not be presumed to be in treaty relations with it unless the particular treaty contains indications to the contrary.

Article 20, paragraph 1 (a), suggests the United States Government, ought to allow for treaties which specifically permit reservations but require their acceptance by a given number or fraction of the parties. It therefore proposes the addition of the words "unless required by the terms of the treaty" at the end of this paragraph. With regard to paragraph 2 it reiterates its observations on the effect of this paragraph when read together with article 18, paragraph 1 (d). It suggests that consideration should be given to the relation between these provisions and the ratification of amendments to the Charter adopted under its Article 108. Paragraph 2 (a) it considers to need clarification because the words "any State to which it is open to become a party" might seem to contemplate that a State which is entitled to become a party but never in fact does so should be able, by accepting a reservation, to bring the treaty into force between that State and the reserving State. Paragraph 2 (b) the United States Government finds unsatisfactory in that the paragraph seems to imply that a State may not object to a reservation on any ground other than that it is "incompatible with the object and purpose of the treaty". A State may feel that, because of the type of treaty and the circumstances, a given reservation by another State would render relations between the two States inequitable. If the criteria for objecting to a reservation are limited to "incompatibility", the treaty rights expected by a ratifying State might be changed considerably by reservations to which it did not consent. Such a result, it points out, would not be consistent with the principle found in paragraph 4 of the Commission's introduction to its commentary on articles 18-20. In paragraph 4 the United States Government considers the phrase "the effect of the reservation" to be unclear, but assumes that it is intended to relate to the question whether or not the reserving State shall or shall not be considered a party to the constituent instrument of the organization. In its view, if the paragraph were intended to cover all the legal aspects of the reservation, including the legal relations

⁹¹ See document A/CN.4/175.

between the several parties, it would conflict with the principle "no reservation can be effective against any State without its agreement thereto". Although the United States Government thinks that article 21 makes it clear that the objecting State's rights would be preserved, it considers that paragraph 4 ought to be drafted in more precise terms in order to avoid any difficulties on this point. It further expresses the view that, even if paragraph 4 is limited to the question of membership, it could give rise to difficulties and confusion, as an objecting State may feel that it ought not to be bound in any way nor its interests affected by the vote of the reserving State in the decisions of the organization. In this connexion it recalls the Commission's observations on the handling of the alleged reservation to the IMCO Convention and its conclusions thereon in paragraph 25 of its commentary,⁹³ and the United States Government poses four questions:

(1) Was the reservation in the IMCO case an appropriate one on which to base a rule of international law?

(2) Is the IMCO precedent, in view of the essentially consultative character of the organization, applicable to other organizations whose character may be quite different, e.g., the International Atomic Energy Agency or the International Labour Organisation?

(3) As the effect of a reservation is essentially a legal matter, does not paragraph 4 assign to an international organization functions that should more properly be handled by the International Court?

(4) Is it proper to assume that "integrity of the instrument" involves not only the integrity of the organizational structure but also the integrity of commitments by States that ratify without reservations and that the latter is not normally a matter for determination by a body constituted for other than juridical purposes?

Argentine delegation. The delegation endorses the view that considerable flexibility with regard to participation in general multilateral treaties should be allowed. It stresses the many points of agreement between the Commission's drafts and the work of the fourth session of the Inter-American Council of Jurists in 1959. The chief difference between the two drafts is that under the Pan-American doctrine, where a treaty is silent on the question of reservations, a reservation may be valid even if incompatible with the object of the treaty. Acceptance of the reservation would bring the treaty into force between the reserving and the accepting State. The delegation further expresses the view that it would be desirable to apply the criterion in article 20, paragraph 4, to treaties drawn up by an international organization or an international conference, and to provide that the instrument should indicate the fundamental articles which could not be subjected to reservations.⁹³

Brazilian delegation. The delegation states that its approach to the question has been much modified by the opinion of the International Court in the *Reservations to the Genocide Convention* case; and it expresses the view

that in an era when a 100 States may be involved in the negotiations the need to formulate reservations, in view of their political, economic and social differences, may make that opinion more widely acceptable. In general it expresses approval of the line taken by the Commission in its drafts. In regard to article 20, paragraph 3, however, it feels that the expression "a small group of States" is too vague. How many States, it inquires, would constitute such a group? May other factors come into consideration, such as the nature of the relations between the States or the region to which they belong?⁹⁴

Colombian delegation. The delegation expresses the view that the draft articles are almost entirely correct in their interpretation of existing requirements; it also recalls some of the background to the resolution of the Inter-American Council of Jurists on reservations.⁹⁵

Czechoslovak delegation. The delegation suggests that the Commission should reconsider the provision in article 20, paragraph 2 (b), concerning the legal effects of an objection to a reservation. The presumption in that paragraph is that objections will have the maximum effect, i.e., that the objecting State will consider the whole treaty ineffective in its relations with the reserving State. The delegation considers that the presumption should be in favour of the minimum effects, i.e., that the objecting State would suspend the validity only of that part of the treaty to which the reservation relates. This rule would, it thinks, be more likely to broaden treaty relations among States and to prevent the formation of an undesirable vacuum in the legal ties between States.⁹⁶

Hungarian delegation. The delegation endorses the view that it is legitimate to assume that the power to make reservations without the risk of being totally excluded by the objection of one or even of a few States may be a factor in promoting a more general acceptance of multilateral treaties.⁹⁷

Iranian delegation. This delegation also endorses the view that the rule calculated to promote the widest possible acceptance of whatever common measure of agreement can be expressed in a multilateral treaty may be the one most suited to the immediate needs of the international community.⁹⁸

Irish delegation. The delegation does not favour the imposition of the time-limits in article 19, since to do so would place additional burdens on Foreign Offices which are lightly staffed.⁹⁹

New Zealand delegation. Having regard to the possibility of reservations being made to the articles on reservations, the delegation has hitherto preferred a code rather than a convention on reservations. However, it appreciates the Commission's reasons for adopting the convention method.¹⁰⁰

⁹³ *Yearbook of the International Law Commission, 1962*, vol. II, p. 181.

⁹⁴ *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 744th meeting*, paras. 5 and 6.

⁹⁴ *Ibid.*, 737th meeting, paras. 13 and 15.

⁹⁵ *Ibid.*, 741st meeting, paras. 8-12.

⁹⁶ *Ibid.*, 739th meeting, para. 6.

⁹⁷ *Ibid.*, 736th meeting, para. 4.

⁹⁸ *Ibid.*, 738th meeting, paras. 11 and 12.

⁹⁹ *Ibid.*, 743rd meeting, para. 13.

¹⁰⁰ *Ibid.*, 742nd meeting, para. 6.

Romanian delegation. While generally endorsing the Commission's approach to the problem of reservations, the delegation takes the view that article 20 should establish a presumption not of maximum but of minimum effects — suspension of the validity of only that part of the treaty covered by the reservation.¹⁰¹

Syrian delegation. The delegation considers that the purpose of admitting the greatest possible number of States to general multilateral treaties would best be fulfilled by limiting the effect of the objection to the article or articles affected. It proposes that article 20, paragraph 2 (b) should be revised accordingly, and suggests that it be replaced by two sub-paragraphs giving effect to its view.¹⁰²

United Arab Republic delegation. The delegation expresses general approval of the solution proposed by the Commission.¹⁰³

Yugoslav delegation. The delegation considers that the Commission should not adopt a restrictive attitude with regard to the concept of reservations, and should bear in mind that the essential aim is to secure the widest possible participation in general multilateral treaties.¹⁰⁴

Observations and proposals of the Special Rapporteur

1. Two Governments refer to the distinction between a "reservation" and an "interpretative declaration". The Japanese Government notes that not infrequently a difficulty arises in practice of determining whether a statement has the character of the one or of the other; and it suggests the insertion of a new provision in article 18, paragraph 2, to overcome the difficulty. This suggestion appears to the Special Rapporteur to overlook the fact that the term "reservation" is already defined in article 1, paragraph 1 (f), in terms which indicate that it is something other than a mere interpretative understanding of the provision to which it relates. Having regard to that definition, it is not thought necessary to underline the point again in article 18. Indeed, the other Government — the United Kingdom Government — actually notes that article 18 does deal only with reservations and, in effect, asks whether statement of interpretation are to be taken up in a later article.

2. Statements of interpretation were not dealt with by the Commission in the present action for the simple reason that they are not reservations and appear to concern the interpretation rather than the conclusion of treaties. In short, they appear rather to fall under articles 69-71. These articles provide that the "context of the treaty, for the purposes of its interpretation", is to be understood as comprising "any agreement or instrument related to the treaty and reached or drawn up in connexion with its conclusion" (article 69, paragraph 2); that "any agreement between the parties regarding the interpretation of the treaty" and "any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation" are to be taken into account "together with the context" of the

treaty for the purposes of its interpretation (article 69, paragraph 3); that as "further means of interpretation" recourse may be had, *inter alia*, to the "preparatory work of the treaty and the circumstances of its conclusion" (article 70); and that a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning. Any of these provisions may come into play in appreciating the legal effect of an interpretative declaration in a given case. Interpretative statements are certainly important, but it may be doubted whether they should be made the subject of specific provisions; for the legal significance of an interpretative statement must always depend on the particular circumstances in which it is made. It may have been made during the negotiations; or at the time of signature, ratification, etc., or afterwards in the "subsequent practice" of the State in applying the treaty; and it may or may not have met with the express or implied agreement of the other States concerned. The substantive question in each case is whether the statement must be considered as having been expressly or impliedly accepted in one way or another by the other parties so as, in effect, to become part of the treaty.¹⁰⁵ The question is not peculiar to statements of interpretation, though they may be the most obvious case; for it also applies to other statements made in connexion with the treaty, such as statements of intention or of policy. In the view of the Special Rapporteur the Commission was entirely correct in deciding that the matter belongs under articles 69-71 rather than under the present section; and the Commission will, no doubt, give it further consideration when it re-examines those articles at its session of 1966.

3. The problem of reservations was the subject of a prolonged examination at the fourteenth session.¹⁰⁶ The Commission was agreed that, where the treaty itself deals with the question of reservations, the matter is governed by the terms of the treaty. It was also agreed that, where a treaty concluded between a small group of States is silent upon the question of reservations, the rule of unanimity applies. In the case of other multilateral treaties which are silent upon the question of reservations, opinion in the Commission was to some extent divided. Certain members of the Commission considered it essential that the effectiveness of a reservation to a multilateral treaty should be dependent on at least some measure of common acceptance of it by the other States concerned. They advocated a rule under which, if more than a certain proportion of the interested States (for example, one-third) objected to a reservation, the reserving State would be barred altogether from considering itself a party to the treaty, unless it withdrew the reservation. The view which prevailed in the Commission, however, was that in the case of general multilateral treaties and of other treaties having a large number of parties, a more flexible system is appropriate, under which each State would decide individually whether or not to accept a reservation and to regard the reserving

¹⁰¹ *Ibid.*, 742nd meeting, para. 27.

¹⁰² *Ibid.*, 739th meeting, para. 19.

¹⁰³ *Ibid.*, 744th meeting, para. 11.

¹⁰⁴ *Ibid.*, 743rd meeting, para. 16.

¹⁰⁵ See *Yearbook of the International Law Commission, 1964*, vol. II, p. 203, para. 13 of the Commission's commentary to articles 69-71.

¹⁰⁶ See *Yearbook of the International Law Commission, 1962*, vol. I, 651st-654th, 656th, 663rd, 664th, 667th, 668th and 672nd meetings, pp. 139-168, 172-175, 234, 252, 253, 257, 258 and 287-291; *ibid.*, vol. II, pp. 175-182.

State as a party to the treaty for the purpose of the relations between the two States. Although they criticize certain aspects of the Commission's proposals, the comments of Governments, taken as a whole, appear to the Special Rapporteur to endorse the Commission's decision to try to work out a solution of the problem of reservations to multilateral treaties on the basis of the flexible system followed in the existing texts of articles 18-20.

4. The Special Rapporteur considers that there is substance in the contention of the Danish Government that, as at present drafted, article 19 may give the impression that the process of tacit consent provided for in that article applies equally to reservations prohibited by the treaty, and in its view that other States ought not to be called upon to take a position with regard to such reservations. In order to take account of this point and to simplify the logical arrangement of the different parts of articles 18-20, the Special Rapporteur proposes that the cases where the treaty expressly or impliedly forbids the making of the reservation should be separated from the cases where the treaty is silent concerning the making of reservations. This would mean, so far as substance is concerned, taking paragraph 1 (a), (b) and (c) of article 18 and paragraph 1 (a) of article 20 and making them into a separate article. On this basis, the following would be substituted for the present article 18:

"Article 18

"Treaties permitting or prohibiting reservations

"1. A reservation permitted by the terms of the treaty is effective without further acceptance by the interested States, unless the treaty otherwise provides.

"2. Unless expressly agreed to by all the interested States, a reservation is inadmissible when:

"(a) the making of the reservation is prohibited by the treaty or by the established rules of an international organization;

"(b) the treaty expressly authorizes the making of specified reservations which do not include the reservation in question."

In paragraph 1 the words "unless the treaty otherwise provides" are inserted in order to take account of the possibility mentioned by the United States Government that a treaty may specifically authorize reservations but on condition of their acceptance by a specified number or fraction of the parties. One Government, it is true, suggests that the criterion of "compatibility with the object and purpose" should be made applicable equally to reservations made pursuant to express treaty provisions. The Commission, however, felt at its fourteenth session that, where the parties have themselves predicated what is or what is not an admissible reservation, that should conclude the matter. A conceivable exception might be where a treaty expressly forbids certain specified reservations and thereby impliedly permits others; for it might not be unreasonable to regard compatibility with the object and purpose as still an implied limitation on the making of other reservations. But this may, perhaps, go too far in refining the rules regarding the intentions of the parties, and there is something to be said for keeping the rules in article 18 as simple as possible.

5. The Special Rapporteur next suggests that a new article 19 should then deal with the proposing and the admission of reservations in cases where the treaty contains no provisions dealing with the question of reservations; in other words, the new article 19 would include the substance of article 18, paragraph 1 (d), and of article 20. On this basis the following would replace the present article 19:

"Article 19

"Treaties silent concerning reservations

"1. Where a treaty is silent on the question of reservations, reservations may be proposed provided that they are compatible with the object and purpose of the treaty. In any such case the acceptance or rejection of the reservation shall be determined by the rules in the following paragraphs.

"2. When it appears from the nature of a treaty, the fewness of its parties or the circumstances of its conclusion that the application of its provisions between all the parties is to be considered an essential condition of the treaty, the reservation shall be effective only on its acceptance by all the parties.

"3. Subject to article 3 (bis), when a treaty is a constituent instrument of an international organization, acceptance of a reservation shall be determined by the competent organ of the international organization.

"4. In other cases, unless the State concerned otherwise specifies:

"(a) acceptance of a reservation by any party constitutes the reserving State a party to the treaty in relation to such party;

"(b) objection to a reservation by any party precludes the entry into force of the treaty as between the objecting and the reserving State.

"5. In cases falling under paragraph 4 a reserving State is to be considered a party to the treaty if and when one other State which has established its consent to be bound by the treaty shall have accepted the reservation."

6. Paragraph 1 of the proposed new article 19 restates in positive form the rule contained in the existing article 18, paragraph 1 (d), and it retains the criterion of "compatibility with the object and purpose of the treaty" as a limitation on the freedom to propose reservations. One Government criticizes the Commission's use of the expression "formulate a reservation" in the existing article 18. It may be doubted whether this criticism is justified, since that article covered cases both of a right to make and of freedom to propose reservations, and it was necessary to employ a neutral term. If, however, the articles on reservations are rearranged in the manner suggested by the Special Rapporteur, the new article 19 will concern cases only of freedom to "propose" reservations, and this term is therefore substituted in paragraph 1 of this new article. As to the criterion of "compatibility with the object and purpose", the Polish Government queries whether it might not lead in practice to a considerable restriction of the right of States to make reservations to treaties; and it says that this would be particularly undesirable in the case of general multilateral treaties. Although for quite different reasons, the Danish Government also would prefer to see the element of "compatibility with the object and purpose" omitted from this provision. It feels that

the criterion is subjective and that depositaries, when confronted with a reservation which they think to be clearly inadmissible, may feel uncertain as to their obligation to communicate it to the other interested States. The Argentine delegation noted that under the Pan-American system a reservation may be valid even if incompatible with the object of the treaty. On the other side, the Canadian and United States Governments appear to advocate the emphasizing of the "compatibility" criterion in the present context. At the fourteenth session the Commission accepted the principle of compatibility with the object and purpose of the treaty as a general criterion of the legitimacy of reservations. The Special Rapporteur does not feel that the difficulty mentioned by the Danish Government is such as should lead the Commission to alter its view. The same difficulty may arise in the case of treaties containing imprecise provisions on the subject of reservations, and it is no part of the functions of a depositary to adjudicate upon reservations. The most that it is entitled to do is to express its doubts to the reserving State but, if the latter maintains its reservation, the depositary must communicate it to the other interested States (see article 29, paragraphs 5 to 8). The point made by the Polish Government is more fundamental, since it really questions the principle which the Commission accepted and which the Court applied in its opinion in the *Genocide Convention* case. While recognizing that the application of the criterion may involve some element of subjective appreciation, the Special Rapporteur is not persuaded of the cogency of the considerations referred to by the Polish Government. In the first place, it may be doubted whether interpretation of a treaty in good faith admits the possibility, in case of the treaty's being silent on the question of reservations, of attributing an intention to the parties to allow reservations incompatible with its object and purpose. The objects and purposes of the treaty, as the Commission recognized in adopting article 69 at its sixteenth session, are criteria of fundamental importance for the interpretation in good faith of a treaty. Moreover, in article 17 the Commission has proposed that a State which has signed, ratified, acceded to, accepted or approved a treaty should, even before it comes into force, be required to refrain from acts calculated to frustrate its objects. It would seem somewhat strange if in the present article a freedom to make reservations incompatible with the objects and purposes of the treaty were to be recognized. In the second place, the initial appreciation of whether the reservation is compatible with the object and purpose lies with the reserving State itself, which is unlikely to take an unduly strict view of the application of the criterion. Having regard to the extremely flexible system proposed by the Commission, under which a reserving State will become a party to the treaty so long as its reservation is not objected to by one other party, it seems very unlikely that paragraph 1 of the proposed new article 19 (paragraph 1 (d) of the existing article 18) would exercise a material influence in inhibiting participation in multilateral treaties.

7. Paragraph 2 of the new article 19 covers the substance of paragraph 3 of the existing article 20. The Commission, as already noted, was agreed that the "flexible" system

which it proposed for reservations to multilateral treaties between a considerable number of States is inappropriate for treaties concluded between a small group of States; and that in this type of multilateral treaty the rule of unanimity should apply. The Brazilian delegation criticizes the expression "small group of States" as being too vague; and the United States Government, in commenting on paragraph 1 (d) of the existing article 18, stresses that it does not take into account cases where the very nature of the treaty would preclude its being ratified with a reservation not accepted by all or at least by a large majority of the parties. The Commission experienced some difficulty in formulating a satisfactory definition of the multilateral treaties which should be regarded as subject to the unanimity rule for acceptance of reservations. Moreover, although the comments of Governments on reservations do not, on the whole, contain much criticism of the expression "small group of States", this is not the case with their comments on article 9, paragraph 2, where the phrase also occurs. Accordingly, it seems desirable for the Commission to look for some method of further defining the category of treaties which this expression is intended to denote. In article 9, the Special Rapporteur believes that, with a somewhat different approach, the drawing of the distinction can be avoided altogether. In the present context, however, the drawing of the distinction would appear to be inescapable, unless the rule of unanimity were to be regarded as applicable to all multilateral treaties, which is not the general view today. At root the question is one of the intention of the parties and to find a completely precise definition of the category of treaties in issue is not within the bounds of possibility. The problem is to find a definition which is workable for the present purpose if applied in good faith. The Special Rapporteur in paragraph 2 of the new article 19 has sought to make the criterion depend not simply on the number of the parties but on the question whether it must be presumed that the treaty is intended to apply at all times between all the parties; for this is the very point to which the distinction between the different categories of treaties is directed. In making this presumption, it is thought, regard should be had not only to the fewness of the parties but also to the nature of the treaty and the circumstances of its conclusion.

8. Paragraph 3 of the new article 19 covers the substance of paragraph 4 of the existing article 20. The Danish Government considers that in the case of a constituent instrument of an international organization the admissibility of every reservation, whether or not an objection has been lodged against it, should be submitted to the competent organ for decision; and that there should be no question of implied or tacit acceptance in these cases. The Special Rapporteur shares the views of the Danish Government on these points and also the view of the United States Government that the phrase "the effect of the reservation" is unsatisfactory and should be rendered "acceptance of a reservation". Paragraph 3 of the new article 19 and paragraph 4 of the new article 20 take these views into account. The United States Government appears to go further and to question whether an individual member should be bound to accept the decision of the

competent organ in its relations with the reserving State under the constituent treaty; and in general it queries the relevance of the IMCO precedent. The observations of the United States Government, in so far as they may imply that in the sphere of reservations an organization is never competent to interpret and apply its constituent instrument and that this function belongs exclusively to legal tribunals, appear to go too far. The question seems rather to be whether an organization is competent to decide, on behalf of its members, concerning the *acceptance* of a reservation. The Commission will no doubt re-examine this question; in the meanwhile the Special Rapporteur feels that he should formulate paragraph 3 on the basis of the principle adopted by the Commission. Clearly, the application of this principle is, however, subject to the "established rules of the organization", and it seems prudent to make a cross-reference to article 3 (*bis*). Again, as in the case of treaties falling under paragraph 2, he feels that it should be made clear that implied or tacit acceptance of reservations does not apply, and this is done in paragraph 5 of the new article 20.

9. Paragraph 4 of the new article 19 deals with acceptance and rejection of reservations and contains the two basic principles of the "flexible" system. Paragraph 4 (*a*) follows paragraph 2 (*a*) of the existing article 20 in not specifying "compatibility with the object and purpose" as an express condition for the acceptance of a reservation. One Government, the United Kingdom Government, takes the view that a reservation which is incompatible with the object and purpose of a treaty should not be capable of being accepted under article 19. It also observes that the rules proposed by the Commission might be more readily acceptable if their interpretation and application were made subject to international adjudication. The United States Government, while pointing out that the Commission's proposals might have unsatisfactory results with regard to certain types of treaty, does not appear to query the proposed rule in other cases. The Commission recognized that the "compatibility" criterion is to some extent subjective and that views may differ as to the compatibility of a particular reservation with the object and purpose of a given treaty. In the absence of compulsory adjudication, on the other hand, it felt that the only means of applying the criterion is through the individual State's acceptance or rejection of the reservation. It felt bound to infer that a State which expressly accepts, or makes no objection to, a reservation considers it to be compatible with the object and purpose of the treaty. Such an inference would seem to follow automatically from the fact that paragraph 1 of the new article 19 (paragraph 1 (*d*) of the existing article 18) only contemplates the admissibility of reservations "compatible with the object and purpose". In any event, acceptance of a reservation, whether express or implied, would seem necessarily to be conclusive in the bilateral relations between the accepting and reserving State on the principle *allegans contraria non audiendus est*. Accordingly, although the Special Rapporteur would see no objection to mention of the "compatibility" criterion in connexion with acceptance of reservations, he doubts whether it would alter the situation under the "flexible" system the adoption of

which forms the basis of the Commission's proposals. The point made by the United States Government concerning possible difficulties in connexion with particular types of treaty is partly covered by paragraphs 3 and 4 of the existing article 20, and falls under paragraph 2 of the new article 19; it is further discussed in paragraph 7 of these observations.

10. Paragraph 4 (*b*) of the new article 19 also raises a question as to the application of the "compatibility" criterion. Paragraph 2 (*b*) of the existing article 20, to which it corresponds, limits the freedom to object by impliedly confining it to reservations considered incompatible with the object and purpose of the treaty. The Canadian Government thinks that this implication should be made clearer. The Australian, Danish and United States Governments, on the other hand, maintain that a State should remain free to object to a reservation which it considers to be harmful to its own interests independently of the compatibility of the reservation with the object and purpose of the treaty; and they advocate the deletion of the limiting words. At the fourteenth session there was some difference of view amongst members of the Commission on this point. Certain members attached importance to applying the compatibility criterion at all points of the flexible system — proposing, accepting and objecting to reservations. Others thought that a State should be free to object to a reservation on the sole ground of its prejudice to their own interests. It was also felt that the difference might not be very great in practice, since a State objecting on grounds of its own interests would be likely at the same time to characterize the reservation as incompatible with the objects and purposes of the treaty. The Special Rapporteur considers that either solution can be justified in principle. On the one hand, the view may be taken that the silence of the treaty should be interpreted as implying consent to the making of reservations compatible with the object and purpose of the treaty, in which case consent to any particular reservation of that character must be held to have been given in advance. On the other hand, the view may equally be taken that the silence of the treaty implies no more than consent to the proposing of "compatible" reservations, in which case the right to object to a particular reservation would be retained. The latter view is believed by the Special Rapporteur to reflect the existing practice, and in the light of the comments of Governments he has tentatively formulated paragraph 3 (*b*) of the new article 19 on that basis.

11. Another point which arises under paragraph 2 is the moment at which account is to be taken of the acceptance or rejection of a reservation. The Australian and United States Governments represent that, by using the phrase "any State to which it is open to become a party" in paragraph 2 (*a*) of the existing article 20, the Commission appears to contemplate the possibility of a reserving State's being a "party" *vis-à-vis* a State which has not yet itself become definitively bound by the treaty. Although the Commission qualified the rule in paragraph 2 (*a*) by the phrase "as soon as the treaty is in force", this is not enough to exclude the interpretation which is queried by the Australian Government. The point is not purely one of drafting, since it touches the question of the conditions

under which a reserving State is to be considered a "party" to a multilateral treaty under the "flexible" system. Indeed, not only the Australian but also the Danish Government urges the Commission to deal explicitly with that question, since it may affect the determination of the date on which the treaty comes into force and may otherwise be of concern to a depositary. The Special Rapporteur understands the position under the "flexible" system to be that a reserving State is to be considered as a "party" if and at the moment when another State which has established its consent to be bound by the treaty accepts the reservation either expressly or tacitly under paragraph 3 of the existing article 19 (paragraph 4 of the new article 20 as given below). If this understanding is correct, the point made by the Australian and United States Governments is clearly well-founded. Paragraphs 4 (a) and 4 (b) of the new article 19 therefore speak of "any party" instead of "any State to which it is open to become a party".

12. Paragraph 5, specifying when a State is to be considered a party in cases falling under the flexible system, has been added to the new article 19 for the reasons given in the preceding paragraph of these observations.

13. Finally, the Special Rapporteur proposes a new article 20 to cover the more procedural aspects of reservations which are at present dealt with in paragraphs 2 and 3 of the existing article 18 and in article 19. Two Governments suggest that some simplification of the procedural provisions is desirable, and the Special Rapporteur feels that, although they are not without value, the sub-paragraphs in paragraph 2 of the existing article 18 may be dispensed with. He also feels that it is possible to shorten the drafting in some places. These considerations lead him to submit the following as the text of the new article 20:

"Article 20

"Procedure regarding reservations

"1. A reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the other interested States.

"2. A reservation put forward upon the occasion of the adoption of the text or upon signing a treaty subject to ratification, acceptance or approval, shall be effective only if the reserving State formally confirms the reservation when ratifying, accepting or approving the treaty.

"3. Acceptance of a reservation, if express, takes place:

"(a) In any appropriate formal manner on the occasion of the adoption of the text or signature of the treaty or of the exchange or deposit of an instrument of ratification, accession, acceptance or approval;

"(b) By notification to the depositary or, if there is no depositary, to the reserving State and to the other interested States.

"4. In cases falling under article 19, paragraph 4, a reservation shall be considered to have been accepted by any State:

"(a) which, having had notice of it for not less than twelve months, proceeds to establish its consent to be bound by the treaty without objecting to the reservation; or

"(b) which raises no objection to the reservation during a period of twelve months after it established its consent to be bound by the treaty.

"5. An objection to a reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the reserving State and to the other interested States.

"6. An objection to a reservation has effect only when the objecting State shall have established its consent to be bound by the treaty."

14. Paragraph 1 includes the opening phrase of paragraph 2 (a) of the existing article 18 and a simplified version of paragraph 3 of that article.

15. Paragraph 2 contains a slightly simplified version of paragraph 2 (b) of the existing article 18.

16. Paragraph 3 contains a slightly simplified version of paragraph 2 of the existing article 19. If this paragraph is to a large extent expository, its retention seems advisable as a prelude to the important provisions regarding tacit consent in the next paragraph.

17. Paragraph 4 concerns the implied acceptance of a reservation through failure to object, which is the subject of paragraph 3 of the existing article 19. The rule proposed by the Commission was that any State should be considered to have accepted a reservation which failed to object within twelve months of having received notice of it. The Australian Government maintains that this rule may not in practice be workable; that no State should be obliged to object to a reservation before it becomes a party itself, and that it is not the practice to do so. It considers that the Commission's rule should apply only to actual parties; and that other States should be regarded as accepting a reservation if they do not object to it either on becoming a party or within some reasonable time thereafter. The United Kingdom refers in general terms to paragraph 3 of the existing article 19 as not being completely satisfactory. The United States, while considering the paragraph to have merit so far as concerns the admission of a reserving State to a treaty, questions whether a State should ever be presumed to be bound by a new treaty relation that it never expressly approves. It suggests that a State which fails to object should be precluded from preventing the reserving State's participation in the treaty but should not normally itself be presumed to be in treaty relations with that State. The last suggestion is believed by the Special Rapporteur to be contrary to the existing practice in multilateral treaties; and it seems to have the disadvantage of putting a premium upon a State's taking no position with regard to reservations and of being likely to reduce materially the range of the treaty relationships set up by multilateral treaties. On the other hand, there appears to be substance in the view that the inaction of a State which has not yet become a party should not be considered as tantamount to acceptance, unless and until it does become a party without making any objection to the reservation. The Special Rapporteur therefore submits a revised formulation of the Commission's rule which takes account of this point.

18. A further point to note in paragraph 4 of the new article 20 is that the opening phrase limits the application of the paragraph to cases falling under article 19, paragraph 4; in other words, it excludes from the special rules there laid down regarding tacit consent treaties between a "small group of States" and treaties which are constituent instruments of international organizations. The Danish Government goes so far as to advocate that in the case of treaties between a "small group of States" express acceptance of a reservation should always be required. The Special Rapporteur doubts whether such a rule would fully accord with existing practice, or whether it would be advisable formally to exclude any possibility of tacit consent in such cases. He agrees, however, that treaties between a "small group of States" should not be subjected to the special rule under which tacit consent will be presumed after the expiry of twelve months. He also shares the view of the Danish and United States Governments that it would be inappropriate to subject constituent instruments of international organizations to that rule. Hence it seems necessary to specify that paragraph 4 applies only to multilateral treaties other than treaties between a "small group of States" and treaties which are constituent instruments of organizations.

19. Paragraph 5 is a slightly shortened and modified version of paragraph 5 of the existing article 19.

20. Paragraph 6 replaces paragraph 4 of the existing article 19. The rule proposed by the Commission provides that an objection by a State not a party to the treaty loses its force if two years after making the objection the State has still not become a party to the treaty. The Australian Government considers this provision to be undesirable, as there may be good reasons for a State to delay its ratification of a treaty and its objection to a reservation ought, in the view of the Australian Government, to hold good whenever ratification takes place. It suggests that this provision can be dispensed with altogether if the rules regarding tacit consent are formulated in the way which the Special Rapporteur now proposes in paragraph 4 of the new article 20. The Special Rapporteur considers that there is substance in the Australian Government's criticism of the rule proposed by the Commission. On the other hand, he feels that it is necessary to lay down some rule regarding the status of an objection lodged by a State which has not established its own consent to be bound by the treaty. The point is primarily of importance in the case of treaties between a "small group of States", where a reservation requires acceptance by all the parties. The rule now proposed by the Special Rapporteur in paragraph 6 of the new article 20 is thought to meet the case; it deprives an objection of any effect unless and until the objecting State shall itself have established its consent to be bound by the treaty.

21. Finally, for convenience of reference the new texts proposed by the Special Rapporteur for articles 18-20 are set out *in extenso* below:

"Article 18

"Treaties permitting or prohibiting reservations

"1. A reservation permitted by the terms of the treaty is effective without further acceptance by the interested States, unless the treaty otherwise provides.

"2. Unless expressly agreed to by all the interested States, a reservation is inadmissible when:

"(a) the making of the reservation is prohibited by the treaty or by the established rules of an international organization;

"(b) the treaty expressly authorizes the making of specified reservations which do not include the reservation in question."

"Article 19

"Treaties silent concerning reservations

"1. Where a treaty is silent on the question of reservations, reservations may be proposed provided that they are compatible with the object and purpose of the treaty. In any such case the acceptance or rejection of the reservation shall be determined by the rules in the following paragraphs.

"2. When it appears from the nature of a treaty, the fewness of its parties or the circumstances of its conclusion that the application of its provisions between all the parties is to be considered an essential condition of the treaty, the reservation shall be effective only on its acceptance by all the parties.

"3. Subject to article 3 (*bis*), when a treaty is a constituent instrument of an international organization, acceptance of a reservation shall be determined by the competent organ of the international organization.

"4. In other cases, unless the State concerned otherwise specifies:

"(a) acceptance of a reservation by any party constitutes the reserving State a party to the treaty in relation to such party;

"(b) objection to a reservation by any party precludes the entry into force of the treaty as between the objecting and the reserving State.

"5. In cases falling under paragraph 4 a reserving State is to be considered a party to the treaty if and when one other State which has established its consent to be bound by the treaty shall have accepted the reservation."

"Article 20

"Procedure regarding reservations

"1. A reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the other interested States.

"2. A reservation put forward upon the occasion of the adoption of the text or upon signing a treaty subject to ratification, acceptance or approval, shall be effective only if the reserving State formally confirms the reservation when ratifying, accepting or approving the treaty.

"3. Acceptance of a reservation, if express, takes place:

"(a) In any appropriate formal manner on the occasion of the adoption of the text or signature of the treaty or of the exchange or deposit of an instrument of ratification, accession, acceptance or approval;

"(b) By notification to the depositary or, if there is no depositary, to the reserving State and to the other interested States.

"4. In cases falling under article 19, paragraph 4, a reservation shall be considered to have been accepted by any State:

"(a) which, having had notice of it for not less than twelve months, proceeds to establish its consent to be

bound by the treaty without objecting to the reservation; or

“(b) which raises no objection to the reservation during a period of twelve months after it established its consent to be bound by the treaty.

“5. An objection to a reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the reserving State and to the other interested States.

“6. An objection to a reservation has effect only when the objecting State shall have established its consent to be bound by the treaty.”

Article 21. — *The application of reservations*

Comments of Governments

Japan. The Japanese Government proposes the deletion of the word “claim” in paragraph 1 (b). In its view, a non-reserving State, in its relations with the reserving State, should be *definitively entitled* to the same modification as that effected by the reservation and not merely entitled to “claim” it.

United States. The United States Government observes that the acceptability of this article depends on the acceptability of article 20 and on the agreement of satisfactory texts for articles 18 and 19. In addition, it observes that, if section III is not limited to multilateral treaties, the question ought to be considered as to what, if anything, should be laid down in articles 19 and 20 regarding implications arising from acts taken by the parties other than a specific statement of acceptance or rejection, e.g., the application of a bilateral treaty without the other party’s having specifically accepted or rejected the reservation. (*Quaere* whether this observation does not really concern articles 19 and 20.) In paragraph 1 (b) the United States Government considers that the phrase “to claim” is ambiguous, as it might be understood to require the non-reserving State to notify the reserving State of an intention to invoke the reservation before it could become entitled to do so in its relations with the reserving State. It proposes that “to apply” should be substituted for “to claim”. Paragraph 2, the United States Government thinks, should not exclude the situation — even if an unusual one — where a State objects to or refuses to accept a reservation but nevertheless considers itself in treaty relations with the reserving State. In order to cover such a situation it suggests the addition of a new paragraph, as follows:

“Where a State rejects or objects to a reservation but considers itself in treaty relations with the reserving State, the provisions to which the reservation applies shall not apply between the two States.”

Observations and proposals of the Special Rapporteur

1. If articles 18-20 are rearranged along the lines proposed by the Special Rapporteur, it will be necessary to modify the opening phrase of the present article. In that event the following text is suggested:

“A reservation established as effective under the provisions of articles 18-20 operates:”

2. In paragraph 1 (b) both the Governments which have commented upon the article have criticized the word “claim”; and this criticism appears to be justified. One possibility might be, as suggested in the comments of Governments, simply to substitute the word “apply” for “claim”. On the other hand, it may be better to go further and to revise paragraph 1 (b) to read as follows:

“Reciprocally to modify the provisions of the treaty to the same extent for each party to the treaty in its relations with the reserving State.”

3. The United States Government suggests that a further paragraph should be added to cover the situation — even if an unusual one — where a State objects to, or refuses to accept, a reservation but nevertheless considers itself in treaty relations with the reserving State. The possibility of such a situation’s arising is provided for in the existing article 20, paragraph 2 (b), and in the new article 19, paragraph 3, and it would therefore be logical to allow for it in the present article. On the other hand, the Special Rapporteur is a little doubtful whether it would be correct to represent the situation as arising from a unilateral expression of will on the part of the objecting State. Is a reserving State obliged to recognize the establishment of treaty relations with the State which has rejected its reservation? The Special Rapporteur feels that it may perhaps be necessary to formulate the additional paragraph on the following lines:

“Where a State objects to the reservation of another State, but the two States nevertheless consider themselves to be mutually bound by the treaty, the provision to which the reservation relates shall not apply in the relations between those States.”

Article 22. — *The withdrawal of reservations*

Comments of Governments

Israel. In the case of treaties for which there is a depositary, the Government of Israel considers that it will be natural, and more consonant with the procedure for multilateral treaties followed in the draft articles as a whole, for a State notifying its withdrawal of a reservation to do so through the channel of the depositary. The present text, in its view, is open to the interpretation that the State concerned is obliged to inform the other interested States individually. It further considers that where the channel of the depositary is employed, the withdrawal of a reservation should normally take effect in accordance with the provisions of the treaty or, failing them, in accordance with the provisions of the draft articles regarding the taking effect of communications made by or through a depositary, unless the notice of withdrawal specifies otherwise.

United Kingdom. The United Kingdom Government considers that, on the withdrawal of a reservation, other States should be allowed a reasonable time (e.g., three months) before becoming bound by any new obligations resulting from the withdrawal, unless the treaty expressly

provides otherwise. Those States might need, it thinks, to adjust their laws or administrative practices to meet the new situation resulting from the withdrawal of the reservation.

United States. The United States Government supports this article, and finds particular merit in the provision that the withdrawal of the reservation "takes effect when notice of it has been received by the other States concerned".

Observations and proposals of the Special Rapporteur

1. Cases are infrequent where a treaty contains provisions regarding the withdrawal of reservations. In principle, however, where a treaty does in fact contain such provisions, they ought to prevail over those of the present article. Accordingly, the Special Rapporteur proposes that the article should be prefaced with the general reservation "Unless the treaty otherwise provides", the operative provisions becoming sub-paragraphs.

2. While doubting whether the second sentence of paragraph 1 is susceptible of the interpretation that a notice would have to be given directly and not through a depositary, the Special Rapporteur shares the view of the Government of Israel that, as in other articles, specific reference should be made to communicate through the depositary.

3. The further suggestion of the Government of Israel raises a larger question. The suggestion is that the notice of withdrawal should normally take effect in accordance with the terms of the treaty, or failing them, in accordance with the provisions of the present articles regarding the taking effect of communications made by or through a depositary, unless otherwise specified in the notice of withdrawal. Rare indeed are the cases where the treaty itself contains any provisions on the point, so that the residuary rule laid down in the present articles would normally be applicable. Article 29, which deals with the functions of a depositary, does not in its present form contain any provision regarding the time of the taking effect of a communication made by or through a depositary. On the other hand, article 15, paragraph 2, specifically lays down that, unless otherwise provided by the treaty, instruments of ratification, accession, etc., become operative upon the deposit of the instrument with the depositary. In its comments upon article 29, the Government of Israel puts forward a proposal designed to make allowance for the observance of the normal administrative processes necessary for the depositary's preparation of the relevant communications and for their receipt by individual States through the normal channels. The Government does not there say precisely how this proposal is to relate to the "taking effect" of an instrument deposited with a depositary, though it suggests that the proposal would discourage the equation of "promptness" in making communications with the concept of "immediacy" which was applied by the International Court in the *Right of Passage* case,¹⁰⁷ with reference to Article 36, paragraph 4, of the Statute. This is a large question, because it affects the coming into

force generally of instruments deposited with a depositary, and it will be discussed further in connexion with article 29. But whatever may be the Commission's conclusion on the general issue, the Special Rapporteur believes that its decision in the present article to treat a notice of withdrawal as effective only from the date of its receipt by the other States was correct for the reason given in paragraph 2 of its commentary.

4. The point raised by the United Kingdom Government, though related to the one discussed in the previous paragraph, is a distinct one. It concerns the allowance of a reasonable time, *after* a notice of withdrawal becomes operative, for bringing internal laws or administrative instructions into line with the new situation resulting from the withdrawal of a reservation. In some cases the withdrawal of a reservation would not necessitate any internal action on the part of other States. In other cases it might do so and, even if the internal law of some States were automatically to take account of the withdrawal of the reservation, it might still be necessary for appropriate instructions to be given to administrative authorities or appropriate publicity to be given to the new situation resulting from the deletion of the reservation. The Special Rapporteur suggests that the point should be covered by adding at the end of paragraph 2 a proviso in the sense proposed by the United Kingdom Government.

5. In the light of the above observations the Special Rapporteur proposes that the text should be revised to read as follows:

"Unless the treaty otherwise provides —

"(a) a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal;

"(b) such withdrawal becomes operative¹⁰⁸ when notice of it has been received by the other States concerned from the depositary or, if there is no depositary, from the reserving State;

"(c) on the date when the withdrawal becomes operative article 21 ceases to apply, provided that during a period of three months after that date a party may not be considered as having infringed the provision to which the reservation relates by reason only of its having failed to effect any necessary changes in its internal law or administrative practice."

SECTION IV: ENTRY INTO FORCE AND REGISTRATION

Article 23. — Entry into force of treaties

Comments of Governments

Japan. In paragraph 2 the substance is found acceptable by the Japanese Government, but it considers that the matter can safely be left to the interpretation of the treaty in question. (See its revised draft of article 23 in document A/CN.4/175.)

¹⁰⁷ *Case concerning right of passage over Indian territory (Preliminary objections)*, I.C.J. Reports, 1957, p. 125.

¹⁰⁸ This is the same phrase as that used in article 15, paragraph 2, with respect to instruments of ratification, accession, etc.

Luxembourg. The Luxembourg Government, as explained in its comments on article 1 (d) and article 14, considers that the references to "approval" should be deleted from this article. In addition, as appears from its comments on article 15, it places emphasis on the distinction between the time of the commitment of the parties and the time of the entry into force of the treaty (which may be later). It states that articles 15 and 23 should be revised in view of this distinction, though without indicating the precise revisions which it has in mind.

Sweden. The Swedish Government observes that article 23 appears not to cover cases where a treaty does not stipulate any date on which or mode in which it is to enter into force but is simply signed or simply provides for ratification. It presumes that the residuary rule would be that entry into force occurs on the date of signature or of ratification as the case may be.

United Kingdom. In the view of the United Kingdom Government, an automatic rule would be preferable to that provided in paragraph 3, which depends on the parties' reaching a further agreement. The rule, it suggests, should be that a treaty which does not fall under paragraphs 1 and 2 enters into force on the date of signature or, if it is subject to ratification, acceptance or approval, when it has been ratified, accepted or approved by all the participants.

United States. The United States Government considers the article to be clear and to reflect accepted present-day practices that are recognized as desirable.

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur, for the reasons given in his observations on article 1, paragraph 1 (d), does not favour the deletion of the references to "approval" in paragraph 2.
2. The Japanese Government, while not dissenting from the substance of the Commission's proposals, would prefer to leave the matters covered in paragraph 2 to the interpretation of the treaty; and more especially in the case of multilateral treaties (see paragraph 2 of its revised draft). The Swedish and United Kingdom Governments, on the other hand, would prefer to see the Commission go even further in laying down automatic residuary rules. As the substance of the article appears to meet with general acceptance, and as it seems desirable to establish residuary rules on this extremely important question, the Special Rapporteur considers that the rules formulated in paragraph 2 should be maintained by the Commission. On the other hand, he proposes that the Japanese Government's point should be met to the extent of adding at the end of paragraph (a) the words "without the States concerned having agreed upon another date".
3. The Special Rapporteur also considers that, if similar qualifying words are used, the residual rule proposed by the Swedish and United Kingdom Governments for paragraph 3 can safely and usefully be adopted. He accordingly proposes that paragraph 3 should be revised to read:

"In other cases where a treaty does not specify the date of its entry into force, the date shall be the date of the signature of the treaty or, if the treaty is subject to

ratification, acceptance or approval, the date upon which all the necessary ratifications, acceptances or approvals shall have been completed, unless another date shall have been agreed by the States concerned."

4. While appreciating the significance attached by the Luxembourg Government to the distinction between the time of the commitment of the parties and the time of the entry into force of the treaty, the Special Rapporteur doubts whether anything more is needed to underline this distinction than is already done at a number of points in the draft articles (e.g. article 16; article 17, paragraph 2; article 24; and the present article).

New Proposal. — Entry into force of treaties within the territory of the parties

Comments of Governments

Luxembourg. The Luxembourg Government proposes the insertion of a new article to follow article 23 and to be framed in these terms:

"By the entry into force of the treaty, the parties thereto shall be bound to take all measures, both general and particular, and above all measures to ensure publication, that are necessary to secure the application in full of the treaty in their territories."

Such a provision, it suggests, would remind States that the first obligation they incur in becoming bound by an international treaty is to take the measures necessary to ensure the effectiveness of the treaty in their national territories. It points out that clauses on these lines are found in some treaties as, for example, in article 86 of the Treaty instituting the European Coal and Steel Community¹⁰⁹ and in article 5 of the European Economic Community Treaty.¹¹⁰

Observations of the Special Rapporteur

1. This proposal does not appear to the Special Rapporteur to be relevant in the context in which it is put forward — entry into force of treaties as between States. The Commission has given consideration to the question of including in the draft articles a provision covering the duty of States to take the necessary measures on the internal plan to ensure compliance with their treaty obligations. It did so, if somewhat briefly, in the context of the application of treaties, and more especially of the application of treaties to individuals.¹¹¹ The Special Rapporteur then pointed out that this duty is only one aspect of the general duty of a State to perform its international obligations; that it applies to a State's customary no less than to its treaty obligations; and that the principle involved is a general principle of State responsibility which would presumably come under the Commission's consideration in its work on State responsibility. He also pointed out that the principle is implicit in and covered by the rule

¹⁰⁹ United Nations, *Treaty Series*, vol. 261, p. 221.

¹¹⁰ *Ibid.*, vol. 298, p. 17.

¹¹¹ See the present Special Rapporteur's third report in *Yearbook of the International Law Commission, 1964*, vol. II, p. 46, para. 5 of the commentary to article 66.

pacta sunt servanda proclaimed in article 55. In the light of these considerations it was provisionally concluded by the Commission that it was not necessary to include an article on this point.

2. The Special Rapporteur thinks it to be clear that the principle in question is simply a facet of the rule *pacta sunt servanda*. Accordingly, if it were to be thought desirable to make special mention of the principle in the law of treaties, as well as in the law of State responsibility, he considers that it should be placed either in close conjunction with the *pacta sunt servanda* article or in the section dealing with the application and effects of treaties. He suggests that the matter should be reviewed at the 1966 session in the light of the comments of Governments upon part III of the draft articles.

Article 24. — *Provisional entry into force*

Comments of Governments

Japan. In the view of the Japanese Government, the precise legal nature of provisional entry into force, even if this technique is sometimes resorted to in practice, is not very clear. Unless its legal effect can be precisely defined, the Japanese Government considers that the best course would be to leave the question of provisional entry into force to the intention of the parties; and it feels that article 23, paragraph 1, may perhaps sufficiently cover this problem.

Sweden. The Swedish Government points out that, while the text of the article appears to require an agreement between the parties in order to bring about the termination of provisional application of a treaty, the commentary contemplates that provisional application may terminate on its becoming clear that the treaty is not going to be ratified or approved by one of the parties. It suggests that the commentary comes closest to the legal position underlying the present practice; for provisional application is often resorted to for the very reason that there is no absolute assurance that internal constitutional procedures will result in the confirmation of the provisional acceptance of the treaty.

United States. While recognizing that the article accords with present-day requirements and practices, the United States Government questions whether there is any need to include it in a convention on the law of treaties.

Observations and proposals of the Special Rapporteur

1. The Commission considered that "provisional entry into force" occurs in modern treaty practice with sufficient frequency to require notice in the draft articles.¹¹⁸ Although the resulting situation may be anomalous and not easy to define with precision, its incidents may be important for the parties. Accordingly, it seems desirable for the legal character of that situation to be recognized in the draft articles, lest the omission be interpreted as denying it. The Japanese Government suggests that the

problem might be left to be covered by article 23, paragraph 1, which states that "a treaty comes into force in such manner and on such date as the treaty itself may prescribe". This no doubt is one possible way of looking at the problem; though it would not cover the problem altogether, as the States concerned sometimes bring about the "provisional entry into force" by a separate agreement in simplified form.¹¹⁹ But it seems preferable to separate "provisional entry into force" from normal entry into force under the treaty which is the subject of article 23. There is a certain anomaly, from the point of view of constitutional law, in dealing with "provisional entry into force" as an ordinary case of "entry into force under the terms of a treaty" which for constitutional reasons has been made subject to ratification or approval.

2. The legal position in provisional entry into force is not, however, easy to formulate; and the Special Rapporteur feels that there is substance in the Swedish Government's observation that paragraph 2 of the commentary to article 24 perhaps comes nearer to describing it as it appears in practice than the second sentence of the article itself.

3. If the article is retained by the Commission, a course which the Special Rapporteur himself is inclined to favour, he proposes that it should be slightly revised to take account of the Swedish Government's observation and of cases where the agreement to bring the treaty into force provisionally is not expressed in the treaty itself but concluded outside it. The text might then read:

"A treaty may prescribe, or the parties may otherwise agree that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part, on a given date or on the fulfilment of specified requirements. In that case the treaty or the specified part shall come into force as prescribed or agreed, and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or it shall have become clear that one of the parties will not ratify or, as the case may be, approve it."

Article 25. — *The registration and publication of treaties*

Comments of Governments

Denmark. The Danish Government feels that the text of this article is not entirely satisfactory, as treaties between a Member of the United Nations and a non-member State are at present covered both by paragraph 1 and paragraph 2. The article should, in its view, provide that any Member is under an obligation to register treaties which it concludes, in conformity with Article 102 of the Charter, and that any non-member State party to the present articles is under a similar obligation. It further observes that under current practice parties may agree between themselves that registration shall be effected by one of them, or by the secretariat of an international organization under whose auspices the treaty is concluded.

¹¹⁸ See *Yearbook of the International Law Commission, 1962*, vol. II, p. 182; *ibid.*, vol. I, 656th, 657th and 668th meetings, pp. 175, 179 and 259.

¹¹⁹ *Ibid.*, vol. I, 668th meeting, p. 259.

Israel. The Government of Israel doubts whether the draft articles are the proper place for introducing any change in existing practices which distinguish between registration in implementation of Article 102 of the Charter and filing and recording in accordance with the regulations made by the General Assembly thereunder. This distinction, it notes, was deliberately maintained when the regulations were drawn up in 1946 and the Charter is not the only international constitution which calls for registration of treaties, e.g. article 81 of Constitution of the International Civil Aviation Organization. It suggests that the Commission should draw the General Assembly's attention to the possible need for the practices regarding registration of treaties to be re-examined and consolidated after the completion of the work on the law of treaties.

Japan. While finding the article to be on the whole acceptable, the Japanese Government thinks that paragraph 1 does not make it clear whether it applies to the category of international agreements referred to in Article 102 of the Charter or whether it concerns all international agreements as defined in the draft articles.

Luxembourg. While fully approving the provisions of the article, the Luxembourg Government asks whether paragraph 2, as drafted, is not an amendment to the Charter. It suggests that the paragraph should be reworded as follows:

"States which are parties to the present article and are not Members of the United Nations shall undertake with the Secretariat of that Organization the treaties which they have concluded."

United Kingdom. In the view of the United Kingdom Government, it is unnecessary and undesirable to duplicate the provisions of Article 102 of the Charter.

United States. The United States Government observes that a question might well be raised whether the provisions of this article are appropriate for inclusion in the draft articles or whether the matter should be left to the United Nations. Paragraph 1, it notes, merely reiterates the obligations of Members and of the United Nations under Article 102 of the Charter. As to paragraph 2, it points out that the paragraph would impose a new obligation not only on non-members but also upon the United Nations. While recognizing the desirability of having all treaties registered with the United Nations and published by it, the United States Government questions whether the draft articles should seek to impose that function upon the Secretariat as an obligation without some recognition that the consent of the United Nations is necessary. It suggests that before the texts of the draft articles are finally agreed upon arrangements might be made for a resolution by the General Assembly inviting all non-member States to register their treaties and providing for their publication. In paragraph 3, it suggests that the phrase "in force" should be replaced by the phrase "adopted by the General Assembly of the United Nations" in order to give more direct recognition of the role of the United Nations in this matter.

Bolivian delegation. The delegation considers that in paragraph 2 the registration of a treaty with the United Nations Secretariat by non-member States should not be obligatory

but should be left optional as in the past. It also criticizes the omission of any provision dealing with treaties concluded between a Member of the United Nations and a non-member State.¹¹⁴

Romanian delegation. The delegation considers the article to be satisfactory.¹¹⁵

Observations and proposals of the Special Rapporteur

1. The Commission appreciated that there is a certain awkwardness in duplicating the provisions of Article 102 of the Charter. On the other hand, it felt that the principle that treaties should be registered and published is now so generally accepted and so important in practice that its total omission from a general convention or code on the law of treaties would appear somewhat strange. Moreover, it seemed desirable in any general convention or code to equalize so far as possible the position of Members and non-members on this point, which appears to be essentially one of principle rather than merely an incident of membership in the United Nations. There is no question in the mind of the Commission of imposing any new obligation upon non-member States without their consent. An obligation to register (or "file and record") treaties would arise for a non-member only if it accepted that obligation by becoming a party to the general convention on the law of treaties. As non-members already make use of the depositary and registration facilities of the Secretariat of the United Nations and are not called upon to contribute to their upkeep, it does not seem unreasonable to invite a non-member, on becoming a party to the general convention on the law of treaties, to accept the registration and publication of treaties as general principles. Nor was there any question in the mind of the Commission of imposing any new obligations on the United Nations without its consent. The Commission is itself an organ of the United Nations, and the draft articles which it is preparing are to be submitted to the General Assembly, the organ of the United Nations competent to decide both in regard to the United Nations system of registration and publication of treaties and in regard to the action to be taken upon the Commission's drafts. Inevitably, therefore, the General Assembly will be in a position to pronounce upon the acceptability or otherwise of the present article from the point of view of the United Nations before any action is taken with reference to the draft articles as a whole. Moreover, in its resolution 97 (I) of 14 December 1946 approving regulations to give effect to Article 102 of the Charter,¹¹⁶ the General Assembly seems to have recognized the general desirability of the registration (filing and recording) and publication of the treaties of States not members of the United Nations; for by article 10, paragraph 3, and article 12 of those regulations it specifically directed the Secretariat to file, record and publish "treaties or international agreements transmitted by a party not a member of the United Nations".

¹¹⁴ *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 740th meeting, para. 33.*

¹¹⁵ *Ibid.*, 742nd meeting, para. 27.

¹¹⁶ The text of these regulations, as amended by General Assembly resolution 482 (V) of 12 December 1950, is set out in an annex to the Commission's 1962 report (see *Yearbook of the International Law Commission, 1962*, vol. II, pp. 194-195).

2. The Special Rapporteur does not feel that the difficulty suggested by the Japanese Government with regard to the category of "international agreements" covered by article 1 really arises. "Treaties" for the purposes of the present articles are defined in article 1 and it is those treaties with which article 25 is concerned. If the treaties and international agreements covered by Article 102 of the Charter were narrower in range than those covered by the present articles, the point raised by the Japanese Government might be a material one. But a glance at article 1 of the regulations giving effect to Article 102 shows how extremely comprehensive is the range of "treaties and international agreements" covered by Article 102. Accordingly, it is not thought that the paragraph needs further clarification on this point.

3. The Danish Government, on the other hand, points out that paragraphs 1 and 2 are so worded that treaties concluded between a Member and a non-member of the United Nations may be said to be governed by both paragraphs. This will be the case however the paragraphs are worded, but the Special Rapporteur shares the view of the Danish Government that the logical objection which may at present be raised to the drafting of the two paragraphs should be removed by reformulating them in terms of the obligations of Members and non-members. The Special Rapporteur does not feel that, even as at present drafted, paragraph 2 can legitimately be viewed as an amendment to the Charter. However, if the first two paragraphs are reformulated in the way suggested, this will automatically meet the preoccupation of the Luxembourg Government in this regard. The Special Rapporteur, on the other hand, considers that the *obligation* of non-members should be so stated as to apply only to treaties entered into after the present articles come into force.

4. The doubt raised by the Government of Israel as to the draft articles' being the proper place for introducing any change in existing practices which distinguish between registration under Article 102 and "filing and recording" under the regulations made by the General Assembly seems to be mainly a verbal point. Paragraph 3 of the article expressly provides that the procedure of registration in the case both of Members and non-members is to be governed by the regulations in force for the application of Article 102; in other words, unless and until the regulations are changed by the General Assembly, the existing practice will remain intact under the draft articles. The Commission felt that "filing and recording" is, in substance, only another name for registration and that to safeguard the Government of Israel's point it would be enough to underline the continued application of the General Assembly's regulations. In point of fact, if the draft articles were ultimately to be adopted as a general convention on the law of treaties, there would be some advantage in modifying the General Assembly regulations so as to make the "registration" of a treaty by a non-member under paragraph 2 of the present article, subject to the "registration" rather than the "filing and recording" regulations. Under article 3, for example, registration by a Member of the United Nations relieves all other parties of the obligation to register the treaty, whereas there is no

similar provision in the case of "filing and recording". The Special Rapporteur therefore shares the view of the Government of Israel that in due course it might be desirable for the General Assembly to re-examine and consolidate the existing practices regarding registration of treaties.

5. In paragraph 3 no objection is seen to the suggestion of the United States Government that the phrase "in force" should be replaced by the phrase "adopted by the General Assembly of the United Nations" in order to give more direct recognition to the role of the United Nations in the matter. On the other hand, the words "in force" were chosen to indicate that the regulations are subject to change by the Assembly; and it may be advisable to say instead "from time to time adopted by the General Assembly of the United Nations".

6. In the light of the above observations, the Special Rapporteur suggests that the article should be revised on the following lines:

"1. Members of the United Nations are under an obligation, with respect to every treaty entered into by them, to register it in conformity with Article 102 of the Charter of the United Nations.

"2. Parties to the present articles which are not members of the United Nations agree to register every treaty entered into by them after the present articles come into force.

"3. The procedure for the registration of treaties under the foregoing paragraphs and for their publication shall be governed by the regulations from time to time adopted by the General Assembly of the United Nations for giving effect to Article 102 of the Charter."

SECTION V: CORRECTION OF ERRORS AND THE FUNCTIONS OF DEPOSITARIES

Article 26. — The correction of errors in the texts of treaties for which there is no depositary

Comments of Governments

Japan. While thinking that articles 26 and 27 will serve a useful purpose in establishing procedures for correction of errors, the Japanese Government considers that their provisions are too detailed. It suggests that the two articles should be amalgamated. (See its revised draft, articles 26 and 27, in document A/CN.4/175.)

Sweden. In the view of the Swedish Government, the rules contained in articles 26 and 27 are more appropriate for inclusion in a code of recommended practices than in a convention.

United States. The United States Government thinks that the article serves a useful purpose as a guide on procedures for correcting errors, but proposes certain drafting changes. In paragraph 1 it suggests that the word "shall" should be changed to "may", as States may wish in a particular case to follow some other procedure or to take no action at all because of the insignificance of the error. It points out that in paragraph 1 (b) the words

“notes of similar instrument” contain a misprint, and should read “notes or similar instrument”. In paragraph 4 it comments that the communication of corrections to texts should not be required before the treaty has been registered, since Article 102 of the Charter and the regulations made under it do not provide for registration until after a treaty has come into force. It proposes that the paragraph should be revised as follows:

“Notice of any correction made under the provisions of this article to the text of a treaty that has entered into force shall be communicated to the Secretariat of the United Nations.”

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur agrees with the Japanese Government that some curtailment of the provisions of articles 26 and 27 is possible and desirable. However, he doubts whether it is advisable to curtail the articles to the extent advocated by that Government in its revised draft. The chief object of including these articles is to provide for the use of regular procedures for correcting errors in the main forms in which they occur in practice. Accordingly, it is thought that the Commission was right to distinguish between these main forms. On the other hand, some streamlining of the drafts is clearly possible, and especially with regard to the two final paragraphs, which correspond with each other in the two articles. The Special Rapporteur thinks it preferable, from a drafting point of view, to detach these two paragraphs and transfer them to a new article, article 27 (*bis*), rather than to amalgamate the two articles into a single, somewhat heavy, article.

2. The Special Rapporteur doubts whether all the rules in articles 26 and 27 ought properly to be regarded as nothing more than recommended practices, as the Swedish Government implies. The Special Rapporteur understands the Commission to have regarded the procedures which the articles lay down as procedures which are enjoined upon the States concerned and upon depositaries for the protection of parties and signatories in the absence of agreement upon another procedure for the correction of the error. On the other hand, the Special Rapporteur shares the general view of the Swedish Government that the provisions of the draft articles in part I ought for the most part to be stated in the form of residuary rules, and this is not the case in articles 26 and 27 as at present drafted. If this is done, it will also serve to cover the suggestion of the United States Government that the word “shall” in paragraph 1 should be changed to “may”.

3. The further point made by the United States Government that in paragraph 4 the communication of corrections to the Secretariat of the United Nations ought not to be required until the treaty has entered into force and thus qualified for registration under the applicable regulations regarding registration of treaties is thought to be well-founded.

4. In the light of the above observations the Special Rapporteur proposes that article 26 should be amended to read as follows:

“1. Unless otherwise agreed between the interested States, where an error is discovered in the text of a

treaty for which there is no depositary after the text has been authenticated, the error shall be corrected:

“(a) by having the appropriate correction made in the text of the treaty and causing the correction to be initialled in the margin by representatives duly authorized for that purpose;

“(b) by executing a separate protocol, a *procès-verbal*, an exchange of notes or similar instrument, setting out the error in the text of the treaty and the corrections which the parties have agreed to make; or

“(c) by executing a corrected text of the whole treaty by the same procedure as was employed for the erroneous text.

“2. Paragraph 1 applies also where there are two or more authentic texts of a treaty which are not concordant and where it is agreed to correct the wording of one of the texts.”

Article 27. — The correction of errors in the texts of treaties for which there is a depositary

Comments of Governments

Finland. The Finnish Government suggests that, although paragraph 2 conforms to the practice of the Secretariat of the United Nations, it would be sufficient for the depositary to transmit the copy of the *procès-verbal* only to the State which has received the incorrect copy of the treaty, and merely to notify the other State of the action taken.

Japan, Sweden. The observations of the Japanese and Swedish Governments regarding this article are set out in their comments upon article 26.

United States. The United States Government considers that the provisions of this article will serve as a useful guide on procedures for the correction of errors in multi-lateral treaties for which there is a depositary. It suggests, however, that paragraph 6 should undergo a revision similar to that which it proposes for paragraph 4 of article 26 and for the same reasons.

Bolivian delegation. The delegation observes that the article, while providing for cases in which an error is discovered in the text, does not provide for cases where the error goes unnoticed by the depositary but is pointed out by a State.¹¹⁷

Panamanian delegation. While thinking that the juxtaposition of the mechanics of correcting errors with the important functions of the depositary is academically unfortunate, the delegation considers it justified by the practical consideration of the role played by a depositary in the correction of errors.¹¹⁸

Observations and proposals of the Special Rapporteur

1. The comments of the Japanese, Swedish and United States Governments have already been discussed under

¹¹⁷ *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 740th meeting, para. 33.*

¹¹⁸ *Ibid.*, 741st meeting, para. 19.

article 26. The Bolivian delegation, in effect, queries whether the language of the article, as at present drafted, is apt to cover cases where the error is not noticed by the depositary but is pointed out independently by a State. The Special Rapporteur does not feel that any change is necessary in the text to cover this point, since the language of paragraphs 1, 2 and 3 is completely neutral as to who discovers or draws attention to the error or lack of concordance in the text.

2. The Finnish Government's suggestion that paragraph 2 should be amended so as to require the *procès-verbal* to be transmitted only to the State which has received the incorrect copy of the treaty is not thought to be practicable. The certified copies here envisaged are the copies of the original instrument deposited with the depositary, and these copies are sent to all the States concerned. Normally, the copies would all be identical. The Japanese Government, in its revised draft, proposes the omission of this paragraph in order to lighten the text of the article. Although sympathizing with the objective, the Special Rapporteur doubts whether the deletion of this paragraph is advisable. The Secretariat in its memorandum on the "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" said of the certified copies here in question:

"One of the depositary's functions is to prepare and transmit to the States concerned certified copies of the original. This is an important function as it replaces the exchange of the original instruments, which formerly took place between the signatories. The certified copies are frequently used by Governments for submission of the text of the agreement to their competent organs for whatever action is required under their particular constitutional procedures."¹¹⁹

In the light of these remarks the Special Rapporteur feels that paragraph 2 should be retained. On the other hand, paragraph 2 does appear not to be placed in its proper order in the article. The corrections dealt with in this paragraph do not relate to the original text, but merely to a copy; consequently, they do not require the assent of the States concerned, and the process of correction is different from those in paragraphs 1 and 3. Moreover, paragraph 4 is a further stage of the processes dealt with in paragraphs 1 and 3, but not of that dealt with in paragraph 2, and the latter paragraph tends to interrupt the logical exposition of the processes in the other paragraphs. Accordingly, it is thought that paragraph 2 should be placed lower down in the article, after the existing paragraph 4.

3. The Special Rapporteur believes that it may be acceptable to lighten the text of paragraph 1 by speaking of bringing the error to the attention of all the "interested States", instead of specifying the criteria by which they are to be determined. This may at the same time give a certain flexibility to the provision in the event of an error's being discovered after a considerable lapse of time, when it might be reasonable to consider that the consent only of the parties was required.

4. In paragraph 4 the Special Rapporteur further suggests that it may be advisable to confine the second sentence, beginning with "However", to the case of a treaty drawn up "within an international organization", and to leave the case of a treaty drawn up at a conference convened by an international organization to be covered by the first sentence alone.

5. The transfer of paragraphs 5 and 6, which correspond with paragraphs 3 and 4 of article 26, to a separate article has been proposed by the Special Rapporteur in paragraph 1 of his observations on that article.

6. On the basis of the above suggestions the Special Rapporteur proposes that the article should be revised to read as follows:

"1. (a) Unless otherwise agreed, where an error is discovered in the text of a treaty for which there is a depositary after the text has been authenticated, the depositary shall bring the error to the attention of all the interested States, and shall inform them that it is proposed to correct the error if within a specified time-limit no objection shall have been raised to the making of the correction.

"(b) If on the expiry of the specified time-limit no objection has been raised to the correction of the text, the depositary shall make the correction in the text of the treaty, initialling the correction in the margin, and shall draw up and execute a *procès-verbal* of the rectification of the text and transmit a copy of the *procès-verbal* to each of the interested States.

"2. The same rules apply where two or more authentic texts of a treaty are not concordant and a proposal is made that the wording of one of the texts should be corrected.

"3. If an objection is raised to a proposal to correct a text under paragraph 1 or 2, the depositary shall communicate the objection to all the interested States, together with any other replies received in response to the notifications mentioned in those paragraphs. However, if the treaty was drawn up within an international organization, the depositary shall also refer the proposal to correct the text and the objection to such proposal to the competent organ of the organization concerned.

"4. Where an error is discovered in a certified copy of a treaty, the depositary shall draw up and execute a *procès-verbal* specifying both the error and the correct version of the text, and shall transmit a copy of the *procès-verbal* to each of the interested States."

Article 27 (bis). — Taking effect and notification of correction to the text of a treaty (proposal by the Special Rapporteur)

The Special Rapporteur, for the reasons explained in paragraph 1 of his observations on article 26, proposes that paragraphs 3 and 4 of that article and the corresponding paragraphs of article 27 (paragraphs 5 and 6) should be made into a separate article, numbered for the time being article 27 (*bis*). The text proposed for this article is as follows:

¹¹⁹ ST/LEG/7, para. 11; and see para. 18.

"1. Whenever the text of a treaty has been corrected in accordance with article 26 or 27, the corrected text shall replace the faulty text as from the date on which the latter text was adopted, unless the interested States otherwise decide.

"2. Notice of any such correction to the text of a treaty that has entered into force shall be communicated to the Secretariat of the United Nations."

Article 28. — The depositary of multilateral treaties

Comments of Governments

Sweden. The Swedish Government observes that the article contains dispositive rules.

United States. The United States Government considers the article to be declaratory of well-accepted practice and its inclusion to be useful.

Observations of the Special Rapporteur

No amendment has been suggested by Governments, and the Special Rapporteur has no proposal to make with respect to this article.

Article 29. — The functions of a depositary

Comments of Governments

Israel. The Government of Israel considers that in enumerating the functions of a depositary special reference should be made to the depositary's duty to register treaties and related documents. It draws attention to the discussions which preceded General Assembly resolution 364 B (IV) of 1 December 1949 and to relevant inter-agency agreements such as that of 17 February 1949 between the United Nations and the International Labour Organisation.¹²⁰ It also thinks that it may be desirable *de lege ferenda* to make it clear that, unless the treaty itself provides otherwise, phrases like "promptly" and "as soon as possible" appearing in paragraphs 3 (d), 6 and 7 (a) (see also article 15, paragraph 3) are to be interpreted in such a way as to allow for the observance of the normal administrative processes customary in the depositary authority for the preparation of the relevant communications and for their receipt by individual States through the normal channels. This would, it suggests, discourage the equation of "promptness" with the concept of "immediacy" which was applied by the International Court in the *Right of Passage* case with reference to Article 36, paragraph 4, of the Statute of the Court.¹²¹ In paragraph 8 it points out that "any such matters" in the English text has a wider meaning than "*autres actes similaires*" in the French text (cf. "*otras cuestiones análogas*" in the Spanish text); and it suggests that the French text should be modified to bring it into line with the English text.

Japan. In the view of the Japanese Government, paragraph 1 overlaps to a great extent with article 1, para-

graph 1 (g), and it suggests that the first sentence should be deleted. While recognizing that paragraphs 2 to 7 would provide a useful guide in a "code", the Japanese Government considers it to be a little out of place as well as out of proportion to provide for procedural details of a depositary in a general convention on the law of international agreements. It suggests that the article could be redrafted in a more concise form (see article 29 of the Japanese Government's revised version of the articles in document A/CN.4/175).

United States. While considering that the article as a whole should serve as a useful guide with respect to the functions of a depositary, the United States Government questions certain of its provisions. In paragraph 3 (a) it suggests that the words "at the time the depositary is designated" should be added at the end, that is after the word "organization". The purpose of the addition is to protect a depositary in case an organization should adopt a new rule requiring the text of the treaty to be prepared in many additional languages. Paragraph 3 (b) it considers to be phrased too widely in requiring certified copies to be transmitted to every State to which it is open to become a party to the treaty, even if it has no interest in the treaty. Such a State, it thinks, might even be offended and protest against the communication of the copy. It proposes that the paragraph should be worded as follows:

"To prepare certified copies of the original text or texts and transmit such copies to all signatory, ratifying or acceding States, and any other States mentioned in paragraph 1 that request copies."

In paragraph 3 (c) the United States Government raises a question as to the relationship of the paragraph with paragraphs 4, 5 and 6. These three paragraphs, it assumes, would operate before the signature takes place or the instrument of ratification, etc., is considered as "deposited". But it considers that the relationship between these paragraphs and paragraph 3 (c) needs some clarification and that there may be cases where it would be desirable for other States to be consulted before an instrument is received in deposit, e.g. in the case of particular reservations. It therefore proposes that the words "subject to the provisions of paragraphs 4, 5 and 6 of this article" should be inserted at the beginning of paragraph 3 (c). In addition, the United States Government proposes that the second half of paragraph 3 (c) "and to execute a *procès-verbal*, etc.", should be deleted, as this appears to it to require a formality that is unnecessary and would often serve no useful purpose. It emphasizes that the United States serves as depositary for many multilateral treaties with respect to which the formality of *procès-verbaux* is omitted without giving rise to any problems or complaints. Paragraph 3 (d) and the remaining provisions of the article are considered by the United States Government to reflect existing procedures and practices that are widely accepted and effective.

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur does not share the view of the Japanese Government that it is out of place and out of proportion to provide for procedural details of a deposi-

¹²⁰ United Nations, *Treaty Series*, vol. 26, p. 323.

¹²¹ *Case concerning right of passage over Indian territory (Preliminary objections)*, I.C.J. Reports, 1957, p. 125.

tary's functions in a general convention on the law of treaties. The regular performance of the duties of the depositary is of critical importance to the operation of the modern system of multilateral treaties. Nor does it seem correct to regard the provisions of article 29 as purely procedural; for they establish not only the duties of depositaries but also the rights of the interested States with respect to the procedure. On the other hand, certain of the Japanese Government's suggestions for streamlining the text of the article may, it is thought, be usefully adopted without losing anything of substance.

2. In paragraph 1, as is pointed out by the Japanese Government, the opening phrase in effect repeats the definition of a depositary in article 1, paragraph 1 (g). The Special Rapporteur proposes that the two sentences of the paragraph should be telescoped so as to read as follows:

"A depositary shall exercise its functions impartially on behalf of all the parties to the treaty and of all the States to which it is open to become a party."

3. Paragraph 2 and the opening phrase of paragraph 3, as the Japanese Government suggests, can with advantage be amalgamated so as to combine the two paragraphs as follows:

"In addition to any functions expressly laid down in the treaty, and unless the treaty otherwise provides, a depositary shall have the duty:"

4. Paragraph 3 (a) is omitted from the Japanese Government's redraft of the article, but the Special Rapporteur feels that it should be retained. The United States Government asks that the words "at the time the depositary is designated" should be added at the end of the paragraph in order to protect a depositary from having a new burden imposed upon it without its consent by a change in the rules of an international organization. No objection is seen to this addition.

5. Paragraph 3 (b) is considered by the United States to place an unnecessarily wide obligation on a depositary with regard to the transmission of certified copies. This comment appears to the Special Rapporteur to be justified, and he proposes the following revised text of the paragraph:

"To prepare certified copies of the original text or texts and transmit such copies to all parties and signatory States and to any other of the States mentioned in paragraph 1 that so requests."

6. Paragraph 3 (c) is also omitted by the Japanese Government. The United States Government suggests the deletion only of the second phrase, which relates to the execution of a *procès-verbal* of signatures and of the deposit of instruments. In the light of its own experience as a depositary, it believes this requirement to be an unnecessary formality. Although not proposing the deletion of the first phrase, "To receive in deposit all instruments and ratifications relating to the treaty", the United States suggests that its relation to paragraphs 4, 5 and 6 needs to be considered. It feels that there may be cases where it would be desirable for other States to be consulted before an instrument is received in deposit, and suggests that the

paragraph be prefaced by the words "subject to paragraphs 4, 5 and 6". The Special Rapporteur considers that a better solution may be to rearrange the order of the various paragraphs.

7. The Japanese Government, in its proposed redraft of the whole article, includes a reference to the duties of a depositary in the correction of errors. The Special Rapporteur agrees that this would be logical, but considers that this should take the form of a simple cross-reference to article 26 rather than an abbreviated statement of the duties.

8. The Government of Israel proposes that special reference should be made to the depositary's duty to register treaties and related instruments. The Special Rapporteur, while recognizing the importance of this point, hesitates to state it as a general duty, having regard to the complexity of the General Assembly's regulations concerning registration. Would the Swiss Government, for example, as depositary of a treaty to which Members of the United Nations were parties, be bound to "register" or "file and record" the treaty? The Special Rapporteur feels that it may be better to leave this point to be covered by the opening phrase "In addition to any functions expressly laid down in the treaty".

9. Another point made by the Government of Israel is that in paragraphs 3 (d), 6 and 7 (a) the expressions "promptly" and "as soon as possible", unless further defined or interpreted, might be understood to signify "immediate", whereas time must be allowed for the normal administrative processes to operate. The Special Rapporteur is inclined to think that the right course may be simply to omit these words where they occur and to regard due diligence in carrying out the duties of a depositary as implied from the very nature of the duties and therefore automatically required by an interpretation of the article in good faith.

10. In the light of the above observations and with the object of streamlining the text as far as possible, the Special Rapporteur proposes that it should be revised as follows:

"1. A depositary shall exercise its functions impartially on behalf of all the parties to the treaty and States to which it is open to become a party.

"2. In addition to any functions expressly laid down in the treaty, and unless the treaty otherwise provides, a depositary shall have the duty:

"(a) To prepare any further texts in such additional languages as may be required either under the terms of the treaty or the rules in force in an international organization at the time the depositary is designated;

"(b) To prepare certified copies of the original text or texts and transmit such copies to all parties and signatory States and to any other of the States mentioned in paragraph 1 that so requests;

"(c) To examine whether a signature, deposit of an instrument or formulation of a reservation is in conformity with the relevant provisions of the particular treaty and of the present articles, and, if need be, to communicate on the point with the State concerned;

“(d) To accept any signatures to the treaty, and to receive in deposit any instruments relating to it;

“(e) To acknowledge in writing to the State concerned the receipt of any instrument or notification relating to the treaty and to inform the other interested States of the receipt of such instrument or notification;

“(f) To carry out the provisions of article 9, paragraph 3, on receiving a request from a State desiring to accede to the treaty in conformity with the provisions of that article;

“(g) To carry out the provisions of article 26 in the event of the discovery of an error in a text of the treaty.

“3. Where the treaty is to come into force upon its signature by a specified number of States or upon the deposit of a specified number of instruments of ratification, accession, acceptance or approval, or upon some uncertain event, a depositary shall have the duty to inform the States mentioned in paragraph 1 when, in its opinion, the conditions for the entry into force of the treaty have been fulfilled.

“4. In the event of any difference arising between a State and the depositary as to the performance of the above-mentioned functions or as to the application of the provisions of the treaty concerning signature, the execution or deposit of instruments, reservations, ratifications or any such matters, the depositary shall, if the State concerned or the depositary itself deems it necessary, bring the question to the attention of the other interested States or of the competent organ of the organization concerned.”

Part II. Invalidity and termination of treaties

SECTION I: GENERAL PROVISION

Article 30. — Presumption as to the validity, continuance in force and operation of a treaty

Comments of Governments

Israel. The Government of Israel suggests that in the French text the expression “*est réputé être en vigueur*” may introduce an element of legal fiction which is not present in the corresponding expression in the English text “shall be considered as being in force”. It also feels doubt as to the use of the word “nullity” in the present article in the absence of corresponding usage in the substantive articles which follow. In addition, it points out that the article does not take account of the operation of the rules regarding separability (see article 46).

Portugal. The Portuguese Government notes that the article contains a general provision affirming the principle of the validity of treaties, and that the exceptions which it mentions give a concise notion of the structure of part II.

United States. While observing that the article states a conclusion which is normally self-evident, the United States Government says that it has merit in that it places in the articles as a whole a formal presumption which might otherwise be deviated from for reasons beyond

those permitted by other articles. At the same time, it expresses the view that, by stating what is readily assumed, the article seems to imply that every aspect of treaty law is covered by the convention, or series of conventions, which may be adopted on the law of treaties. It feels that the article could well be omitted if the convention, or conventions, could be simplified to state only those aspects of the law of treaties which require statement.

Pakistan delegation. The delegation considers that the Commission is justified in stating the general rule in the present article.¹²²

Syrian delegation. Here and elsewhere in the draft articles the delegation would like to see the word “*terminaison*” in the French text replaced by “*fin*” or by “*extinction*”.¹²³

Uruguayan delegation. The delegation observes that article 30 is a key article which forecasts the tenor of all the articles which follow; and that, by prefacing the part dealing with invalidity and termination of treaties with that general provision, the Commission wishes to safeguard the universally valid principle of *pacta sunt servanda*.¹²⁴

Venezuelan delegation. The delegation considers that in the Spanish version the text of the article should be amended to make it clear that the “nullity, termination or suspension... or... withdrawal” referred to must be brought about as a result of the application of the articles on the law of treaties. In its view, it is necessary to determine the result of their application before the question whether a particular treaty is void can be settled.¹²⁵

Observations and proposals of the Special Rapporteur

1. Part II, as provisionally adopted by the Commission in 1963,¹²⁶ contained a series of articles setting out the cases where on one ground or another a treaty is to be considered vitiated by nullity or terminated or its operation suspended. Article 30 was introduced by the Commission at the beginning of these articles in order to underline that any treaty concluded and brought into force in accordance with the draft articles governing the conclusion and entry into force of treaties is to be considered as being in force and in operation unless the contrary is shown to result from the application of the articles dealing with the invalidity, termination and suspension of the operation of treaties. The purpose of the article was to ensure that the recognition in the draft articles of the several specific grounds on which a State may claim that the rule *pacta sunt servanda* is not applicable in a particular case should not result in any general weakening of the security and stability of treaties.

2. The inclusion of a general provision of the kind contained in article 30 appears to be endorsed in the comments of Governments and delegations, though the United States Government observes that it could be dispensed with if

¹²² *Official Records of the General Assembly, Eighteenth Session, Sixth Committee, 791st meeting, para. 26.*

¹²³ *Ibid.*, 786th meeting, para. 15.

¹²⁴ *Ibid.*, 792nd meeting, para. 22.

¹²⁵ *Ibid.*, 790th meeting, para. 15.

¹²⁶ See *Yearbook of the International Law Commission, 1963, vol. II, pp. 189 et seq.*

the draft articles were framed on a more selective basis. The need for article 30 was perhaps more acute under the arrangement of the articles which was provisionally adopted in the 1963 report than it is under the arrangement now proposed. The invalidity, termination and suspension of the operation of treaties, under certain conditions, were then being predicted before any mention had been made of the fundamental rule *pacta sunt servanda*. In consequence, there was a risk that "*pacta sunt servanda*" might have the appearance of being almost a residuary rule — a rule applicable only *after* a treaty has been found not to be invalid, terminated or suspended as to its operation. Under the arrangement of the articles now proposed, the *pacta sunt servanda* rule will be stated immediately after the rules dealing with the conclusion and entry into force of treaties, while the rules dealing with invalidity, termination and suspension of operation will appear rather as secondary rules concerned with particular cases. Accordingly, it may be desirable to re-examine the arguments for and against the inclusion of a general provision on the lines of article 30.

3. On the one hand, it may be said that — in the words of the United States Government — "this article states a conclusion that is normally self-evident"; for it is certainly true that a treaty concluded and brought into force in accordance with the rules set out in part I (new part II) is to be presumed to be valid, in force and in operation unless the contrary is established. This being so, it may suffice to lay down the rule *pacta sunt servanda* and then leave it to be inferred that the onus is on any State which claims that the rule does not apply in a particular case. On the other hand, it may be said that the express formulation *in extenso* of numerous provisions regarding invalidity and termination makes the inclusion of the article still desirable in order to discourage any idea that the draft convention on the law of treaties sanctions a facile recourse to those provisions for the purpose of repudiating treaties. In favour of this view it may also be urged that in their comments on the draft articles dealing with invalidity and termination a number of Governments express anxiety as to the effect of those articles on the security of treaties unless their application is subjected to safeguards.

4. If the Commission decides to retain article 30, the question arises as to the correct position for the article in the scheme of the draft articles. One possibility would be to insert it at the beginning of the new part dealing with "The observance and interpretation of treaties". In that event, it would follow "Conclusion" and "Entry into force" and immediately precede the article containing the *pacta sunt servanda* rule. This could be said to be its logical position because it would state that a treaty regularly concluded and brought into force is to be considered as being in force and in operation, and the *pacta sunt servanda* article (article 55) would then state that "a treaty in force is binding upon the parties to it and must be performed by them in good faith". Another possibility would be to place the article, as at present, at the beginning of the series of articles dealing with invalidity and termination in order to emphasize the relation between the presumption and those articles.

5. If the article is retained, it will also be necessary to consider certain suggestions made by Governments for the improvement of its wording. The suggestion of the Government of Israel that the expression in the French text "*est réputé être en vigueur*" should be modified to make it correspond more exactly with the English text is felt by the Special Rapporteur to be one that should be adopted. That Government's further point that the word "nullity" should be changed so as to bring the text more into line with the substantive articles which follow also seems to the Special Rapporteur to be well-founded, since the word invalidity is used in the title to this part, while in the articles are found the expressions "invalidating consent", "without legal effect" and "void". The Special Rapporteur suggests that for the purposes of article 30 the most appropriate word would be "invalidity". As to the Syrian delegation's proposal that in the French text, here and in other articles, the word "*terminaison*" should be replaced by "*fin*" or "*extinction*", this raises a philological question which was much discussed at the fifteenth session and which, it is suggested, should be re-examined by the drafting committee at the forthcoming session.

6. Two further points made by Governments require consideration. The first is the comment of the Government of Israel that article 30 does not take account of the operation of the rules regarding separability. These rules are contained in articles 33 to 35 and 42 to 45, which specifically contemplate the possibility of the invalidity, termination or suspension of part only of the treaty, and in article 46, which lays down the conditions under which such partial invalidity, termination or suspension are allowed. Whether it is necessary to make anticipatory mention of these rules in article 30 seems to the Special Rapporteur to be doubtful. When partial invalidity, termination or suspension results from the application of the rules regarding partial invalidity, termination or suspension, the treaty as an instrument remains in force and in operation; and it might not be very logical or consistent with the purpose of article 30 to qualify the presumption which it contains by inserting some form of express reservation of those rules. Their relevance and effect appear to be sufficiently safeguarded by the words at the end of the article "unless the nullity... results from the application of the present articles", since these words automatically bring in the provisions dealing with partial invalidity, termination and suspension.

7. The second point is the comment of the United States Government that the article "seems to imply that every aspect of treaty law is covered by the convention, or series of conventions, which may be adopted on the law of treaties". The conclusion drawn by the United States Government from this comment is that article 30 could well be omitted if the convention, or conventions, could be simplified to state only those aspects of the law of treaties which require statement. The Special Rapporteur finds some difficulty in appreciating the precise train of thought which underlies the drawing of this conclusion. The comment of the United States Government does, however, prompt the question whether the draft articles cover all the possible grounds of invalidity, termination and suspension. If they do not, article 30 might be said

to go too far when it provides that every treaty is to be considered as being in force and in operation unless the contrary results from "the application of the present articles". This being so, the Commission may wish to review its proposals regarding the invalidity, termination and suspension of treaties in order to satisfy itself as to their completeness. Is it, for example, still content to leave the problem of the "obsolescence" or "desuetude" of treaties to be covered by the rules governing "fundamental change of circumstances" and by tacit agreement to terminate a treaty?

8. The present wording of article 30 is not fully symmetrical, since the title and the "unless" clause cover the questions of validity, continuance in force and continuance in operation whereas the statement of the presumption "shall be considered as being in force and in operation" may seem to refer only to the second and third of these questions. In addition, it may be desirable to be more specific as to the articles whose application may produce invalidity etc. and to mention expressly articles 31 to 51 inclusive.

9. In the light of the above observations, the Special Rapporteur suggests the following rewording of article 30:

"Every treaty concluded and brought into force in accordance with the provisions of part II shall be considered as being valid, in force and in operation with regard to any party to the treaty, unless the invalidity, termination or suspension of the operation of the treaty or the withdrawal of the party in question from the treaty results from the application of articles 31 to 51 inclusive."

SECTION II: INVALIDITY OF TREATIES

Article 31. — Provisions of internal law regarding competence to enter into treaties

Comments of Governments

Burma. The Burmese Government appears to take the view that a failure to comply with the provisions of internal law regarding competence to enter into treaties does, in principle, invalidate the treaty on the international plane. For it says that the article, as at present drafted, "may give the parties a feeling of false security in entering into treaties, in the belief that the burden of showing 'manifest' lack of competence or defect in procedure would fall on the party which wishes to withdraw". It suggests that the article needs further consideration.

Czechoslovakia. The Czechoslovak Government accepts the ideas underlying the article as reflecting the "appropriate and just balance between internal and international laws".

Denmark. The Danish Government recalls the statement of its position on the present question in the *Eastern Greenland* case¹²⁷ and says that the reference to this statement in paragraph 9 of the Commission's commentary

does not appear to reflect the Danish position quite accurately. Although feeling that the text proposed by the Commission may deprive constitutional provisions of their international relevance to a somewhat greater extent than is recognized in the opinion of the majority of writers, the Danish Government is ready to accept the proposal as a basis for solving this intricate problem. At the same time, it doubts whether in the last sentence of the article the phrase "may not withdraw the consent expressed by its representative" is appropriate. It maintains that the consent should rather be considered as not having been validly expressed from the point of view of international law; and that the formula used in articles 33 and 34 "may invoke... as invalidating its consent to be bound by the treaty" should also be employed in the present article. The use of this formula would, in its view, be justifiable because the question of invalidity under international law is to be considered distinct from the question of invalidity under national law; and there is consequently no reason why invalidity under international law should not be dependent upon a criterion—the manifest character of the violation of constitutional provisions—which would not necessarily be relevant under national law.

Israel. A number of drafting amendments are suggested by the Government of Israel, as follows: (a) the phrase "competence to enter into treaties" in the first sentence should be replaced by "competence to enter into the treaty", and the phrase "unless the violation of its internal law" should be replaced by "unless the violation of that law"; (b) the consistency of the phrase "shall not invalidate the consent" used in the first sentence with the phrase "may not withdraw the consent" used in the second sentence requires consideration; (c) the general principle underlying article 47 is operative as regards the subject-matter of article 31 and the interrelation of the two articles should be taken into account in the drafting of the present article; (d) the first sentence should be so drafted as to make it clear that the word "manifest" is to be understood in an objective sense.

Luxembourg. The Luxembourg Government approves the rule formulated in article 31 so far as concerns the failure to comply with provisions of internal law regarding competence to conclude treaties. It draws attention, however, to the analogous problem of a failure to observe other applicable provisions of internal law not relating to the competence of representatives to conclude treaties, as, for example, provisions for the demilitarization of the State, for the transfer of powers to an international organization or for the guarantee of fundamental rights and freedoms. While taking the view that a failure to observe such provisions does not affect the international validity of the treaty, it suggests that these cases should be dealt with in the commentary to the article.

Netherlands. The Netherlands Government endorses the guiding principle proposed by the Commission. It fears, however, that the exception admitted by the "unless etc." clause may seriously undermine that rule as it may be easy for States wishing to shirk their obligations under treaties to make every breach of their national regulations appear to other parties as a "manifest violation" of their national laws. It suggests that the clause should be made

¹²⁷ *P.C.I.J.*, Series C, No. 63, pp. 880-884, and No. 66, pp. 2758-2759.

more objective by rewording it on the lines of paragraph 7 of the commentary:

"Unless the other parties have been actually aware of the violation of internal law or unless this violation was so manifest that the other parties must be deemed to have been aware of it."

Portugal. The Portuguese Government approves the rule set out in the article. While noting that the phrase "unless the violation of its internal law is manifest" lacks something in precision, it doubts whether other possible formulations such as "absolutely manifest" or "sufficiently notorious" are any more precise. It also observes that an additional limitation on a State's being bound by the unauthorized acts of its representatives results from article 32 and that this is a further reason for rendering the present article acceptable.

Sweden. In general the Swedish Government endorses the principle proposed by the Commission as the basic rule, and also the exception to that rule provided for in the article. However, it feels that the formulation of the exception is not quite satisfactory, since the consent, if it is indeed "invalidated" in these cases, cannot very well be "withdrawn". It suggests that the article should be revised to read as follows:

"When the consent... shall not invalidate the consent expressed by its representative. Nevertheless, in case the violation of its internal law was manifest, a State may withdraw the consent expressed by its representative. In other cases it may not withdraw such consent unless the other parties to the treaty so agree."

Uganda. The Government of Uganda appears to take exception to the rule proposed in article 31 on the ground that, in its view, the article "leaves room for internationally concluded treaties to bypass constitutional procedures of a Member State".

United Kingdom. Although agreeing generally with this article, the United Kingdom Government feels that it may be difficult to apply in practice without some clarification of the proviso "unless the violation of its internal law was manifest". The wording, in its view, does not make it clear to which persons the violation must be manifest, nor whether those persons must, in fact, have had actual knowledge of the violation at the material time.

United States. The United States Government observes that the provisions of article 31, when considered along with the commentary upon it, should prove to be self-enforcing in the course of time; for a State which invokes a right to withdraw on the ground that the violation of its internal law is manifest is likely to find that States will thereafter require it to give assurances as to the fulfilment of the requirements of its internal law.

Bolivian delegation. The delegation is happy to note that, under the present article, consent expressed by the representative is considered to be valid. It seems, however, to give its approval to the article only on the assumption that a different rule is to apply in the case of "formal" treaties.¹²⁸

Bulgarian delegation. The delegation approves the solution proposed by the Commission, but stresses the need to specify what exactly should be understood by "manifest violation".¹²⁹

Delegation of Cyprus. The delegation endorses the general principle laid down in the article and thinks it to be a mistake to weaken it by admitting cases of "manifest violation" as an exception to it. In its view, no clear-cut distinction could be made in practice between a "manifest" and "non-manifest" violation.¹³⁰

Ecuadorian delegation. Article 31, in the view of the delegation, should not present any difficulty in the case of treaties in good and due form. Nevertheless, the delegation would have preferred the Commission to have adopted precise rules defining and distinguishing accession, acceptance and approval in order to prevent interpretations which might have unfortunate consequences. The competence of a representative is most likely, it thinks, to be challenged where the treaty is in simplified form and not subject to ratification, chiefly because, according to the draft code, that type of treaty is defined solely by its form. Although it is impossible to define it according to its substance, a formula may perhaps be found which will more clearly indicate the position of that class of agreements in international law.¹³¹

Delegation of El Salvador. The delegation thinks that the question raised in the article merits further consideration.¹³²

Iranian delegation. The delegation finds the article acceptable but feels that the exact meaning of the word "manifest" should be made clear.¹³³

Iraqi delegation. The delegation considers that the article should have been founded on the "constitutionalist" rather than the "internationalist" principle; many authors, it says, maintain that international law leaves it to the internal law of each State to determine the making of a treaty. In its view, therefore, the "constitutionalist" principle should have been made the foundation of article 31, subject to certain exceptions in favour of the internationalist principle justified by the necessity to respect the good faith of the other party, above all in multilateral treaties where it is difficult to have a detailed knowledge of the internal law of all the contracting parties.¹³⁴

Italian delegation. Although appreciating the efforts of the Commission to find a satisfactory solution, the delegation cannot support the article as it stands. In its view a State cannot "withdraw" a consent which has never been given; and a statement made by a representative in disregard of internal law cannot be imputed to his State. The drafting problem arises, it thinks, from the fact that the article is not entirely logical. The delegation considers that the article belatedly states, in what seems to it to be a

¹²⁹ *Ibid.*, 788th meeting, para. 13.

¹³⁰ *Ibid.*, 783rd meeting, para. 17.

¹³¹ *Ibid.*, 789th meeting, para. 24.

¹³² *Ibid.*, 782nd meeting, para. 3.

¹³³ *Ibid.*, 787th meeting, para. 32.

¹³⁴ *Ibid.*, 788th meeting, para. 19.

¹²⁸ *Official Records of the General Assembly, Eighteenth Session, Sixth Committee, 793rd meeting, para. 19.*

contradictory manner, something which should have been stated in different form in earlier articles, e.g. articles 4, 11 and 12. None of the articles in part I required the establishment of a State's consent to be effected in compliance with the constitutional laws of the State. Under part I the only conditions to be met before a State could be considered to have given its consent to be bound through the intermediary of a competent organ were those provided in article 4. It follows, in the opinion of the delegation, that a treaty may be regarded as valid in so far as article 4 is concerned, with respect to the consent given by the representatives of the parties, but invalid in so far as article 31 is concerned, for reasons relating to that consent. The delegation maintains that the role of constitutional law in the matter of consent should be defined in the part dealing with the authority of the organs of a State to commit that State to be bound by a treaty, and not merely incidentally in the section dealing with the invalidity of treaties. It further maintains that the rules of constitutional law are given less than their proper weight in article 31, less than in many international treaties and in particular the Charter, Article 110 of which provides that it shall be ratified by the signatory States in accordance with their respective constitutional processes.¹³⁵

Panamanian delegation. The delegation does not share the fear of some delegations that the difficulty of distinguishing in practice between a "manifest" and a "non-manifest" violation of internal law would introduce an element of instability into international relations. It expresses the view, however, that article 31 deals only with the question of the competence of the representative of a State, and observes that other conflicts between internal and international law may arise, for example where there is a constitutional limitation upon the granting of jurisdictional concessions. The delegation does not now propose that the draft articles should be extended to cover such other aspects of internal law concerned with treaty-making, as these are numerous and varied. It merely wishes to underline that the draft articles are not to be construed as a complete body of rules providing for all problems respecting the causes of invalidity. Its position is that the fact that the draft does not deal with certain topics or develop all their possibilities does not mean that they are necessarily discarded as valid legal principles or that the possibility of their later codification is excluded.¹³⁶

Philippine delegation. In the view of the delegation, the article deserves sympathetic consideration. At the same time, while the exception appears to be desirable, the phrase "unless the violation of its internal law was manifest" seems to it to be far too vague and to require to be worded more precisely.¹³⁷

Romanian delegation. The delegation observes that the article raises two considerations which are difficult to reconcile; and that the only way to resolve the difficulty is to find objective criteria for determining the cases in

which a State is legally justified in contesting the action of its representative.¹³⁸

Spanish delegation. The delegation considers that it is impossible for third States to be aware of all the complex questions raised by the formal or extrinsic constitutionality of a treaty, let alone those raised by its substantive or intrinsic constitutionality. It observes that, if a Government is prepared to enter into an agreement with another, the other party, by questioning its competence to conclude treaties, would violate the principle of non-intervention; and that many constitutions are silent with respect to certain acts which may nevertheless establish, maintain or terminate international obligations. It further observes that *de facto* Governments would be placed in a very invidious position if all international acts which under internal law are unconstitutional were to be declared void. In general, therefore, the delegation is of the opinion that the Commission should not have weakened the principle that the unconstitutionality of a treaty in internal law does not affect its international validity; and that it should not have introduced a concept so subjective as "manifest violation". In addition, it does not think that the article makes it clear whether the violation to which it refers is simply a violation of the letter of the constitution or equally a violation of a constitutional practice, a matter which it might be very difficult for foreigners to ascertain.¹³⁹

Thai delegation. The delegation feels that, so long as different legal systems prevail in the world, it will be idealistic to believe that all countries can have in common a legal principle as progressive as that embodied in article 31. It also believes that the scope of the word "manifest" is not defined with sufficient clearness and that the application of the article may give rise to controversies.¹⁴⁰

Delegation of the United Arab Republic. While appreciating the efforts of the Commission to reconcile the principles of stability of treaties and of respect for constitutional limitations, the delegation regrets that article 31 does not endorse the principle of incorporating constitutional limitations in international law but merely recognises the validity of that principle in exceptional cases. It would have preferred a provision on the lines of article 21 of the *Harvard Research Draft*¹⁴¹ which is worded as follows: "A State is not bound by a treaty made on its behalf by an organ or authority not competent under its law to conclude the treaty; however, a State may be responsible for an injury resulting to another State from reasonable reliance by the latter upon a representation that such organ or authority was competent to conclude the treaty."¹⁴²

Uruguayan delegation. The provisions of article 31 appear to the delegation to be *prima facie* reasonable and ade-

¹³⁵ *Ibid.*, 793rd meeting, paras. 5-10.

¹³⁶ *Ibid.*, 790th meeting, paras. 29 and 30.

¹³⁷ *Ibid.*, 790th meeting, para. 8.

¹³⁸ *Ibid.*, 783rd meeting, para. 31.

¹³⁹ *Ibid.*, 792nd meeting, paras. 5-7.

¹⁴⁰ *Ibid.*, 791st meeting, para. 3.

¹⁴¹ *Research in International Law*, "III, Law of Treaties"; Supplement to the American Journal of International Law, vol. 29, 1935.

¹⁴² *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 791st meeting, para. 14.

quate. Although it feels that a distinction might perhaps have been drawn between the violation of procedural or formal rules and the violation of rules regarding the competence of a State's representative, the delegation considers the rules proposed by the Commission to be the best solution to the problem yet put forward.¹⁴³

Yugoslav delegation. The delegation considers that in matters concerning the validity of treaties it is essential to avoid any ambiguity; and that it is inadvisable to introduce a distinction between a manifest and non-manifest violation of a State's internal law. In its view, no State can today justifiably plead ignorance of an other State's constitutional law, while a State entering into a treaty must be assumed to do so in accordance with its own constitutional law. It maintains that a treaty can have no legal force unless it is concluded in accordance with both international law and the internal laws of the signatories. It considers this view to be reflected in article 32 and to be implicit throughout the draft articles; it therefore sees no reason for departing from it in the present article.¹⁴⁴

Observations and proposals of the Special Rapporteur

1. The essence of the rule proposed by the Commission is that, except in the case of a "manifest" violation, the fact that the conclusion of a treaty violates its internal law does not allow a State to claim that the consent of the State to be bound by the treaty expressed by its representative is invalid. At the fifteenth session the views of members were to some extent divided and the different views expressed in the Commission are summarized in paragraph (12) of its commentary to article 31. Some members would have preferred not to admit any exception to the basic rule and to lay down that in every case where the consent of a State appears to have been expressed in due form by a representative considered under international law as qualified to do so the State is bound. Some members, on the other hand, considered that international law has to take account of internal law to the extent of recognizing that this law determines the organ or organs competent in the State to exercise the treaty-making powers. The majority, however, considered that, if this exception were to be allowed, the complexity and uncertain application of provisions of internal law regarding the conclusion of treaties would create too large a risk to the security of treaties. The furthest that the majority was prepared to go was to recognize an exception in cases of "manifest" violation on the basis that in such cases the other State could not legitimately claim to have relied upon the representative's expression of consent.¹⁴⁵ This, they thought, would serve to cover cases of a gross abuse of power by a Head of State or other high officer of State without compromising the basic principle. The rule formulated in 1962 therefore constituted a middle view which obtained the support of the majority.

2. Seventeen of the Governments and delegations which have commented on the present article express themselves in favour of the rule proposed by the Commission while making suggestions for improving its formulation. Seven Governments and delegations, on the other hand, appear to be opposed to that rule, considering that greater importance should be given to the rôle of constitutional law as an element in the formation of a State's consent to be bound by a treaty. Three delegations do not make their position plain on the central question of principle. In these circumstances the Special Rapporteur thinks that his proper course is to assume the maintenance of the rule adopted in 1962 but to try to improve its formulation in the light of the points made in the comments of Governments and delegations.

3. A number of Governments have suggested that the text should indicate more clearly, first, to whom the violation must be "manifest" for the purpose of bringing the exception into play and, secondly, what constitutes a "manifest" violation of internal law. On the first point, as the exception is based on the principle that good faith does not permit the other State to reply upon a consent manifestly given by a representative in violation of internal law, it follows that it is to the "other State" that the violation must be considered to have been manifest. This does not, however, mean that the manifest character of the violation is a wholly subjective question. That will be so if the other party is proved to have had actual knowledge of it. But where direct evidence of actual knowledge is lacking, the circumstances may still show that the violation was so manifest that it would be inadmissible to allow the other party to disclaim all awareness of it. On the second point, it is clearly impossible to define exhaustively in advance all the cases in which a violation may be held to be "manifest", for the question must depend to a large extent on the circumstances of each case. The most that can be achieved is to state the broad principle as clearly as possible. The Special Rapporteur suggests that a reformulation of the "manifest violation" clause on the lines suggested by the Netherlands Government is as far as it is possible to go to meet the views of Governments on the two points just discussed; and a reformulation of the clause on those lines will be found in the new text of the article proposed in paragraph 9 below.

4. A number of Governments have questioned the consistency of the phrase "shall not invalidate the consent expressed by its representative" in the first sentence of the article with the phrase "may not withdraw the consent" in the second sentence. This criticism appears to be well-founded; for the words in the second sentence "except in the latter case" imply that in cases also of "manifest violation" the right attributed by the article to the State concerned is to *withdraw* its consent, and this is not consistent with the "invalidity" attached by the article to the consent in the previous sentence. The Swedish Government suggests that the difficulty might be avoided by a text which divides the article into three, rather than two, sentences. However, the Special Rapporteur is inclined to think that the best solution is simply to omit the second sentence altogether. If this sentence is looked at closely, it does no more than state a necessary consequence of

¹⁴³ *Ibid.*, 792nd meeting, para. 27.

¹⁴⁴ *Ibid.*, 782nd meeting, para. 12.

¹⁴⁵ See J. Basdevant, *Recueil des Cours de l'Académie de droit international*, vol. XV (1926), p. 581; and P. Guggenheim, *Survey on the ways in which States interpret their International Obligations* (United Nations Educational, Scientific and Cultural Organization), p. 8.

the rule laid down in the first sentence. If under the general provision in the first sentence the representative's expression of consent binds the State, it necessarily may not withdraw from the treaty except with the agreement of the other parties.

5. The suggestion of the Danish Government that the formula used in the present article should be brought into line with that used in articles 33 and 34 "may invoke... as invalidating its consent to be bound etc." is thought to be sound; and this formula is therefore employed in the new text proposed in paragraph 9.

6. Two States (Luxembourg and Panama) interpret the article as concerned only with violations of provisions of internal law which relate to the competence of organs of a State to exercise the treaty-making power; and these States suggest that it should be extended to cover violations of other constitutional provisions. The Commission was fully aware that constitutional restrictions upon the competence of the executive to conclude treaties are not limited to procedural provisions regarding the exercise of the treaty-making power but may also result from provisions of substantive law entrenched in the constitution. It is also the understanding of the Special Rapporteur that the Commission intended the words "the fact that a provision of the internal law... regarding competence to enter into treaties has not been complied with" to cover both forms of restrictions on competence. As, however, these words have been read in a different sense by the two States, the Special Rapporteur suggests that it may be desirable to replace them with the broader phrase "the fact that a treaty has been concluded in violation of its internal law".

7. The Special Rapporteur also doubts whether it is necessary in article 31 (the case is different in article 32) to link the article directly with the provisions of article 4 regarding full powers to represent the State in the conclusion of treaties. Although there may be a certain connexion between the two articles, the question in the present article is not fundamentally one of evidence of full powers under international law but of restrictions imposed by internal law on the exercise of the treaty-making power. Omission of the reference to article 4 will both lighten the drafting and minimize the possibility of an interpretation limiting the operation of the article to provisions of internal law regarding the distribution of the treaty-making power amongst State organs. Accordingly, the new text of the article proposed in paragraph 9 does not contain any cross-reference to the provisions of article 4.

8. The comment of the Government of Israel, that the general principle underlying article 47 (loss of the right to allege the invalidity of a treaty through preclusion) is operative as regards the present article and ought to be taken into account in its drafting, also requires consideration. Article 47, as at present drafted, does not cover the present article, since it is expressed to apply to articles 32 to 35 with no mention of article 31. In their comments upon article 47 the Portuguese and Swedish Governments, as well as the Government of Israel, express the view that the present article should be brought within the operation

of that article. This view is believed to be correct. But, although the point requires to be borne in mind in considering the substance of the present article, it appears rather to concern the drafting of article 47.

9. In the light of the foregoing observations, the Special Rapporteur suggests that the article might be reformulated on the following lines:

"Violation of internal law

"The fact that a treaty has been concluded in violation of its internal law may be invoked by a State as invalidating its consent to be bound by the treaty only if the violation of its internal law was known to the other States concerned or was so evident that they must be considered as having notice of it."

Article 32. — Lack of authority to bind the State

Comments of Governments

Israel. In paragraph 1 the Government of Israel suggests that the phrase "bound by a treaty" should read "bound by the treaty". It also suggests that the rule should be formulated affirmatively, instead of negatively, as follows: "the act of such representative shall have legal effect if it is afterwards confirmed..." In paragraph 2 the Government of Israel suggests that the word "power" should be replaced by "authority" and that the phrase "bound by a treaty" should again be amended to read "bound by the treaty". It also considers that in the final phrase of the paragraph it should be made clear that the particular instructions must have been brought to the attention of the other contracting States prior to the termination of the negotiations. It further proposes that, subject to the conditions laid down in article 46, an appropriate clause regarding the separability of treaty provisions for the purposes of this article should be introduced into it.

Portugal. The Portuguese Government expressly endorses the principles formulated in the article, explaining its understanding of them.

United States. The United States Government recalls its comments upon article 4, in which it suggests that "any other representatives" (i.e. other than Heads of State, etc.) should not be obliged to produce full powers in every case, but only upon the request of the other contracting party. It further states that in many instances the appointment of a representative to negotiate is preceded by an agreement at high levels on matters of substance, and that the surrounding circumstances may also make it clear that a given individual or mission is fully authorized. In addition, it takes the position that the reference to article 4 in the present article is somewhat ambiguous as it "seems to ignore the fact that a representative may be furnished with some credentials as required under the existing wording of paragraphs 3-6 of article 4". In the light of these comments the United States Government proposes that paragraph 1 should be revised to read as follows:

"If the representative of a State, who cannot be considered under the provisions of article 4 or in the light of the surrounding circumstances as being furnished

with the necessary authority to express the consent of his State to be bound by a treaty, nevertheless executes an act purporting to express its consent, the act of such representative *may* be considered by any of the parties to be without any legal effect, unless it is afterwards confirmed, either expressly or impliedly, by his State.”

In paragraph 2, simply by way of underlining what already appears to be the sense of the paragraph, it suggests that at the end of the paragraph there should be added the words “prior to his expressing the consent”.

Indian delegation. The delegation is not happy with the phraseology of paragraph 2, which appears to it to refer to secret restrictions; for the instrument of full powers normally specifies, for the information of the other contracting States, any non-secret restrictions on those powers.¹⁴⁶

Pakistan delegation. The delegation considers that in paragraph 1 the word “shall” should be replaced by “may”. The appointment of a representative to negotiate and draw up a treaty is generally preceded by a high-level decision, so that mandatory terminology should be avoided.¹⁴⁷

Spanish delegation. The delegation points out that the term “*facultad*” found in the Spanish text does not correctly express the authority granted by one person to another to represent him in a legal transaction; and that the term “*poder*” or “*apoderamiento*” would be more appropriate.¹⁴⁸

Observations and proposals of the Special Rapporteur

1. With regard to paragraph 1, the main point made in the comments of Governments and delegations is that of the United States Government, which holds that the reference to the provisions of article 4 is ambiguous in that it seems to overlook that a representative may be furnished with some credentials as contemplated by that article. This comment does not appear to the Special Rapporteur to have great force since the reference in the present paragraph to the provisions of article 4 is entirely general, and cases of restricted authority are dealt with in paragraph 2. The preoccupation of the United States Government appears rather to relate to the provisions of article 4 itself, with regard to which it has stressed that in practice full powers are often dispensed with when a prior agreement as to the object of the negotiations or other surrounding circumstances indicate that a representative is fully authorized to conclude the treaty. The Commission has taken this point into account in re-examining article 4,

the drafting of which has been considerably changed at the present session. These changes in the wording of article 4 in any event require certain modifications in the present article.

2. The operative provision of paragraph 1, as at present formulated, states that the unauthorized act of the representative “shall be without any legal effect” unless it is afterwards confirmed by his State. The Special Rapporteur suggests that, as in the case of article 31, it may be desirable to use a formulation closer to those used in articles 33 and 34 regarding fraud and error; in other words, he suggests that the operative provision should be reworded in terms of a right to invoke the lack of authority as invalidating the expression of the State’s consent to be bound by the treaty.

3. In paragraph 2 the replacement of the word “power” by “authority”, which is suggested by the Government of Israel, is thought by the Special Rapporteur to be an improvement. The addition at the end of the paragraph which is suggested by both the Israel and United States Governments, of words spelling out more precisely the requirement that the restriction upon the representative’s authority must have been brought to the notice of the other States before he expresses the consent of his State is also thought to be acceptable.

4. As in the case of the previous paragraph, the Special Rapporteur suggests that the operative provision of this paragraph should be reworded in terms of a right to invoke the lack of authority as invalidating the expression of the State’s consent to be bound by the treaty.

5. The Special Rapporteur also suggests that the title of the article should be made more specific by changing it to “Unauthorized act of a representative”.

6. In the light of the above observations the Special Rapporteur proposes that the article should be reformulated as follows:

“Unauthorized act of a representative

“1. Where a representative, who is not considered under article 4 as representing his State for the purpose or as furnished with the necessary authority, purports to express the consent of his State to be bound by a treaty, his lack of authority may be invoked as invalidating such consent unless this has afterwards been confirmed, expressly or impliedly, by his State.

“2. Where the authority of a representative to express the consent of his State to be bound by a treaty has been made subject to a particular restriction, his omission to observe that restriction may be invoked as invalidating the consent only if the restriction was brought to the notice of the other contracting States prior to his expressing such consent.”

¹⁴⁶ *Official Records of the General Assembly, Eighteenth Session, Sixth Committee, 783rd meeting, para. 3.*

¹⁴⁷ *Ibid.*, 791st meeting, para. 27.

¹⁴⁸ *Ibid.*, 792nd meeting, para. 2.

DOCUMENT A/CN.4/L.108

Addition to article 29 or new article 29 *bis*, proposed by Mr. S. Rosenne

[Original text: English]
[13 May 1965]

Unless otherwise provided in the treaty or these articles, any notice communicated by the depositary to the States mentioned in article 29, paragraph 1, becomes operative 90 days after the receipt by the depositary of the instrument to which the communication relates.

Commentary

(1) Certain provisions of these articles require notice to be transmitted through the depositary, notably articles 15 (2), 18 (3), 19 (2) [Special Rapporteur's Fourth Report, A/CN.4/177, Add.1, article 20 (1), 20 (3), 20 (5)], 22 (1) [Special Rapporteur's Fourth Report, article 20 (b)], 27, 29, 40 (1) (b), and 50; and other provisions, notably article 66, provide in more general terms for the giving of notices to the parties, without always specifying whether, in cases of multilateral treaties, the notices are to be transmitted through the depositary. The depositary himself functions "on behalf of" all the parties to the treaty and the States to which it is open to become a party, and clearly it is right to rely on the exercise of the depositary functions with all due diligence, whatever form of language is used to express that idea.

(2) The draft articles adopted in 1962 deal with the functions of the depositary from the point of view of the administration of the treaty. However, the exercise of those functions produces legal consequences in terms of the legal rights and duties of States, and in order to ensure that effect will be given to these legal consequences it becomes necessary to establish when the act to which the instrument refers becomes operative, i.e. the time from which those rights and obligations will come into existence. This issue is raised directly by the United Kingdom Government in the limited context of the effect of the withdrawal of a reservation in its comment on article 22 (A/CN.4/175), and the same thought seems to be behind the comment of the Israel Government on articles 15 and 29, when it refers to "receipt of those notifications through the normal channels by the home authorities of the individual State" (*ibid.*).

(3) It could well be imagined that this moment would be the very time on which that act is communicated to the

depositary. This was indeed the view of the International Court of Justice in the *Right of Passage* case,¹ with reference to the special circumstances of the time with effect from which a declaration accepting the compulsory jurisdiction of that Court under its Statute enters into effect; and the same would probably be the position as regards other existing multilateral conventions which are silent on the matter. This view of the law was recognized by the Commission in 1962 in article 15, paragraph 2 (b); at the same time the Commission, by referring to the possible "small time-lag before the other States become aware that the treaty is in force between them and the State depositing the instrument", may have realized the possible practical inconvenience of the rule.²

(4) The present proposal therefore aims to cover that time-lag by allowing for a short period before the instrument deposited with the depositary becomes operative in the sense of establishing the time from which the legal position of the other States concerned is affected. It is suggested that this period should be fixed at 90 days, thus allowing both for the observance of the normal administrative practices of the depositary and for receipt of the notice by the home authorities of the States concerned and the observance of their normal administrative practices. It also allows for different depositary practices: sometimes the notices are transmitted through a government's own diplomatic posts abroad, sometimes through diplomatic posts accredited to the depositary; and sometimes by mail. The term "becomes operative" appears in article 15 (2) and in the Special Rapporteur's new proposal for article 22.

Note to the above

As an illustration: On 16 April 1965, there was received in the Israel Ministry of Foreign Affairs a communication from a depositary, dated 6 April 1965, relating to an action concerning a multilateral treaty and received by the depositary on 10 March 1965.

¹ *Case concerning Right of Passage over Indian Territory (Preliminary objections)*, I.C.J. Reports, 1957, p. 125.

² *Yearbook of the International Law Commission*, 1962, vol. II, document A/5209, commentary on article 15, para. 4.

DOCUMENT A/5687

**Depositary practice in relation to reservations
Report of the Secretary-General**

[Submitted in accordance with General Assembly resolution 1452B (XIV)]

[Original texts: English/French/Spanish]

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Introduction

1. The General Assembly at its fourteenth session considered agenda item 65 entitled "Reservations to Multilateral Conventions: the Convention on the Inter-Governmental Maritime Consultative Organization". On the recommendation of the Sixth Committee it adopted resolution 1452 B (XIV) on 7 December 1959. By paragraph 2 of that resolution, the General Assembly requested the Secretary-General "to obtain information from all depositary States and international organizations with respect to depositary practice in relation to reservations, and to prepare a summary of such practices, including his own, for use by the International Law Commission in preparing its reports on the law of treaties and by the General Assembly in considering these reports".

2. Pursuant to this request of the General Assembly, the Secretary-General, by circular letter of 25 July 1962, invited all States and international organizations which are serving as depositaries of multilateral conventions to provide him with information regarding their depositary practice in relation to reservations. A detailed questionnaire, a copy of which is reproduced as annex I of this document, was enclosed in the Secretary-General's circular letter to assist the States and the international organizations concerned in preparing the requested information. This questionnaire was organized under the following six headings: Rules Governing Reservations; Reservation *v* Declaration; Reservations Upon Signature; Reservations Upon Ratification or Accession; Objections to Reservations; and Entry into Force.

3. Replies of substance were received from thirty-four States and sixteen inter-governmental organizations.

4. The following nineteen States and five inter-governmental organizations have informed the Secretary-General that they do not at present serve as depositaries of any multilateral conventions:

Afghanistan	Iraq
Congo (Brazzaville)	Israel
Cyprus	Japan
Czechoslovakia ¹	Laos
Dominican Republic	New Zealand
Gabon	Pakistan
Ghana	Peru
Guatemala	Tanganyika
Haiti	Thailand
Honduras	

International Development Association
International Finance Corporation
International Monetary Fund
World Meteorological Organization
Universal Postal Union

¹ The letter from Czechoslovakia states:

"The position of the Czechoslovak Socialist Republic as a Contracting Party to a great number of multilateral conventions concerning the question of depositary functions in connexion with the reservations to multilateral conventions was explained by the Czechoslovak Delegation during the fourteenth session of the United Nations General Assembly. See *Official Records of the General Assembly, Fourteenth Session, Sixth Committee*, pp. 156-157."

5. The following sixteen States and eleven inter-governmental organizations have informed the Secretary-General that they are the depositaries of the number of agreements stated after the name of each:

Australia (4)
Austria (2)
Bulgaria (1)
Canada (13)
Denmark (16, concluded since 1900)
Federal Republic of Germany (9)
Finland (several)
Luxembourg (3)
Netherlands (53)
Philippines (2)
Poland (several)
Romania (1)
Sweden (several regional conventions)
Union of Soviet Socialist Republics (12)
United Kingdom of Great Britain and Northern Ireland (15, concluded since 1945)
United States of America (62)
Council for Mutual Economic Assistance (several)
Council of Europe (40)
Food and Agriculture Organization of the United Nations (8)
General Agreement on Tariffs and Trade (52)
Inter-Governmental Maritime Consultative Organization (3)
International Atomic Energy Agency (1)
International Bank for Reconstruction and Development (2)
International Labour Organisation (121)
Organization of American States (over 100)
United Nations Educational, Scientific and Cultural Organization (16)
World Health Organization (3)

6. Of the foregoing, the following States and organizations have informed the Secretary-General that no reservations have ever been presented to any of the conventions of which they are depositaries and that consequently they have no depositary practice on reservations:

Australia	Poland
Austria	Romania
Bulgaria ²	Sweden
Federal Republic of Germany	Union of Soviet Socialist Republics
Finland	
Philippines ³	

Council for Mutual Economic Assistance
International Bank for Reconstruction and Development⁴
International Labour Organisation⁵

² The depositaries have stated that the conventions and agreements contain no provisions on reservations.

³ The letter from the International Labour Office states:

"In no case has a reservation to an International Labour Convention been registered.

"The Practice followed by the International Labour Office in the matter, and the grounds on which it is based, are set forth in detail in the Memorandum submitted by the International Labour Organisation to the International Court of Justice—at its request, in connexion with the case concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Written Statements, pages 212-278). The Court did not have occasion to comment on this memorandum, but the International Law Commission subsequently took note of it at its third session (May-July 1951). In its report to the General Assembly on that session, the Commission stated:

"20. Because of its constitutional structure the established practice of the International Labour Organisation, as described in the Written Statement dated 12 January 1951 of the Organisation submitted to the International Court in the case of reservations

7. The replies to the questionnaire are given in part I of this document.
8. Part II of the report describes the depositary practice of the Secretary-General in relation to reservations. This part is also organized under the six headings used in the preceding part and gives a factual summary of the practice currently followed by the Secretary-General.
9. Annex II gives examples of reservation clauses appearing in conventions concluded under the auspices of the United Nations.

Part I. Depositary practice of States and international organizations in relation to reservations

A—RULES GOVERNING RESERVATIONS

Question 1. Do you, or does any organization for which you act as depositary, maintain standard reservations clauses for use in multilateral conventions? If so, please supply them, together with references to any conventions in which they occur.

Dominican Republic. The Dominican Republic does not act as depositary for any conventions. It does not maintain standard reservations clauses for use in multilateral conventions.

Luxembourg. As the Government of Luxembourg is the depositary only for a very small number of agreements, there has been no opportunity for a particular practice to evolve in Luxembourg with regard to reservations to multilateral conventions. In the agreements deposited with the Government of Luxembourg the procedure for reservations is dealt with in the actual texts, so that the role of the depositary State is clearly defined.

Thus, article 29 of the Statute of the European School, signed at Luxembourg on 12 April 1957, provides that:

“On signing this Statute, the Luxembourg Government may enter such reservations as may seem appropriate by reason of its status as Government of the host country and of its own school legislation.”⁴

Article 8 of the Protocol concerning the establishment of European schools, signed at Luxembourg on 13 April 1962, contains a corresponding clause providing that:

“The Government of any country in which a school is situated... shall be entitled to enter reservations as provided in article 29 of the Statute of the European School.”

Netherlands. No.

to the Convention on Genocide, excludes the possibility of reservations to international labour conventions. However, the texts of these conventions frequently take account of the special conditions prevailing in particular countries by making such exceptional provisions for them as will admit of their proceeding to ratification; indeed, this course is enjoined on the General Conference by article 19 (3) and other articles of the Constitution of the Organisation. [Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858), para. 20.]

The letter concludes by stating that the Director-General of the International Labour Office also acts as depositary for three regional conventions, and that no question of reservations has arisen with respect to any of these instruments.

⁴ United Nations, *Treaty Series*, vol. 443, p. 232.

Poland. No reservations clauses are contained in multilateral conventions in respect of which the Polish Government performs depositary functions, with the exception of the Protocol of 28 September 1955⁵ modifying the Convention for the Unification of Certain Rules relating to international Carriage by Air, signed at Warsaw on 12 October 1929,⁶ which states in article XXVI that no reservations to this Protocol are allowed.

United Kingdom of Great Britain and Northern Ireland. No.

United States of America. The United States Government does not maintain standard reservations clauses for use in multilateral conventions. So far as it is aware, no organization established by a convention or other agreement for which the United States Government is depositary maintains any such standard reservations clauses.

Council of Europe. Yes as a rule. See articles (e) and (d), respectively, of annexes I and II of the Model Final Clauses approved by the Ministers' Deputies at their 113th meeting (annex I contains the model final clauses of an agreement that can be signed without reservation as to ratification or acceptance; annex II contains the model final clauses of a convention requiring ratification or acceptance). Article (e) [(d)] reads as follows:

“1. Any Contracting Party may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, declare that it avails itself of one or more of the reservations provided for in the Annex to this Agreement [Convention].

“2. Any Contracting Party may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary-General of the Council of Europe, which shall become effective as from the date of its receipt.

“3. A Contracting Party which has made a reservation in respect of any provision of this Agreement [Convention] may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision in so far as it has itself accepted it.”

Food and Agriculture Organization of the United Nations. The Food and Agriculture Organization of the United Nations (FAO) had no standard reservation clause and until 1953 no provision concerning reservations was included in any of the conventions and agreements concluded under the auspices of FAO. In 1957 the ninth session of the FAO Conference adopted a series of “Principles and Procedures” which were designed to govern *inter alia* conventions and agreements concluded under the auspices of FAO and, in particular, under articles XIV and XV of the FAO Constitution.⁷ These principles supplement the aforementioned constitutional

⁵ *Ibid.*, vol. 478, p. 373.

⁶ League of Nations, *Treaty Series*, vol. CXXXVII, p. 11.

⁷ Food and Agriculture Organization of the United Nations: *Report of the ninth session of the FAO Conference, 1958*, paras. 503-509 and appendix D.

provisions and rule XXI ("Conventions and Agreements") of the General Rules of the organization. In pursuance of resolution 598 (VI) of the General Assembly the FAO Conference incorporated in these principles a paragraph regarding reservations. This provision, which deals with a number of problems raised in the questionnaire, reads as follows:

"10. In conformity with Resolution 598 (VI) of the United Nations General Assembly, a clause on the admissibility of reservations shall be inserted in all conventions and agreements. This clause shall state that a reservation may become operative only upon unanimous acceptance by the parties to the convention or agreement. Failing such acceptance the nation concerned does not become a party to the convention or agreement. With respect to reservations made prior to the coming into force of the convention or agreement such reservation must be accepted by all the nations that at the time of the coming into force are parties thereto. For calculating the number of acceptances of the convention or agreement necessary to bring it into force nations having made reservations shall not be included in this number. Reservations made after the coming into force of a convention or agreement must be accepted by all parties to the convention or agreement. The Director-General of the Organization shall notify all signatory, acceding and accepting governments of all reservations. Governments not having replied within three months from the date of notification shall be considered as having accepted tacitly the reservation and the notification referred to above shall draw attention to this rule."⁸

While deciding that a reservation clause should, in future, be incorporated in any convention or agreement to be concluded under article XIV of the FAO Constitution, the Conference also decided to adopt what might be considered the simplest method, i.e., the unanimity rule.

In order to give effect to the principles adopted by the FAO Conference, including the aforementioned provision relating to reservations, the Conference in its resolution No. 46/57 not only resolved, *inter alia*, that these principles should apply to the drafting of the constituent rules of bodies to be established in future under article XIV of the Constitution but also urged the parties to existing conventions and agreements "... to apply, as far as possible, the rules contained in the present statement of principles..." and invited these parties "to amend the texts of these conventions and agreements when feasible in order to bring them into line with said principles..."⁹ In compliance with the wish expressed by the Conference, several conventions and agreements have been amended and now contain a reservations clause in conformity with paragraph 10 of the aforementioned principles. The international instruments which have so been amended are the Constitution of the International Rice Commission, the Agreement for the establishment of the Indo-Pacific

Fisheries Council and the Constitution of the European Commission for the Control of Foot and Mouth Disease; the Agreement establishing the General Fisheries Council of the Mediterranean is in the process of being amended.

General Agreement on Tariffs and Trade. Since 1955, when the Executive Secretary began to perform depositary functions, the Contracting Parties have only very rarely encountered the problem of reservations to instruments deposited with the Executive Secretary. It appears that the intensive negotiating and consultation procedures during the pre-drafting and drafting stages in the preparation of GATT instruments have generally eliminated those situations which might have given rise to the submission of reservations. As a result, the Contracting Parties have not had occasion to devise standard reservations clauses for use in such instruments.

Inter-Governmental Maritime Consultative Organization (IMCO). The reply is in the negative. The conventions of which IMCO is depositary contain no clauses relating to reservations.

International Atomic Energy Agency. The only multilateral treaty for which the Agency acts as depositary is its Agreement on Privileges and Immunities.¹⁰ Section 38 of that Agreement contains the provision:

"It shall be permissible for a Member to make reservations to this Agreement. Reservations may be made only at the time of the deposit of the Member's instrument of acceptance, and shall immediately be communicated by the Director-General to all Members of the Agency."

In view of the limited scope of the Agency's depositary functions and the sparseness of its practice, the Agency does not have any rules governing reservations as contemplated in section A of the questionnaire.

Organization of American States. No.

United Nations Educational, Scientific and Cultural Organization. The United Nations Educational, Scientific and Cultural Organization (UNESCO) does not maintain standard reservation clauses for use in multilateral conventions.

However a clause stating that "Reservations to this Convention shall not be permitted" occurs in the Universal Copyright Convention (1952) (article XX)¹¹ and in the Convention against Discrimination in Education (1960) (article 9).¹²

Universal Postal Union. The Acts of the Universal Postal Union (UPU) contain no express general provision governing the admission and treatment of reservations, apart from the case cited in the reply to question 11 below. Nor is there any resolution by a Congress or other organ on the subject. The Acts of UPU, however, frequently give rise to reservations, of extremely varied nature.

World Health Organization. No.

⁸ Food and Agriculture Organization of the United Nations: *Basic Texts*, 1961, vol. II, p. 38.

⁹ Food and Agriculture Organization of the United Nations: *Report of the ninth session of the FAO Conference*, 1958, p. 182.

¹⁰ United Nations, *Treaty Series*, vol. 374, p. 147.

¹¹ *Ibid.*, vol. 216, p. 132.

¹² *Ibid.*, vol. 429, p. 93.

Question 2. In the alternative, is there a resolution or other set of rules for the regulation or guidance of the depositary in dealing with reservations? If so, a copy of the latest text would be appreciated.

Dominican Republic. There are some resolutions available to the depositary for guidance in dealing with reservations to multilateral treaties. These include the rules recommended in resolution XV of the third meeting of the Inter-American Council of Jurists, held at Mexico City;¹³ a number of articles (2-6) adopted at the Sixth Inter-American Conference; the comments of the Secretary of State for Foreign Affairs of the Dominican Republic included in the Collected Treaties and Conventions¹⁴ of the Dominican Republic; and, leaving aside other sources, the rules of procedure and "provisional understanding" of the Governing Board of the Pan American Union, 1932.

Netherlands. No.

United Kingdom of Great Britain and Northern Ireland. No.

United States of America. The United States Government has not adopted a resolution or other set of rules for its regulation or guidance in performing the depositary functions in regard to reservations.

Council of Europe. Not relevant.

Food and Agriculture Organization of the United Nations. Question 2 is indirectly covered by the reply to question 1.

Inter-Governmental Maritime Consultative Organization. The reply is in the negative. The Secretary-General of IMCO is guided by the practice followed by the United Nations.

IMCO is the depositary of three Conventions, the International Convention for the Safety of Life at Sea (1948),¹⁵ the International Convention for the Prevention of Pollution of the Sea by Oil (1954),¹⁶ and the International Convention for the Safety of Life at Sea (1960).¹⁷ Until the creation of IMCO, the duties of depositary for the first two conventions were carried out by the Government of the United Kingdom until 13 July and 15 June 1959 respectively, on which dates they were officially transferred to IMCO.

Consequently the practice of the IMCO secretariat is limited both as to time and scope. It has therefore endeavoured in carrying out its duties as depositary to follow as closely as possible the rules contained in United Nations document ST/LEG/7 of 7 August 1959 entitled "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements".

¹³ *Final Act of the Third Meeting of the Inter-American Council of Jurists*: Washington, D.C., Pan American Union, 1956.

¹⁴ Secretaría de Estado de Relaciones exteriores, *Compilaciones de Tratados y Convenciones de la República Dominicana*, 1958, vol. VI, pp. X-XIX.

¹⁵ United Nations, *Treaty Series*, vol. 164, p. 113.

¹⁶ *Ibid.*, vol. 327, p. 3.

¹⁷ Cmnd. 2812, No. 65 (1965), H. M. Stationery Office, London, 1965.

The IMCO secretariat has thus far had to register reservations or declarations, formulated after the transfer of the functions of depositary from the United Kingdom Government to the Organization, to the two latter Conventions named above. Thus the reservations relate to agreements concluded after resolution 598 (VI) of the United Nations General Assembly, dated 12 January 1952. The agreements in question do not contain any clause providing for reservations. The procedure indicated in paragraph 80 of document ST/LEG/7 has accordingly been followed by the IMCO secretariat.

Organization of American States. In general the procedure followed in respect to the deposit of ratifications accompanied by reservations has been governed by a desire to facilitate ratification of the particular treaty or convention by as large a number of States as possible, while taking account of the fact that individual States have fixed national policies in certain matters which they are not ready to abandon even for the sake of the adoption of a treaty which they might otherwise recognize as promoting the development of international law or furthering their common political and economic interests. To adopt a rigid rule prohibiting all reservations except those unanimously agreed to might defeat the adoption of the convention. To admit reservations without any limitation might make the convention of little practical value.

The procedure adopted by the Pan American Union has sought to follow a middle course between the two extremes, solving the problem by practical considerations based upon experience.

It is true that this experience has shown that existing rules do not cover all situations, and therefore need to be amended; but on the whole it may be said that the so-called Pan American practice or rule has given good results.

This subject has been studied in America for many years, as stated by the Inter-American Juridical Committee in its report, the culmination of these efforts being the Convention on Treaties,¹⁸ signed at the Sixth International Conference of American States, Havana, 1928.

All but two of the treaties and conventions signed at that Conference made the Pan American Union the depositary of the instruments of ratification, and this depositary function was specifically conferred upon the Union in the Convention on the Pan American Union,¹⁹ also signed at that Conference. Although this Convention never entered into force, since it required the ratification of all countries, sixteen of them deposited their instruments of ratification. Article VII of the Convention on the Pan American Union, on the deposit and exchange of ratifications, reads as follows:

"The instruments of ratification of the treaties, conventions, protocols and other diplomatic documents signed at the International Conferences of American States shall be deposited at the Pan American Union by the respective representative on the Governing Board, acting in the name of his Government, without

¹⁸ *Sixth International Conference of American States, Final Act*, Havana, 1928; text also in *International Legislation*, edited by Manley O. Hudson, Washington, D.C., 1931, vol. IV.

¹⁹ *Ibid.*

need of special credentials for the deposit of the ratification. A record of the deposit of the ratification shall be made in a document signed by the representative on the Board of the ratifying country, by the Director General of the Pan American Union, and by the Secretary of the Governing Board.

"The Pan American Union shall communicate to all the States members of the Union, through their representatives on the Board, the deposit of the ratification."

In order to establish a procedure for carrying out the functions assigned to the Pan American Union by the foregoing article, which was general in nature, the then Governing Board of the Pan American Union entrusted the study of the subject to a special committee.

The report of that committee was approved by the Governing Board at its meeting of 4 May 1932. That report sets forth what have been called the Rules of Procedure of the Governing Board of 1932. The complete text is reproduced below:

"The undersigned, members of the Committee appointed by the Board to study the procedure to be followed by the Pan American Union in the deposit of instruments of ratification of treaties and conventions, have the honour to submit for the consideration of the Board the following report:

"The procedure to be followed by the Pan American Union with respect to the deposit of ratifications, pursuant to article 7 of the Convention on the Pan American Union, signed at the Sixth International Conference of American States, shall be the following, unless provisions of a particular treaty provide otherwise:

"1. To assume the custody of the original instrument.

"2. To furnish copies thereof to all the signatory Governments.

"3. To receive the instruments of ratification of the signatory States including the reservations.

"4. To communicate the deposit of ratifications to the other signatory States, and in the case of reservation, to inform them thereof.

"5. To receive the replies of the other signatory States as to whether or not they accept the reservations.

"6. To inform all the States, signatory of the treaty, if the reservations have or have not been accepted.

"With respect to the legal status of treaties to which reservations are made but not accepted, the Governing Board of the Union understands that:

"1. The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations, in the terms in which it was originally drafted and signed.

"2. It shall be in force as between the Governments which ratify it with reservations and the signatory States which accept the reservations in the form in which the treaty may be modified by said reservation.

"3. It shall not be in force between a Government which may have ratified with reservations and an other

which may have already ratified, and which does not accept such reservations.

"The procedure suggested by the Committee is purely provisional, inasmuch as, strictly speaking, the function of depository of the instruments of ratification to be performed by the Pan American Union for the first time by virtue of the treaties signed at Havana is also provisional, as long as those treaties have not been unanimously ratified.

"In other respects the points involved in this procedure are very complex, and touch on a problem of international law still much debated, which the Committee believes should be solved in a final manner by the VII International Conference of American States and not by a simple interpretative provision of the Governing Board of the Pan American Union.

"The Committee consequently considers it advisable, without prejudice to these provisional rules, that this matter be submitted to the VII International Conference of American States and also brought to the attention of the American Institute of International Law."

It will be noted that the first group of six rules merely provides for a series of administrative steps, while the second group of three rules represents the understanding of the Governing Board with respect to the effect of reservations that any particular State may decide to make at the time of depositing its instruments of ratification.

As stated in the report approved by the Governing Board in 1932, the procedure therein proposed was provisional, until the matter should be definitively settled at a subsequent International Conference of American States.

The Seventh International Conference of American States, held at Montevideo in 1933, considered the question of ratification of treaties in a general way, but rather from the point of view of how to stimulate ratifications; and consequently the resolutions adopted at that Conference made no reference to questions of procedure.

After considering the resolutions of the Seventh Conference on this subject, the Governing Board approved the following resolution at its meeting of 2 May 1934:

"The following measures would be conducive to giving practical effect to the desire repeatedly expressed by the International Conference of American States, as set forth in the above-mentioned resolutions:

"1. Once treaties or conventions have been signed, the Government of the country in which the conference is held should remit to each of the signatory States as soon as possible after the adjournment of the conference, a certified copy of each of the treaties and conventions signed at the conference.

"2. The signatory Governments should be urged, in so far as constitutional provisions may permit, to submit the treaties and conventions to their respective Congresses at the first opportunity following the receipt of the certified copies mentioned in the preceding paragraph.

"3. The Pan American Union shall transmit, every six months, through the members of the Governing Board, a chart showing the status of the ratifications, reservations, adherences, accessions and denunciations of treaties and conventions signed at conferences held by countries members of the Union.

"4. The Pan American Union shall address a communication to each of the American Governments requesting that, in accordance with resolution LVII of 23 December 1933, of the Seventh International Conference of American States, and with the sole purpose of studying the possibility of finding a formula acceptable to the majority of the countries members of the Union, the respective Government is requested to make known the objections which it may have to the conventions open to its signature or awaiting ratification by its National Congress.

"The communication, while recognizing the right of each State to decide in accordance with its interests the question of ratification of treaties and conventions signed at the International Conferences of American States, shall furthermore request each Government to communicate to the Pan American Union the modifications which in its judgement will make ratification possible.

"5. The communication addressed to the American Government in accordance with the preceding paragraphs, shall be sent once a year, an endeavour being made to send it at the time of the regular session of the respective Congress."

The Eighth International Conference of American States, held at Lima in 1938, also dealt with the question of treaties.

On the agenda of that Conference appeared the following topic: "Uniformity and perfection of the methods of drafting multilateral treaties, including the form of the instruments, adherence, accession, deposit of ratifications, etc., and means to facilitate ratifications."

In relation to that topic the Conference approved resolution XXIX, entitled "Methods of Preparation of Multilateral Treaties",²⁰ the text of which is transcribed below:

"The Eighth International Conference of American States
"Resolves:

"1. With the purpose of unifying and perfecting the methods of preparation of multilateral treaties, the form of the instruments, and the adherence, accession and deposit of ratifications thereof, to approve the six rules of procedure adopted by the Governing Board of the Pan American Union in its resolution of 4 May 1932, relative to the deposit of ratifications, the five rules on the ratification of treaties or conventions approved on 2 May 1934, and the two recommendations of 5 February 1936, on the ratification of multilateral treaties.

"2. In the event of adherence or ratification with reservations, the adhering or ratifying State shall transmit to the Pan American Union, prior to the deposit of the respective instrument, the text of the reservation which it proposes to formulate, so that the Pan American Union may inform the signatory States thereof and ascertain whether they accept it or not. The State which proposes to adhere to or ratify the treaty, may do it or not, taking into account the observations which may be made with regard to its reservations by the signatory States.

"3. To adopt the system of depositing treaties in the Pan American Union, as provided in the project presented by the delegation of Chile, published on page 245 of the *Diario* of the Conference.

"4. To refer for study to the Permanent Committee of Rio de Janeiro the project presented by the delegation of Venezuela and published on page 610 of the *Diario* of the Conference."

By the above resolution, the Lima Conference approved the six Rules of Procedure adopted by the Governing

Board on 4 May 1932, but it took no position on the three rules of the same date representing the understanding of the Governing Board with respect to the legal status of treaties ratified with reservations which were not accepted. The Lima resolution maintains the requirement of consultation by the Pan American Union when reservations are made at the time of adherence or ratification, but it does not provide any rule to govern the situation between a State that makes a reservation and another State that does not accept it. Nevertheless, although the Lima Conference made no reference to the three rules of the Governing Board and took no decision whatever regarding the status of treaties ratified with reservations, these rules have been accepted by the Governments in practice, at least tacitly, and the Pan American Union has therefore applied them in exercising its function of depository.

Resolution XXIX of the Lima Conference also approved the two recommendations on the ratification of treaties and conventions that had been made by the Governing Board on 5 February 1936.

The first of these recommendations requests the Pan American Union to continue the publication of the charts on the status of Inter-American Treaties and Conventions, and authorizes the Director General when sending this record to the Governments to inquire regarding the status of the agreements and the progress that is being made toward their ratification.

The second of these recommendations refers to resolution LVI of the Seventh International Conference of American States, which proposes the designation in each country of a representative *ad honorem* of the Pan American Union whose duty would be to expedite the study, approval and ratification of Inter-American Treaties and Conventions.

Returning to the three rules of 1932, it will be noted that the first and second confirm the traditional practice that, as between States that ratify without reservations, the treaty shall be in force in the form in which it was originally signed, and that it shall be in force as between States that ratify it with reservations and contracting States that accept them, in the form in which the treaty has been modified by the reservations. The third rule refers to the more difficult question of the status of a treaty accompanied by a reservation that is not accepted by one or more of the other signatory States. In this case the treaty simply has no effect between the State making the reservation and the State that does not accept it. This results in a quite unsatisfactory situation, for the treaty will be in force between the ratifying State and those that accept its reservation, but will not be in force between the ratifying State and those that do not accept it. There is no remedy for this situation, however, as long as the ratifying State insists on maintaining its reservation and the other States are not disposed to accept it.

Under the procedure indicated there is no limitation whatever on the right of a State to ratify treaties with whatever reservation or reservations it wishes. Article 7 of the Havana Convention on Treaties recognizes that the refusal to ratify or the formulation of a reservation are acts inherent in national sovereignty and as such

²⁰ *Eighth International Conference of American States, Final Act, Lima, 1938, p. 48.*

constitute the exercise of a right which violates no international stipulation or good form. Although this Havana Treaty has been ratified by only a few States, the principle established in the article cited is a part of traditional American law.

But if a particular State has the right inherent in its sovereignty to ratify a treaty with whatever reservations it believes to be in its interest, the other parties to the treaty have an equal right to refuse to be bound by the treaty if they believe that the reservation in question is contrary to their own national interests. They are privileged to decide that the reservation defeats the purposes of the treaty as originally signed, and therefore that it would be more to their interest not to be bound by the treaty in respect to the State making the reservation rather than to accept it in the form resulting from the reservation. In such cases each of the signatory States would decide for itself as to the effect of the proposed reservation upon the obligations set forth in the treaty when it was signed.

In accordance with the practice of the American States a State is not absolutely precluded from ratifying a treaty with reservations simply because one or more of the signatory States is unwilling to accept the reservations. In such case, as has been said, the treaty enters into effect with the States which accept the reservations and does not enter into effect with the State or States which do not accept them.

What justification is there for the rule that treaties do not enter into force between a State which ratifies with reservations and another which has already ratified and which does not accept the reservations? Why should the treaty not come into effect in all other respects except those that relate to the modification introduced by the reservations? Some jurists have argued that this should be the effect of reservations, namely, that they should exclude only the application of the clause in question in the relations of the other Contracting States with the State making the reservation. The provisions of the Havana Convention on Treaties, although they tend to support this position, are not clear, and it is impossible to draw a definite conclusion from them.

The great majority of jurists, however, assert that it is impossible, as a practical matter, to segregate the particular articles to which the reservation appears to apply. The articles of a treaty, they argue, must be taken as a whole; and a qualification or limitation or restriction of any one of them indirectly affects the others and therefore justifies the States which do not accept the reservation in refusing to consider the other parts of the treaty as binding even though they may not appear to come within the reservation. The rules drafted in 1932 by the Governing Board of the Pan American Union follow this point of view.

The procedure adopted by the Governing Board of the Pan American Union in its rules of 1932 involves of necessity some degree of consultation with the signatories to a multilateral treaty. In the case of a bilateral treaty, reservations of the kind in question would be negotiated by the two parties directly, and it would be for one party

to decide whether the reservation proposed by the other party could be accepted without undoing or injuring the beneficial effects of the treaty. But in the case of Inter-American multilateral treaties the American States have found it desirable to entrust to the Pan American Union the task not only of informing the signatory parties of any new reservations made at the time of ratification but of inquiring as to the attitude of the other signatories with respect to such a reservation. The purpose of the latter provision is to avoid as far as possible the defeat of a treaty by having reservations attached to it which are not acceptable to a large number of the signatories. According to the second paragraph of the Lima resolution the State ratifying with a reservation still has the right to proceed to ratify with the reservation in spite of the fact that its ratification may not bring the treaty into effect between a large number of States. But it is believed that if the observations of a number of the signatory States should indicate that they are not willing to accept the reservation, in such event the State which proposed to ratify with the reservation will reconsider its reservation, and before proceeding to deposit its ratification of the treaty it will try to modify its reservation so as to make it generally acceptable, or possibly eliminate it altogether.

The procedure thus followed by the American States seems to be the one best calculated to promote the ratification of treaties in a form which will bring them into force among as many signatory States as possible. The procedure does not absolutely deny the right of a State to make reservations; but it does seek to discourage them in order that the treaty may not be so far weakened by reservations as to be unable to accomplish the purposes for which it was originally intended. In carrying out the communications which it must make with the other signatory States to find out whether they are willing to accept a particular reservation, the Pan American Union is merely carrying out the function assigned to it of facilitating the ratification of a treaty by obtaining beforehand the observations of the other signatory States upon the proposed reservation, so that if these observations should be favourable the State proposing to ratify shall proceed forthwith to do so, and if the observations are unfavourable the State may reconsider its reservation and see if it is not possible for it to modify or withdraw it so as to enable the State to participate in the treaty.

This was illustrated in the case of the Guatemalan reservations to the Rio Treaty and to the Charter of the Organization of American States. When it was seen that a number of States did not accept them, and that the result of this would be that these important agreements would not be in effect between Guatemala and the non-accepting States, the Government of Guatemala clarified the scope of its reservations by means of a declaration. The Pan American Union then consulted the Governments a second time, and the reservations were unanimously accepted in the light of the declaration, accompanied by understandings in some cases, with the result that Guatemala was able to become a party to the Rio Treaty and the Charter, and thus became a full partner with the other members of the Organization of American States.

Although the Pan American rule is not perfect, it has worked well in practice because it has been adequate to the needs of the American States. As a matter of fact, down to the present time there has only been one case in which the non-acceptance of a reservation has rendered a treaty ineffective between two States. This took place with the deposit by the Dominican Republic of its instrument of ratification of the Convention on Consular Agents, signed at Havana on 20 February 1928.²¹ The instrument contained several reservations that had not been made during the course of the deliberations at the Havana Conference, and when certified copies were communicated, the Government of the United States informed the Pan American Union that it could not accept them because they would deprive the Convention of a great part of its value, and consequently that it did not consider the Convention to be in force between the United States and the Dominican Republic.

As previously observed, although the existing rules have given good results, they do not cover all situations. At the time they were adopted, multilateral treaties represented obligations that were bilateral in character rather than collective. There were no such pacts, for example, as the Rio de Janeiro Treaty of 1947²² or the Bogotá Charter of 1948,²³ which require that two thirds of the signatories ratify before they enter into force, and which, moreover, particularly the Rio Treaty, require two thirds of the parties for their practical application. These two treaties contain commitments of a collective character, and it is logical and desirable that in such treaties the contracting parties undertake identical rights and obligations.

Neither did the practice exist at that time of opening treaties for signature; it was customary to sign them at conferences only.

Since 1930 thirteen treaties or agreements have been opened for signature at the Pan American Union. Some Governments signed them on the date on which they were opened for signature, others later. Some of these Governments signed with reservations, even though many other States had already ratified. The existing procedure does not cover this situation. It seems that in such cases the Pan American Union should consult the countries that have already ratified as well as those that have signed, and on the basis of the replies received the interested Government may determine, when it ratifies the treaty, whether to maintain the reservations made at the time it signed.

When the reservation is made at the conference that drafts the treaty, it is considered accepted, and in that case the country making it may proceed to deposit its ratification, with the same reservation, without the necessity of any consultation.

With respect to treaties adopted at the Inter-American Conference, the regulations of that Conference provide,

²¹ League of Nations, *Treaty Series*, vol. CLV, p. 291.

²² Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro on 2 September 1947: United Nations, *Treaty Series*, vol. 21, p. 93.

²³ Charter of the Organization of American States, signed at Bogotá on 30 April 1948: United Nations, *Treaty Series*, vol. 119, p. 48.

in article 67, for the purpose of avoiding reservations at the very moment of signing, that "Such reservations and statements shall be presented to the competent committee, or, at the latest, to the special session referred to in article 64. In the latter case, the text of the reservation or statement shall in due course be transmitted in writing to the Secretary-General and distributed by him to the other delegations for their information." Article 64 of the regulations provides that "Treaties and conventions and the final act shall be submitted to the Conference for approval at a meeting especially called for this purpose on the day preceding the closing session. Such documents shall be open for signature by the delegation at the closing session."

As the problems confronting the Pan American Union in the exercise of its depositary functions are sometimes difficult ones, the Union considered that it would be very useful if clear and precise rules could be adopted for its guidance. The secretariat therefore suggested that the Inter-American Council of Jurists should draft such rules and submit them to the Council of the OAS, with the recommendation that they be presented for definitive approval to the Eleventh Inter-American Conference. Although some of these so-called rules of procedure would necessarily have a substantive character, the secretariat did not believe it practical to state them in the form of a treaty subject to ratification, for if some countries did not ratify it the rules would be binding on some and not on others. Moreover, the ratifications would undoubtedly be delayed for many years. The Convention on Treaties of the Sixth Conference held at Havana in 1928 had after twenty-seven years been ratified by only seven countries.

At its fourth meeting in 1959 the Inter-American Council of Jurists adopted the two following resolutions:²⁴

I

Resolution X

"The Inter-American Council of Jurists

Resolves:

"To recommend to the Eleventh Inter-American Conference the consideration of the following rules on reservations to multilateral treaties:

"In the performance of its functions under article 83.e of the Charter of the Organization of American States, the Pan American Union shall be governed by the following rules, subject to contrary stipulations, with respect to reservations to multilateral treaties, including those open for signature for a fixed or indefinite period.

"I. In the case of ratification or adherence with reservations, the ratifying or adhering State shall send to the Pan American Union, before depositing the instrument of ratification or adherence, the text of the reservations it proposes to make so that the Pan American Union may transmit them to the other signatory States for the purpose of ascertaining whether they accept them or not.

"The Secretary-General shall inform the State that made the reservations of the observations made by the other States. The State in question may or may not proceed to deposit the instrument of ratification or adherence with the reservations, taking into account

²⁴ *Final Act of the Fourth Meeting of the Inter-American Council of Jurists*; Washington, D.C., Pan American Union, 1959.

the nature of the observations made thereon by the other signatory States.

"If a period of one year has elapsed from the date of consultation made to a signatory State without receiving a reply, it shall be understood that that State has no objection to make to the reservations.

"If, notwithstanding the observations that have been made, the State maintains its reservations, the juridical consequences of such ratification or adherence shall be the following:

"a. As between States that have ratified without reservations the treaty shall be in force in the form in which the original text was drafted and signed.

"b. As between the States that have ratified with reservations and those that have ratified and accepted such reservations, the treaty shall be in force in the form in which it was modified by the said reservations.

"c. As between the States that have ratified with reservations and those that have ratified but have not accepted the reservations, the treaty shall not be in force. In any event the State that rejects the reservations and the one that has made them may expressly agree that the treaty shall be in force between them with the exception of the provisions affected by the reservations.

"d. In no case shall reservations accepted by the majority of the States have any effect with respect to a State that has rejected them.

"II. Reservations made to a treaty at the time of signature shall have no effect if they are not reiterated before depositing the instrument of ratification.

"In the event the reservations are affirmed, consultations will be made in accordance with rule I.

"III. Any State may withdraw its reservations at any time, either before or after they have been accepted by the other States. A State that has rejected a reservation may later accept it.

...

"...The making of reservations to a treaty at the time of signature by the plenipotentiaries, of ratification, or of adherence is an act inherent in national sovereignty.

"Acceptance or rejection of reservations made by other States or abstention from doing so is also an act inherent in national sovereignty. It is recommended that reservations made to multilateral treaties, at the time of signing, ratification, or adherence to them shall be precise and shall indicate exactly the clause or rule to which the reservation is made."

(Approved at the third plenary meeting, 8 September 1959)

"Reservation of Brazil:

"The Delegation of Brazil abstains from voting on rule I, paragraphs b, c, and d, with respect to reservations to multilateral treaties, in view of the opinion maintained by the Government of Brazil regarding the principle of the compatibility of reservations with the objective or purpose of the treaties to which they refer.

"Statement of the United States of America:

"The United States delegation makes the following statement with respect to two of the provisions in the draft resolution on the Juridical Effects of Reservations to Multilateral Pacts:

"a. The provision in paragraph I of the resolution that the failure of a party to the Convention to reply within a year to a notice of a reservation filed by a ratifying or adhering party shall be construed as acceptance of the reservation is undesirable.

"b. The requirement of paragraph II of the resolution under which reservations filed at the time of signature must also be reiterated prior to the deposit of the ratification is unacceptable to the United States delegation in the form in which it has been drafted.

"The United States delegation therefore reserves its position on both these provisions.

"Reservation of Bolivia:

"The delegation of Bolivia abstains from voting on the draft resolution dealing with Reservations to Multilateral Treaties, because it regards as inappropriate any statement "in the abstract" on the acceptance or rejection of reservations on multilateral treaties, without a prior definition of the subject matter of these reservations and the significance thereof.

"Statement of Chile:

"The delegation of Chile makes a reservation with respect to the third paragraph of rule I of the draft resolution on Reservations to Multilateral Treaties, the justification of which, within the machinery of consultation on reservations, it recognizes only to the extent that it could be in disagreement, in certain cases, with provisions of Chilean constitutional law."

II

Resolution XI

"The Inter-American Council of Jurists

"Resolves:

"To transmit the proposal of the delegation of Paraguay on Reservation of Theoretical Adherence, to the Inter-American Juridical Committee that it may study the possibilities of its application."

(Approved at the third plenary session, 8 September 1959)

The observations of the delegation of Paraguay concerning reservations to multilateral treaties were the following:

"Statement

"The diversity in legislation, a result of the individual sovereignty of the States, motivates the States to assemble their representatives in conferences and congresses, for the purpose of attaining uniformity in law, and if this is not possible, then for the purpose of fitting certain standards for the selection of the applicable rules.

"It frequently happens that representatives or plenipotentiaries of the different countries, who agree on the advisability of adopting a rule or standard representing the general aspiration of the nations, cannot, however, subscribe to it without reservations, inasmuch as it is contradictory to the domestic legislation of their respective countries.

"The rule or clause in question, when examined after it has been made, presents an appearance totally different from what it is in reality, because instead of being the formula or solution desired, and recommended by the jurists who prepared it, it appears, on the contrary, to be a rule rejected by the majority and invalidated by numerous reservations.

"The result is that nothing has been accomplished in the way of formulating law. The States have assembled their plenipotentiaries in order to resolve the differences in legislation. They have found useful standards but have not been able to subscribe to them without reservations, due precisely to the diversification of domestic legislation. Consequently, the treaties then appear with clauses 'rejected' by all or by a majority, and no State amends its domestic law permitting the acceptance, without reservations, of the recommended standard.

"Object and Effects

"The object and effects of the reservation of theoretical adherence, or reservation of moral adherence, would be the following:

"The State making the reservation finds the disputed clause or rule useful, but due to reasons pertaining to its domestic legislation, it is not in a position to put it into force in a short period of time.

"The State referred to agrees to undertake legislative negotiations as soon as possible looking to the modification of domestic conditions which would make possible the ratification and coming into force of the rule in question.

"Name of the Reservation"

"Here is a type of reservation to multilateral treaties whose content would be perfectly understood and accepted by all nations, and which therefore would not require, in each instance, a definition of the scope of the reservation.

"Without prejudice to finding a more appropriate name for this purpose, the plenipotentiary who signs or the State that ratifies a treaty or convention under the conditions suggested above, would only have to invoke, for example, the reservation of theoretical or moral adherence.

"The use of the reservation of theoretical adherence would result in:

"Determining whether a clause disputed by several States has been rejected because it was undesirable or, on the contrary, whether it has been formulated with the goodwill and adherence of all the States.

"Permitting the Organization of American States to promote, or negotiate in the different States for, the changes required for the easy, and simple ratification of the disputed clauses, making use of the reservation of theoretical adherence.

"Facilitating progress in every State towards unity and harmony in law, in agreement with the other States."

United Nations Educational, Scientific and Cultural Organization. The United Nations Educational, Scientific and Cultural Organization has not adopted any resolution or enacted any other set of rules for the regulation or guidance of the depositary in dealing with reservations. However, the Director-General of UNESCO has been guided in this respect by the resolutions of the General Assembly as well as by the Advisory Opinion of the International Court of Justice concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.²⁵

Universal Postal Union. No (see reply to question 1).

World Health Organization. No.

Question 3. Have you a practice to follow in case of the submission of a reservation which is clearly excluded by the terms of a reservations article contained in the convention?

Dominican Republic. The Dominican Republic has nothing which could properly be called an established practice in such cases. However, the fact that a reservation is excluded by the terms of a reservations article contained in the convention does not completely rule out the possibility of the convention's entering into force in the State which submitted the reservations explicitly excluded by the agreement. The Dominican Republic takes the view that the State which submits the reservations and the signatory States which object to them may expressly agree that the convention shall become effective between them in regard to all matters not affected by the reservations in question.

Netherlands. No.

United Kingdom of Great Britain and Northern Ireland. The policy followed by the Government of the United Kingdom in the case of reservations excluded by the terms of the convention concerned is outlined in a letter dated 10 August 1960 addressed to the Secretary-General of the United Nations by the Acting Permanent Representative of the United Kingdom. The statement of the United Kingdom was circulated by the Secretary-General in a letter (C.N. 126. 1960. TREATIES—5) of 12 September 1960. The statement reads as follows:

"Even in the absence of a right to *make* reservations to a convention it is of course always possible for a party or intending party to *propose* a reservation, but in that case the reservation only has validity if it is accepted by the other parties, or at any rate is not objected to. If any party objects to the reservation, the latter can have no validity, at any rate against the party making the objection."

United States of America. If an instrument of ratification, acceptance, adherence, or accession submitted for deposit contains a reservation which is clearly excluded by the terms of a reservations article contained in the convention, the United States Government as depositary would consider that it could not accept such an instrument for deposit.

Council of Europe. No.

Food and Agriculture Organization of the United Nations. This question would arise only if a reservation were submitted in respect of one of the two conventions of which FAO is the depositary which contain a clause to the effect that no reservation may be made. So far no State ratifying or acceding to one of these conventions has attempted to make a reservation; therefore no practice has been evolved by FAO in this respect.

Inter-Governmental Maritime Consultative Organization. The Conventions of which IMCO is depositary are silent concerning the problem of reservations. The reply is therefore in the negative.

Organization of American States. No.

United Nations Educational, Scientific and Cultural Organization. UNESCO has no established practice to follow in such a case.

World Health Organization. Yes. In the case of the International Sanitary Regulations, if the World Health Assembly finds that a reservation "substantially detracts from the character and purpose of these Regulations", they do not enter into force with respect to that State until the reservation has been withdrawn.

B—RESERVATION v DECLARATION

Question 4. Do you make a distinction in your practice between a reservation and a declaration?

Denmark. In regard to the European Broadcasting Convention²⁶ signed at Copenhagen on 15 September 1948, declarations concerning certain technical questions were

²⁵ *I.C.J. Reports*, 1951, pp. 15 *et seq.*

²⁶ Cmd. 7946, No. 30 (1950), H. M. Stationery Office, London, 1950.

made under the provisions of the text by: Belgium, Bulgaria, Byelorussian SSR, Czechoslovakia, Denmark, Finland, France, Greece, Hungary, Ireland, Italy, Morocco and Tunisia (jointly), Netherlands, Norway, Poland, Romania, Ukrainian SSR, USSR, United Kingdom and Yugoslavia. Portugal made a declaration in the form of a final protocol to the Convention. In addition, declarations were made by Austria, Egypt and Syria (jointly), Iceland, Sweden and Turkey; and by France, the United Kingdom, the United States and the USSR in their capacity of occupying Powers of Germany. These declarations were communicated in the form of certified true copies to the other signatories and to the other States which participated in the conference at which the Convention was signed. The Byelorussian SSR, the Ukrainian SSR and the USSR reproduced the texts of their declarations in their instruments of ratification.

In regard to the European Regional Convention for the Maritime Mobile Radio Service, signed at Copenhagen on 17 September 1948,²⁷ declarations concerning certain technical questions were made under the provisions of the text by the United Kingdom and by the USSR. These declarations were communicated in the form of certified true copies to the other signatories and to the other States which participated in the conference at which the Convention was signed.

None of the signatures or instruments of ratification or accession relating to any of the conventions of which Denmark is the depositary were accompanied by reservations clearly excluded by the terms of the conventions.

Dominican Republic. While the effect of a reservation is to reject, wholly or in part, one or more articles of a convention, a declaration clarifies the sense of one or more clauses, or gives reasons for not signing the convention.

Netherlands. Yes, in so far as a *declaration* which would not be of a nature "to exclude or vary the legal effect of some provisions of the treaty in its application to that State" (according to article 1, paragraph 1 (f), of the "Draft Articles on the Law of Treaties" published in the report of the International Law Commission covering the work of its fourteenth session)²⁸ would not be regarded as a *reservation*.

Poland. In separate international acts, namely in the supplementary Protocol to the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929,²⁹ and in the Protocol of 28 September 1955³⁰ modifying this Convention (article XXVI), the submitting of declarations, which limit the application of certain provisions, is allowed. Such cases are strictly defined and until now no misgivings as to the real character of submitted declarations have been met in practice.

United Kingdom of Great Britain and Northern Ireland. Yes, where the terms of a convention for which the

Government of the United Kingdom act as depositary require the distinction to be drawn.

United States of America. The United States Government as depositary makes a distinction between a reservation, strictly speaking, and a declaration.

Council of Europe. Yes.

Food and Agriculture Organization of the United Nations. In view of the fact that, with one exception (see answer to question 6), no reservations or declarations limiting the scope or field of application of a convention or agreement have been made either at the time of signing or ratification or accession, no practice has been evolved by FAO of regarding the distinction to be made between reservations and declarations. Should the case arise in practice, the Director-General feels that any statement which would have the effect of diminishing either the obligations of the ratifying or acceding State or the rights of States parties to the convention or agreement would have to be considered as a reservation; statements which do not have this effect would be treated as declarations.

Inter-Governmental Maritime Consultative Organization. Up to now, no distinction has been made.

International Atomic Energy Agency. No practice.

Organization of American States. Yes.

United Nations Educational, Scientific and Cultural Organization. A distinction is made in UNESCO practice between a reservation and a declaration.

World Health Organization. No.

Question 5. If a different procedure is followed according to whether a statement is deemed to constitute a reservation or merely a declaration:

- (a) Do you accept the characterization of the State submitting the statement or do you make the necessary determination, for the purposes of depositary procedures, according to the content or effect of the statement, whether it constitutes a reservation?
- (b) If the latter,
 - (i) Do you first consult the State submitting the statement as to its reasons for considering it a declaration rather than a reservation (or vice versa)?
 - (ii) What criteria do you apply in testing whether a statement is a reservation or merely a declaration?

Dominican Republic. A declaration does not necessarily constitute a reservation, but a reservation may be explicitly set out in a declaration.

(a) The fact that a State submits a declaration on a particular point does not imply acceptance of the views it expresses; as a unilateral act, such a declaration is subject to any appropriate comments which may be made by the other States.

(b) (i) The submitting State is consulted only where there is some doubt as to the declaratory character of a statement.

²⁷ United Nations, *Treaty Series*, vol. 97, p. 31.

²⁸ *Yearbook of the International Law Commission*, 1962, vol. II, p. 161.

²⁹ League of Nations, *Treaty Series*, vol. CXXXVII, p. 39.

³⁰ United Nations, *Treaty Series*, vol. 478, p. 373.

(ii) The criterion applied is that a statement simply declares the position of a State regarding a clause or convention which it may or may not intend to accept, while a reservation explicitly expresses the non-acceptance of a clause or provision of a convention which the State in question intends to sign or ratify.

Netherlands. (a) The Netherlands Government accepts the "characterization of the State submitting the statement", unless this statement evidently would be contrary to one of the two conceptions meant in the answer to question 4.

(b) (i) No (in the few cases that this situation presented itself).

(ii) See answer to question 4.

United Kingdom of Great Britain and Northern Ireland. In so far as multilateral conventions for which the Government of the United Kingdom of Great Britain and Northern Ireland act as depositary are concerned, the sole occasion since 1945 on which a dispute of this kind has arisen was in connexion with the International Sugar Agreement of 1958.⁸¹ The matter was referred to the International Sugar Council for a decision on whether the statement constituted a reservation or a declaration for the purposes of article 45 (3) of the Agreement.

United States of America. (a) The content or effect of the statement is considered to be of prime importance. If, despite the designation as a "statement" or "declaration", it appears that it has the actual character and effect of a reservation, the United States Government as depositary would feel obliged to treat it as a reservation, at least tentatively, and to act accordingly.

(b) (i) Ordinarily, the United States Government would first consult with the State submitting the statement in order to clarify the situation and to obtain an explanation from such State.

(ii) It is understood by the United States Government that the term "reservation" means, according to general international usage, a formal declaration by a State, when signing, ratifying, or adhering to a treaty, which modifies or limits the substantive effect of one or more of the treaty provisions as between the reserving State and each of the other States parties to the treaty. A true reservation is a statement asserting specific conditions of a character which (if the reserving State becomes a party to the treaty) effectively qualify or modify the application of the treaty in the relations between the reserving States and other States parties to the treaty. If the statement does not effectually change in some way, either by expanding or diminishing the treaty provisions, the application of the treaty between the reserving States and other States parties thereto, then it is questionable whether it is a true reservation even though it may be designated a "reservation". The terms "understanding", "declaration", or "statement" may be used to designate a statement which may or may not be a true reservation. More properly, "understanding" is used to designate a statement when it is not intended to modify or limit any of the provisions of the treaty in its international opera-

tion, but is intended merely to clarify or explain or to deal with some matter incidental to the operation of the treaty in a manner other than a substantive reservation. Sometimes an understanding is no more than a statement of policies or principles or perhaps an indication of internal procedures for carrying out provisions of the treaty. The terms "declaration" and "statement" when used as the descriptive terms are used most often when it is considered essential or desirable to give notice of certain matters of policy or principle, but without any intention of derogating in any way from the substantive rights or obligations as stipulated in the treaty. As a general rule, it is considered necessary, in the case of any instrument of ratification, adherence or acceptance embodying any of the above-mentioned types of statement, that the other State or States concerned be notified thereof and be given an opportunity to comment. If the statement is designated a "reservation" but is not a true reservation, the notification to the other State or States may be accompanied by an explanatory statement designed to emphasize the fact that no actual modification or limitation of the treaty provisions is intended.

Council of Europe. (a) Yes, concerning the second part of the question.

(b) (i) No (in the practice of the Council of Europe the question has never been raised because the statements concerned have always been sufficiently clear).

(ii) The contents.

Food and Agriculture Organization of the United Nations. The determination by the Director-General would be necessary in all cases where the "standard" reservation clause required under paragraph 10 of the Principles mentioned in the answer to question 1 has been incorporated into a convention or agreement because the further procedure prescribed in these cases depends on this determination. In making a determination the Director-General would not necessarily consider himself bound by the characterization given to the statement by the State which submitted it.

General Agreement on Tariffs and Trade. In those very few instances where a signature was accompanied by a reservation, the statement of the signatory State as to its precise characterization was accepted.

Inter-Governmental Maritime Consultative Organization. Inapplicable.

Organization of American States. (a) The Pan American Union makes the determination, in consultation with State submitting the statement.

(b) (i) Yes.

(ii) If the text of the statement would modify the obligations of the parties, it is a reservation; if not, it is a declaration.

United Nations Educational, Scientific and Cultural Organization. This situation arose in only two instances, which are described below. In both cases the determination was an obvious one. The first instance involved declarations made at the time of signature and are described under question 6 below. The second instance, involving a reservation made at the time of ratification, is described under

⁸¹ United Nations, *Treaty Series*, vol. 385, p. 138.

question 11 below. In the second case, the words "*sous réserve que...*" appeared in the text of the instrument of ratification and the contents of the instrument clearly implied a restriction in the application of the agreement concerned. The Government having tendered the instrument of ratification for deposit was accordingly informed by the Director-General that the said instrument was considered as containing a reservation the text of which the Director-General proposed to communicate to all interested States.

World Health Organization. Not relevant.

C—RESERVATIONS UPON SIGNATURE³²

Question 6. When a State indicates a desire to sign a convention subject to a reservation which is not expressly permitted by the text of the Convention or otherwise already accepted,

- (a) *Do you receive the signature, or*
- (b) *Before doing so, do you consult the interested States, and if so which ones?*

Canada. At the time of the signature of the Acts of the XIVth Congress of the Universal Postal Union (1957),³³ one State signed with a reservation, and another State signed with a declaration that it did not accept the reservation.

Dominican Republic. (a) The signature is not received.

(b) Before it is received, the interested States, i.e. the States which drafted the convention, are consulted.

Netherlands. No practice.

United Kingdom of Great Britain and Northern Ireland. In so far as multilateral conventions for which the Government of the United Kingdom act as depositary are concerned, there has been no occasion since 1945 on which a State has indicated a desire to sign a convention subject to a reservation not expressly permitted by the text of the convention or not otherwise already accepted.

United States of America. Unless a reservation is clearly excluded by the terms of the convention, the United States Government as depositary considers that it would have no competence to deny a State the right to sign the convention subject to such reservation as that State may deem necessary for its purposes.

(b) Ordinarily it would be considered unnecessary and undesirable for the depositary to consult any of the interested States regarding a contemplated reservation. If, in any case, it were considered desirable to consult with them, the United States Government as depositary would be inclined to consult all of them, including not only those (if any) which had previously deposited instruments but also all those which had participated in formulating the convention. This might, for example, be done in a case where there is a question whether a prospective reservation

is or is not actually excluded by the terms of the convention.

Council of Europe. (a) The question has never been raised in the practice of the Council of Europe.

(b) The question has never been raised in the practice of the Council of Europe.

Food and Agriculture Organization of the United Nations. The problem raised in this question is unlikely to arise in future in view of the fact that reservations may be accepted only subject to the conditions and in accordance with the procedures set forth in the FAO Principles referred to in the answer to question 1. There has, however, been one instance in the past where a reservation was made upon signature. When signing the International Plant Protection Convention, 1951,³⁴ the representative of the Government of Egypt inserted the following before his signature, without giving any advance notice of the intention of doing so: "On account of the fact that the Royal Egyptian Government does not acknowledge and has not up till now acknowledged the existence of Israel, my signature to this Convention does not bind my Government by any means to Israel and has been allowed with all rights reserved in this connection". Bearing in mind, on the one hand, that this statement might be regarded as a reservation in relation to another contracting party (Israel) and, on the other, that the Convention did not contain any provision with respect to reservations, FAO immediately communicated the statement to the Government of Israel and received from that Government the following declaration: "The Government of Israel has noted the political character of the statement made by the Egyptian Government on the occasion of the signing of the International Plant Protection Convention. In the view of the Government of Israel this Convention, which is of a purely technical character, is not the proper place for the making of such political pronouncements. The Government of Israel will, in so far as concerns the operation of the Convention, adopt towards the Government of Egypt an attitude of complete reciprocity." The statement by the Egyptian Government was reproduced in the certified photostatic copies of the Convention which were circulated to all signatory Governments together with a copy of the declaration by the Government of Israel.

General Agreement on Tariffs and Trade. When a GATT instrument has been signed with a reservation, in most cases the terms of the reservation have subsequently been communicated to all contracting parties to the General Agreement irrespective of whether they had accepted or not accepted the instrument concerned, thereby giving them adequate opportunity to take any appropriate action with respect thereto.

Inter-Governmental Maritime Consultative Organization.

(a) The signature has been received by the Secretary-General (three cases have arisen).

(b) No.

Organization of American States. (a) Yes. (b) No.

United Nations Educational, Scientific and Cultural Organization. There has been no instance of a State indicating

³² A list of the States and organizations which informed the Secretary-General that no reservations have ever been submitted to any of the Conventions of which they are the depositaries is given in paragraph 6 of the Introduction.

³³ United Nations, *Treaty Series*, vol. 364, p. 3.

³⁴ *Ibid.*, vol. 150, p. 67.

a desire to sign a convention subject to a reservation. However, at the time of the signature of the Convention for the Protection of Cultural Property in the Event of Armed Conflict³⁵ and of the Final Act of the Conference at which the signature took place, the Byelorussian SSR, the Ukrainian SSR and the USSR made declarations which were reproduced in the minutes of the Conference. The signature of the representatives of these three States under the Final Act and the Convention are preceded by the mention "With attached declaration". These declarations were transmitted to the Secretary-General of the United Nations and were registered with the Secretariat. The texts of these declarations are reproduced in the United Nations, *Treaty Series*, vol. 249, pp. 231 and 356.

Universal Postal Union. The UPU Congress of London, 1929, included in the records of its meetings a statement to the effect that reservations constituting derogations from the stipulations of the Convention should take effect only if they had been accepted and incorporated in the Final Protocol [Documents of the London Congress, volume II, page 155 (French text)].³⁶ This statement concerns reservations made at the time of signature of the Acts and constituting derogations from the stipulations of the Convention. In practice, most of the reservations to the UPU Acts are made in this form. Since they are of a purely technical nature, they give rise to no difficulty and hence call for no special comment. It rarely happens that signature of the Acts is accompanied by reservations, which in that case are merely political statements. Two such cases may be quoted—one at the Ottawa Congress, 1957, and the other at the Brussels Congress, 1952 [see Documents of the Ottawa Congress, volume III, page 40 (French text), and Documents of the Brussels Congress, volume III, page 50 (French text)].³⁷

World Health Organization. The question is not relevant, because the texts prepared by WHO (The Regulations regarding Nomenclature with respect to Diseases and Causes of Death³⁸ and the Additional Regulations,³⁹ and the International Sanitary Regulations⁴⁰) make formal provision for the possibility of reservations.

Question 7. When a signature is accompanied by a reservation, have you a fixed procedure for establishing the terms of the reservation:

- (a) *By inscription on the face of the convention at the place of signature;*
- (b) *By inclusion in a formal procès-verbal or in the final act of a conference;*
- (c) *By accompanying letter from the signatory State, the terms of which are then notified to interested States?*

³⁵ *Ibid.*, vol. 249, p. 215.

³⁶ Bureau international de l'Union Postale Universelle, Berne, 1929.

³⁷ Bureau international de l'Union Postale Universelle, Berne, 1958 and 1952 respectively.

³⁸ See *Manual of the International Statistical Classification of Diseases, Injuries and Causes of Death* (World Health Organization, Geneva, 1948), vol. 1.

³⁹ See *Official Records of the World Health Organization*, No. 71, Geneva, 1956, p. 424.

⁴⁰ World Health Organization, Geneva, 1961.

Canada. In both the case of the XIVth Congress of the Universal Postal Union (1957)⁴¹ and the North American Regional Broadcasting Agreement (1950),⁴² the signatories executed final protocols incorporating what would presumably have otherwise been entered as reservations to the signature of the primary instruments. The final protocol of the NARBA states:

"At the time of signing the North American Regional Broadcasting Agreement, Washington, D.C. (1950) the undersigned Plenipotentiaries take note of the following reservations..."

The fact that these final protocols were signed by the States signing the primary instruments would seem to constitute acceptance by them of the reservations.

Dominican Republic. The terms of the reservations are inscribed on the inscription sheet at the place of signature.

Luxembourg. Thus far, only the Government of Luxembourg has taken advantage of the provisions of article 29 of the Statute of the European School [see reply of Luxembourg to question 1]. Its reservation is set forth in a protocol of signature of which the other parties took note at the time of signature.

Netherlands. The procedures (a), (b) or (c) depend on the desire of the State wishing to make a reservation:

- (a) Yes, if technically possible;
- (b) Yes, if a *procès-verbal* of signature is provided for in the treaty concerned, is desired by the State making the reservation, or is customary with the depositary;
- (c) Yes, if this is actually the case.

United Kingdom of Great Britain and Northern Ireland. The Government of the United Kingdom of Great Britain and Northern Ireland has no fixed procedure. Where a choice has to be made between methods (a) and (c), method (a) is preferred for reservations expressly permitted by the text of the convention or otherwise already accepted.

United States of America. This depends, in general, on the terms of the convention. No fixed procedure could be valid as against any clear provision of the convention to the contrary. Generally, however, where there is nothing to the contrary in the convention to govern the matter:

(a) Inscription on the face of the convention at the place for signature is considered appropriate. This is the simplest and perhaps the best procedure in the case of a convention which has been left open for signature during a period after the adjournment of the conference at which the convention was drawn up. This would be permitted unless a different procedure has been agreed upon by those States concerned, in such a way that the intent of those States in this respect is known to the depositary.

(b) The United States Government as depositary does not favour the formal *procès-verbal* procedure for this purpose unless it is clearly provided for by the convention. So far as the final act of a conference is concerned, it is difficult to perceive the relevance of this in regard to the performance of functions by the United States Govern-

⁴¹ United Nations, *Treaty Series*, vol. 364, p. 3.

⁴² *Treaties and other International Acts Series 4460*, Washington, D.C., Department of State, 1950.

ment as depositary after the close of the conference and in regard to signatures affixed thereafter. In general, it is considered that the designation "Final Act" is most appropriately used for a document which has essentially the character of minutes of a meeting, indicating when and where the conference was held, which States were represented, who represented them, and a summation or outline of the actions taken. Texts of conventions or other agreements formulated at the conference should be annexed to such "Final Act". Sometimes the conventions or other agreements formulated at the conference are referred to as final acts of the conference. In a broad sense, this is correct. If, however, a convention is drawn up as a separate document for signature at the conference or thereafter, it is more precise to refer to it as the "Convention" and not as the "Final Act". If such a convention is to be signed during, or at the closing session of the conference, a procedure often followed for setting forth or establishing the terms of reservations is to give the texts thereof in a "Protocol of Signature". It would appear that the conference itself would determine the "procedure for establishing the terms of the reservation" in such a situation. This would not be left for determination by the depositary. If, on the other hand, the depositary is given the responsibility for receiving signatures after the close of the conference, then the United States Government, so far as its depositary procedures are concerned, would not itself draw up a "Final Act" for reservations.

(c) The United States Government as depositary does not, as a rule, consider it appropriate for reservations to be set forth merely in a letter or note accompanying an instrument of ratification, acceptance, adherence, or accession. If the instrument is to be qualified by a reservation, it is considered that the reservation should be embodied in the instrument itself. A declaration, understanding, or other statement not constituting an actual reservation may, of course, be set forth in an accompanying letter or note, the text thereof then being notified to interested States at the same time they are notified regarding the deposit of the formal instrument.

Council of Europe. If the reservation is communicated beforehand, by inscription above the signature; if the reservation is made on receiving the signature, by a written statement signed by the representative of the State concerned.

Food and Agriculture Organization of the United Nations. No fixed procedure as envisaged in this question has been so far adopted by FAO.

General Agreement on Tariffs and Trade. In the very few instances where a signature was accompanied by a reservation, the terms of the reservation were established by inscription on the face of the instrument at the place of signature.

Inter-Governmental Maritime Consultative Organization. (a) The reservation accompanies the signature.

Organization of American States. No.

United Nations Educational, Scientific and Cultural Organization. No practice.

Universal Postal Union. Reservations made at the time of signature of the Acts of UPU Congresses are incorporated in the Final Protocols of the Congresses (see reply to question 6).

World Health Organization. As a general rule, States put forward their reservations in their letters informing WHO of their acceptance of the Regulations.

Question 8. At what point of time do you notify interested States of the terms of the reservation:

(a) Before receiving the signature (as under 6 (b) above);

(b) On receiving the signature;

(c) Only on circulating a certified true copy of the convention;

(d) Only when the reservation is confirmed by or upon ratification?

Canada. After one State signed the Acts of the XIVth Congress of the Universal Postal Union with a reservation, and another State signed with a declaration that it did not accept the reservation, certified copies of the Acts of the Congress, including the reservation and the declaration, were circulated to all States and territories attending the Congress.

Dominican Republic. Before receiving the signature.

Netherlands. (a) No;

(b) Yes, in case of treaties which are open for signature for an indefinite period of time;

(c) Yes, in case of treaties which have only one specific date for signature;

(d) No.

United Kingdom of Great Britain and Northern Ireland. The Government of the United Kingdom of Great Britain and Northern Ireland notify interested States of the terms of a reservation expressly permitted by the text of the convention concerned, or otherwise already accepted, as soon as the signature and reservation have been received. As regards reservations not expressly permitted by the text of the convention or not otherwise already accepted, see answer to question 6.

United States of America. Probably the only fixed rule with respect to the timing of notifications to interested States, so far as the exercise of depositary functions by the United States Government is concerned, is that notifications will be sent as soon as practicable after the actions to which they relate have been taken. More specifically:

(a) In the absence of extraordinary circumstances, the United States Government as depositary would consider that it had no responsibility or obligation to send official notifications to the interested States concerning the terms of a reservation before that reservation is actually made. If the reservation is to be inscribed at the place of signature or is otherwise to accompany signature of the convention, the United States Government as depositary would ordinarily await the affixing of the signature and the concurrent making of the reservation before undertaking to notify interested States thereof. It is conceivable, however, that in its capacity as depositary the United States Government might, at the request of a State which plans to sign

the convention subject to a reservation, communicate the text of the proposed reservation to interested States in order to obtain their views as a guide to the would-be reserving State in determining its course of action.

(b) As indicated above, the United States Government as depositary ordinarily would notify interested States of the terms of a reservation which accompanies a signature after such signature, subject to reservation, has been affixed. The timing of such notification will vary according to the circumstances; the situation in the case of a convention or other agreement which remains open for signature indefinitely will be different from that in the case of a convention or other agreement which remains open for signature during a specified limited period. For example, notifications regarding additional signatures are sent as soon as practicable after the respective signatures have been affixed. If any signature were accompanied by a reservation or other statement, the terms of the reservation or other statement would be set forth in the notification regarding signature. If, however, the United States Government were charged with the responsibility as depositary for a convention which is to be open for signature during a specified period, it would be considered, as a general rule, that the depositary will have fulfilled its responsibility if it awaits the closing date for signature of the convention and, as soon as practicable thereafter, transmits to the interested States certified true copies of the convention showing all signatures together with such reservations or other statements as may have been inscribed thereon.

(c) As indicated above, the transmission of certified true copies of a convention which has been open for signature during a specified period, such copies showing all signatures which were affixed and all reservations or other statements accompanying the signatures, will be considered, as a rule, as having fulfilled the depositary responsibility in this respect. If the convention remains open for other States to become parties, by adherence or accession, the United States Government as depositary will, of course, notify interested States of each instrument of adherence or accession deposited (including information regarding any reservation or other statement contained in or accompanying such instrument). Any such adhering or acceding State, if it has not already received a certified true copy of the convention, will be furnished such a copy together with an up-to-date status list showing all signatories and dates of their respective signatures, and showing dates of definitive actions taken by signatories and other States to become parties to the convention, together with information regarding reservations or other statements accompanying signature or the deposited instrument.

(d) As indicated above, it is considered that the interested States should, as a rule, be informed of the terms of a reservation which accompanies the signature of a convention as soon as practicable after such signature has been affixed. A long period may elapse between the date of such signature and the deposit of an instrument of ratification by the reserving State. When the reservation is confirmed by or upon ratification, that fact should be communicated to the interested States as soon as practicable after the receipt of the instrument of ratification

containing the reservation, together with information as to whether or not the instrument has been accepted for deposit.

Council of Europe. Only on circulating a certified true copy of the convention.

Food and Agriculture Organization of the United Nations. There has been only one case of a reservation made at the time of signature; the procedure followed on that occasion is described in the answer to question 6. Should any similar cases arise in future it will be the policy of FAO to communicate the reservation immediately to all signatory Governments and thereafter to any Governments which may subsequently sign or adhere to the convention or agreement.

General Agreement on Tariffs and Trade. See reply to question 6.

Inter-Governmental Maritime Consultative Organization. (c) By circularizing the true certified copy of the Convention (and of the Final Act of the Conference which adopted it).

Organization of American States. States are notified when reservation is made, but consulted only if included in ratification.

United Nations Educational, Scientific and Cultural Organization. No practice.

World Health Organization. In the case of the Regulations regarding Nomenclature, upon receipt of the text of the reservation at Headquarters, by means of a letter to all member States informing them of its terms. In the case of the International Sanitary Regulations, upon the entry into force of the Regulations with respect to the State concerned, by means of a notice inserted in the *Weekly Epidemiological Record*.

Question 9. Is a distinction made under 8 above according to whether all interested States had effective notice of the terms of all reservations at the time of the adoption of the convention or, on the other hand, if further signatures are authorized and received subsequent to the closing of the conference adopting the convention?

Dominican Republic. Failing any provision to the contrary in the convention, further signatures may be authorized and received after the closing of the conference adopting the convention, in accordance with the latter's terms.

Netherlands. Yes: see answer to question 8 (b) and (c).

United Kingdom of Great Britain and Northern Ireland. No.

United States of America. If the signatures to a convention are affixed at the conference at which the convention was adopted, it can be assumed that the States participating in the conference have had effective notice of the terms of reservations accompanying the signatures. It is taken for granted that, after the closing of the conference, the depositary will prepare and transmit to the interested States certified true copies of the convention showing all signatures and accompanying reservations. It would seem to be unnecessary, in such a case, for the depositary to

send any special notification in regard to the terms of reservations. If further signatures are authorized and received subsequent to the closing of the conference at which the convention was adopted and originally signed, it is incumbent upon the depositary to notify the interested States with respect to each additional signature and with respect to any reservation accompanying such signature.

Council of Europe. No distinction is made.

Food and Agriculture Organization of the United Nations. Those conventions and agreements concluded under the auspices of FAO which are subject to signature, remain open for signature not only during the session of the conference which adopted it but also for a period (specified in the international instrument) after the closing of the session. The procedure of communicating reservations made by one signatory to the other signatories is described in the answer to question 8.

Inter-Governmental Maritime Consultative Organization. In this specific case, the Convention was open to signature by States for a period of one month from the date of its adoption. It was during this period that the reservations (or declarations) were formulated with the signature. The circularizing of the true copies took place after the expiry of this period, and they therefore contain the text of these reservations or declarations.

Organization of American States. No.

United Nations Educational, Scientific and Cultural Organization. No practice.

World Health Organization. In the case of the International Sanitary Regulations, States members of WHO had nine months from the date of notification in which to formulate reservations; these were brought to the notice of States by the procedure described in the second part of the answer to question 8. States which have become members of WHO since the adoption of the Regulations have three months in which to formulate reservations, which are notified as indicated above. In the case of the Regulations regarding Nomenclature, States members of WHO had twelve months (nine months for the Supplementary Regulations) in which to formulate reservations, and at the end of this period a circular letter giving the positions of the different States and the nature of the reservations was sent to each of them. States which have become members of the Organization since the adoption of the Regulations have also had twelve and nine months respectively in which to formulate reservations, and at the end of the appropriate period the other States have been notified by letter in accordance with the procedure described in the first part of the answer to question 8.

Question 10. Have you a practice or understanding as to the force and effect of a reservation made on signature but not reiterated in the instrument of ratification—i.e., whether it is deemed to have been abandoned or continuous in effect even though not expressly confirmed on ratification?

Dominican Republic. A reservation which is not reiterated in the instrument of ratification is regarded as not having been made.

Netherlands. No practice.

United Kingdom of Great Britain and Northern Ireland. No.

United States of America. It would seem to be advisable to suggest an absolute rule to be applied with respect to the force and effect of a reservation made on signature but not reiterated in the instrument of ratification. As a matter of practice, of course, there are certain general principles that can be applied. In general, it is desirable, in the case of a reservation accompanying signature, for that reservation to be confirmed by and reiterated in the instrument of ratification if it is the intention of the reserving State that such reservation continue in effect. Depending upon the content of that reservation and the circumstances in the particular case, it may be inferred that failure to reiterate the reservation in the instrument of ratification evidences an intent to withdraw the reservation and not have it continue in effect. Considering that the deposit of the instrument of ratification is the definitive act by which the State becomes a party to the convention, any reservation which it intends to make should be embodied in that instrument. If the convention is subject to ratification, the signature is not definitive and ordinarily means nothing except as an indication of the State's interest in the convention and an intention to give it appropriate consideration with a view to becoming a party. If the reservation is set forth in a "Protocol of Signature" or other like document accompanying the signature of the convention, and if the State making the reservation deposits an instrument of ratification covering both the convention and the "Protocol of Signature" without specific reference in the instrument to the reservation, it is to be inferred that this has the effect of reiterating the reservation. It may occur that after signature the reserving State decides that the reservation which it made upon signature should be revised or modified, in which case the reservation in its revised or modified terms should be embodied in the instrument of ratification, thus replacing the reservation made at the time of signature.

Council of Europe. According to the Council of Europe practice, even if not expressly confirmed on ratification, the reservation is considered to have a continuous effect.

Food and Agriculture Organization of the United Nations. The Director-General considers it to be normal practice that a State which made a reservation on signing an international instrument should repeat or refer to such reservation in its instrument of ratification. He would be inclined to construe a ratification not accompanied by any reference to a reservation made at the time of signing as constituting an implicit withdrawal of such reservation, in accordance with a conclusion adopted by the International Law Commission in the report covering the work of its third session.⁴³

Inter-Governmental Maritime Consultative Organization. The Secretary-General has not yet had to adopt a definite position regarding this question, though the case may arise.

⁴³ See *Yearbook of the International Law Commission, 1951*, vol. II, document A/1858, para. 34 (5).

In any event, would the adoption of a position not be in conflict with General Assembly resolution 598 (VI) of 12 January 1952, which in paragraph 3 (b) (i) provides that the depositary shall not pass judgement on the legal effects of reservations or declarations?

Organization of American States. The instrument of ratification normally reiterates or abandons a reservation made at the time of signing. If the ratification is silent, the secretariat consults the depositing Government to ascertain its intention.

United Nations Educational, Scientific and Cultural Organization. No practice.

World Health Organization. Not relevant.

D—RESERVATIONS UPON RATIFICATION OR ACCESSION⁴⁴

Question 11. When an instrument of ratification, accession or acceptance is accompanied by a reservation which is not expressly permitted or prohibited by the text of the convention and not otherwise already accepted:

(a) Do you receive the instrument for definitive deposit; or

(b) Do you treat the instrument as having been tendered for deposit pending consultation with the interested States regarding the reservation?

Dominican Republic. The Dominican Republic treats the instrument as having been tendered for deposit pending consultation with the interested States regarding the reservation.

Netherlands. No practice.

United Kingdom of Great Britain and Northern Ireland. In so far as multilateral conventions for which the Government of the United Kingdom of Great Britain and Northern Ireland act as depositary are concerned, the sole occasion since 1945 on which an instrument of ratification, accession or acceptance was accompanied by a reservation not expressly permitted or prohibited by the text of the convention concerned and not otherwise already accepted, was the occasion of the deposit of an instrument of accession to the International Sugar Agreement of 1958.⁴⁵ The instrument of accession contained a reservation which could have been said to have fallen within the provisions of either paragraph (2) or paragraph (3) of article 45 of the Agreement. The instrument of accession was received for deposit, but the accession was regarded to have only provisional effect, pending further consideration of the reservation by the International Sugar Council.

United States of America. When the United States Government serves as depositary for an international convention, it undertakes to follow rules and procedures most generally applied internationally. In some cases those rules and procedures clearly apply in the particular circumstances. In some cases, their application is not so clear. With reference to the questions pertaining to an

instrument of ratification, accession, or acceptance accompanied by a reservation which is not expressly permitted or prohibited by the text of the convention and not otherwise already accepted (bearing in mind that we are here dealing only with what is strictly a reservation):

(a) The United States Government as depositary ordinarily considers that it cannot immediately accept the instrument for definitive deposit. It may, of course, receive the document, deferring a determination with respect to definitive deposit until appropriate steps have been taken to resolve any question concerning the acceptability of the reservation.

(b) In general, the instrument in such a case is treated as having been tendered for deposit pending consultation with the interested States regarding the reservation.

Council of Europe. The question has never been raised in the practice of the Council of Europe.

Food and Agriculture Organization of the United Nations. An instrument of ratification, accession or acceptance which is accompanied by a reservation is treated as having been tendered for deposit pending consultation with the interested States in accordance with paragraph 10 of the FAO Principles mentioned in the answer to question 1.

Inter-Governmental Maritime Consultative Organization. Instruments of acceptance were received in such a case (accompanied by both declarations and reservations). In accordance with General Assembly resolution 598 (VI) the Secretary-General circularized the acceptance to the States concerned, leaving it to each State to draw legal consequences from such communications.

Organization of American States. The answer is (b).

United Nations Educational, Scientific and Cultural Organization. Only one instance of a reservation accompanying an instrument of ratification, accession or acceptance can be found in the experience of UNESCO. The instrument of ratification by Norway of the Convention and of the Protocol for the Protection of Cultural Property in the Event of Armed Conflict⁴⁶ contained a reservation concerning the Protocol. The Director-General acknowledged receipt of the instrument as having been tendered for deposit. He also informed the Government that he intended to communicate the reservation of Norway to the interested States "*à qui il appartient de faire connaître l'attitude qu'ils entendent adopter à l'égard de celle-ci*".

Universal Postal Union. The decision taken by the London Congress in 1929 (see reply to question 6) has never been interpreted as prohibiting reservations at the time of ratification. For that reason the ratification of the UPU Acts is equally often accompanied by reservations or political statements.

World Health Organization. In the case of the Regulations regarding Nomenclature, a State is considered to be definitively bound from the date on which its declaration is received at Headquarters. In the case of the Sanitary Regulations, it is necessary to await the World Health Assembly's decision.

⁴⁴ A list of the States and organizations which informed the Secretary-General that no reservations have ever been submitted to any of the Conventions of which they are the depositaries is given in paragraph 6 of the introduction.

⁴⁵ United Nations, *Treaty Series*, vol. 385, p. 138.

⁴⁶ *Ibid.*, vol. 249, p. 216.

Question 12. In notifying the interested States of the receipt of the instrument:

(a) *Do you merely communicate the text of the reservation; or*

(b) *Do you request the interested States to inform you of their attitude towards the reservation; or*

(c) *Do you merely communicate to some States, and ask the attitudes of others?*

Canada. In respect of the Acts of the XIVth Congress of the Universal Postal Union (1957) three States entered reservations at the time of ratification which had not been entered at the time of signature. These were circulated without comment by the depositary, in the *procès-verbal* of deposit of the instrument of ratification.

At the time of signature of the North American Regional Broadcasting Agreement (1950),⁴⁷ no reservations were made on signature, but at the time of ratification one State entered a reservation. No comments were received by the depositary concerning this reservation which was circulated as a part of the instrument of ratification.

Dominican Republic. The interested States are requested to inform of their attitude towards the reservation.

Netherlands. No practice.

United Kingdom of Great Britain and Northern Ireland. The Government of the United Kingdom of Great Britain and Northern Ireland merely notify interested States of the terms of a reservation expressly permitted by the text of the convention concerned or otherwise already accepted. As regards reservations not expressly permitted by the terms of the convention or not otherwise already accepted, see answer to question 11.

United States of America. The customary procedure of the United States Government, acting as depositary, is to notify the interested States of the fact that the instrument containing the reservation has been tendered for deposit, communicating to them the text of the reservation, and usually requesting a statement from each of the interested States as to its attitude with respect to the reservation.

Council of Europe. The Council of Europe only communicates the text (the question of conformity has never been raised in the Council of Europe practice).

Food and Agriculture Organization of the United Nations. The Director-General is required to notify all signatory acceding and accepting Governments of all reservations. However, only certain Governments will be requested to indicate their attitude (see answer to question 13 (a)).

Inter-Governmental Maritime Consultative Organization. (a) Yes.

Organization of American States. The answer is (b).

United Nations Educational, Scientific and Cultural Organization. In notifying the interested States of the receipt of the instrument mentioned in the answer to question 11, the Director-General communicated the full text, in the original language, of the instrument of ratification containing the reservation. The Director-General states that

he had informed the Government concerned that he intended to communicate the reservation to the interested States "à qui il appartient de faire connaître les conséquences juridiques qu'ils entendent en tirer", and that he would duly transmit to the Government concerned and to all the other interested States any observations which might be made in the matter.

Universal Postal Union. As a general rule, the depositary of the UPU Acts communicates reservations or statements made upon ratification, together with any objections on the part of Governments of member-Countries of the Union, by diplomatic note. The International Bureau of UPU reproduces these communications for the benefit of the Administrations of member-Countries in its circulars, as far as is necessary for the application of the provisions of the Union's Acts. Consequently, the Bureau refrains from publishing notes of a purely political nature not in conformity with the communications of an administrative nature for which the International Bureau is responsible.

As regards reservations made at the time of accession to the Agreements, it should be noted that provision is made for a special procedure when a member-Country expresses, outside Congress, a desire to accede to the Agreement concerning postal parcels and asks to be allowed to collect exceptional outward and inward rates on a higher scale than that authorized by article 15 of the Agreement (see article 45, paragraph 2, of the Ottawa Agreement, 1957).⁴⁸ The International Bureau submits such a request to all the member-Countries signatory to the Agreement. If, within a period of six months, more than one-third of these member-Countries do not pronounce against the request, it is considered to be admitted. Reservations of this nature are thus subject to an administrative procedure, whereas accession to the Agreement to which such reservation applies is notified by the diplomatic channel.

As to the other reservations that accompany the instruments of accession to Agreements, they are derogations from the technical provisions already applying to many other countries and contained in the Final Protocol to the Union's Agreements. It is mainly the new member-Countries which, on accession, maintain the application of reservations that were already in force in their territories before they became independent.

World Health Organization. The text of the reservation is merely communicated.

Question 13. If 12 (b) or 12 (c) above is answered in the affirmative:

(a) *To which States do you address such a request:*

(i) *All States eligible to become parties to the convention;*

(ii) *Signatory States; or*

(iii) *States which have deposited their instruments of ratification, accession or acceptance?*

(b) *What time-limit, if any, do you set in the notification within which the States should inform you of their attitude, and how is any such time-limit determined?*

⁴⁷ *Treaties and other International Acts Series 4460*, Washington, D.C., Department of State, 1950.

⁴⁸ United Nations, *Treaty Series*, vol. 365, p. 130.

- (c) *Do you consider a State which has not replied within the prescribed time-limit as having consented to the reservation?*
- (d) *If no objections are received within the prescribed time-limit, do you receive the instrument for definitive deposit and inform the interested States accordingly?*

Dominican Republic. (a) Such a request is addressed to the signatory States.

(b) One year is regarded as the time-limit within which States should indicate their attitude towards the reservation made by another State. This period is counted from the time of notification. If on the expiration of one year after having been notified of a reservation the consulted State has not commented on the reservation, it is regarded as not having objected.

(c) Yes.

(d) Yes.

Netherlands. No practice.

United Kingdom of Great Britain and Northern Ireland. The Government of the United Kingdom of Great Britain and Northern Ireland have not yet experienced such a problem in carrying out the functions of depositary for a multilateral convention.

United States of America. Having in mind that question 12 (b) has been answered in the affirmative, from the standpoint of customary procedure:

(a) In the case of a convention which has been signed and is no longer open for signature, the United States Government as depositary addresses its notification to all signatory States and to States which have deposited instruments of adherence or accession pursuant to the terms of the convention. If a particular State is not a signatory and has not deposited an instrument of adherence or accession, but is specifically designated in the convention as being a State eligible to become a party (as, for example, where it is named in an annex to the convention), the notification will be sent also to such State. If the convention is merely left open, in general terms, for adherence or accession by non-signatories, so that theoretically all States may be eligible to become parties, the United States Government as depositary does not consider that it is obliged to notify *all* States simply because of such eligibility. It may address the notification to all States which participated in the conference at which the convention was adopted, whether or not they became signatories or deposited an instrument.

(b) The United States Government as depositary does not consider, unless it finds authority therefor in the terms of the convention, that it has the authority to fix a time-limit within which the States must inform it of their attitude toward the reservation. If, for extraordinary reasons, it appears to be necessary to expedite the responses, the notification may point out the necessity for receiving prompt responses and urge the States to take prompt action in this respect.

(c) If a time-limit were made necessary by the terms of the convention, it would be considered that a State which had not replied within the prescribed time-limit had impliedly consented to the reservation. Ordinarily, how-

ever, there is no prescribed time-limit. It may be necessary, in a case where there has elapsed a long period of time, to consider that a State which has not replied had impliedly consented to the reservation; for example, if, in accordance with the terms of a convention, a reserving State has become a party by virtue of acceptance of its reservation by a prescribed number or percentage of States parties, and one or more of the States parties have not replied during a long period, the convention meanwhile being given effect between such State or States and the reserving State, it may be assumed that the State or States which had not replied had impliedly consented to the reservation. It is difficult to lay down any absolute rules in regard to this matter.

(d) If a time-limit were made necessary by the terms of the convention, it would be considered that, if no objections are received within the prescribed time-limit, the instrument containing the reservation should be treated as having been definitively deposited and the interested States would be informed accordingly. In general, however, a time-limit is not made necessary by the terms of the convention, and it may be impossible for the depositary to know whether the instrument containing the reservation can be treated as having been definitively deposited until replies are received from all of the interested States. If the character of the convention is such that the unanimity rule must be applied (as, for example, in the case of an organizational convention which necessarily requires concurrence by all States), the depositary may not have to await replies from all States, since it would be necessary to consider the instrument containing the reservation as not being acceptable for deposit if any of the States whose concurrence is necessary expressly objects to the reservation.

Council of Europe. Not relevant.

Food and Agriculture Organization of the United Nations.

(a) Upon the coming into force of the convention or agreement the Director-General will address his request to all States that are parties at the time of the coming into force. Accordingly no such request will be addressed to a State which has signed the convention or agreement *ad referendum* but not ratified it by such date. *After the coming into force* of a convention or agreement the Director-General addresses such request to all States which had become a party to the convention or agreement at the time the reservation was received.

(b) The time limit for government replies is three months from the date of notification.

(c) Governments not having replies within three months are considered as having tacitly accepted the reservation.

(d) Yes.

Inter-Governmental Maritime Consultative Organization. Inapplicable.

Organization of American States. (a) The answer is (i).

(b) No time limit.

(c) No.

(d) Under present practice the instrument of ratification is not received for definitive deposit until all parties have replied. The reserving State decides whether to deposit or

not in the light of the replies, since an objection would mean that the treaty would not be in effect between the reserving State and the objecting State.

United Nations Educational, Scientific and Cultural Organization. The communication mentioned in the answer to question 12 was addressed to all States eligible to become parties to the Convention. The Director-General fixed a time-limit of six months after which States which had not made their attitude known would be deemed to have approved the contents of the instrument of ratification.

Universal Postal Union. See reply to question 12.

World Health Organization. Not relevant.

E—OBJECTIONS TO RESERVATIONS⁴⁹

Question 14. In the event of your receiving an objection from an interested State to a reservation, what, if any, legal effect does your practice attribute to the objection?

- (a) *Do you consider the objection without force, on the grounds of an absolute sovereign right of States to make reservations?*
- (b) *Does your practice make no assumption as to any given legal effect but merely give notice to interested States of the terms of the objection?*
- (c) *Do you inform the reserving State that it has the alternative of withdrawing the reservation or failing to become a party to the convention?*
- (d) *Do you treat the objection as affecting only the relations between the reserving and objecting States under the convention? If so, is the effect of the objection to prevent the creation of any rights and obligations between the reserving and objecting States*
 - (i) *under the whole of the convention (i.e., to treat them as not being parties to the convention in respect of each other), or*
 - (ii) *only under the article or articles reserved?*

Canada. At the time of the signature of the Acts of the XIVth Congress of the Universal Postal Union (1957), one State signed with a reservation, and another State signed with a declaration that it did not accept the reservation. Certified copies of the Acts of the Congress, including the reservation and declaration, were circulated to all States and territories attending the Congress. The State which made the reservation has not yet ratified the Acts of the Congress. Three States entered reservations at the time of ratification which had not been entered at the time of signature. These were circulated without comment by the depositary in the *procès-verbal* of deposit of the instrument of ratification. A number of protests to these reservations were received and were circulated if requested by the protesting State without comment by the depositary.

Dominican Republic. The legal effect is that the convention does not enter into force between the reserving State and the objecting State, unless the two States expressly

agree that the convention shall become effective between them as regards all but the reserved clauses.

(a) Objections to reservations have as much force as the reservations themselves, so far as concerns the obligations assumed by the States submitting them.

(b) The Dominican Republic merely gives notice.

(c) As already indicated, this is not an absolute alternative, since the convention may enter into force between States accepting the reservations and the reserving State, and even between States rejecting the reservations and the reserving State, if they so agree, in respect of all clauses not affected by the reservations.

(d) The convention enters into force among the States which ratify it unreservedly in the terms in which it was drafted and signed. In the case of reserving and objecting States, the convention enters into force as modified by reservations not rejected by the objections. It follows that the purposes of the objection is precisely to prevent the creation of any rights and obligations between the reserving and objecting States.

Between reserving and objecting States the convention fails to come into force only so far as concerns articles to which reservations or objections have been submitted.

Netherlands. No practice.

United Kingdom of Great Britain and Northern Ireland. See answer to question 13.

United States of America. It is questionable whether absolute rules can be extrapolated to cover all conceivable situations. There are many factors to be considered, including the specific terms of the convention, its inherent character, and the evident intent of the States which concluded the convention. Within this indefinite framework, however, the following replies can be given to the particular questions:

(a) The United States Government considers that the sovereign right of States to make reservations is counter-balanced by the sovereign right of other States to reject such reservations and to consider such reservations as not being valid between themselves and the reserving State. An objection to the reservation will have such force as the circumstances and the terms and character of the convention require.

(b) In general, the United States Government as depositary does not make any assumption as to any given legal effect. Each case must be considered in the light of the particular circumstances of that case. If the circumstances require that an instrument containing a reservation be considered unacceptable for definitive deposit in the event there is any objection to the reservation, then the depositary would find it impossible to accept the instrument for definitive deposit. In a broad sense, the position thus taken might be equated with an assumption as to the legal effect of objection. In general, the legal effect of a reservation and the legal effect of objections to the reservation are matters for determination by the States parties to the convention. It seems inadvisable, however, to attempt to lay down a single rule to be applied in all situations. When an objection is made to a reservation,

⁴⁹ The depositaries listed in paragraph 6 of the introduction, which have never received a reservation, have likewise never received any objections to reservations, and have no depositary practice on the matter.

the terms of the objection are notified to the interested States.

(c) If a treaty is of such a type that unanimous acceptance of a reservation is required, and one or more of the States whose consent is necessary object to the reservation, the United States Government as depositary would inform the reserving State of this fact and would leave it to such State to determine for itself whether it should withdraw the reservation or fail to become a party.

(d) In this, as in respect of many other matters pertaining to reservations and objections thereto, it seems inadvisable to attempt to lay down any rule of general applicability, at least so far as existing international law and practice are concerned. There are some general principles to be applied, depending on the circumstances and the terms and character of the convention, but it appears that such matters must be dealt with on a pragmatic basis. If, in a particular case, a State becomes a party to a convention subject to a reservation, despite objection to such reservation by another State, it may be possible to consider that the convention is not in effect at all between the reserving State and the objecting States or it may be possible to consider that the convention is in effect between them except with respect to the provisions to which the reservation relates. In general, it is not for the depositary to determine such matters. The objecting State itself may determine whether it is prepared to consider the convention in force between it and the reserving State except as to the provisions reserved or whether it feels obliged to consider the convention as not in force at all between it and the reserving State. Some conventions are readily susceptible to effective operation in certain parts and not in certain other parts. Some conventions may not be susceptible to effective operation as between two States except in their entirety. Each case requires separate consideration.

Council of Europe. No practice, because the question has never been raised within this organization.

Food and Agriculture Organization of the United Nations.

(a) and (b) The legal effect of objections is fully described in paragraph 10 of the Principles mentioned in the answer to question 1: if one of the parties to the convention or agreement concerned objects to the reservation, the reserving State does not become a party to the convention or agreement.

(c) The reserving State would, in all cases, be informed that by withdrawing its reservation it could become a party to a convention or agreement.

(d) The objection affects the relations between the reserving State and *all* parties to the convention or agreement.

General Agreement on Tariffs and Trade. The Contracting Parties have never received objections to reservations and have therefore had no reason to establish a procedure which would deal with this legal problem.

Inter-Governmental Maritime Consultative Organization.

(b) Yes.

(d) A State having lodged the objection itself declared that the objection affected only its relations with the State

which had made the reservations, and this only in respect of the provision that was the subject of the reservation and objections.

International Atomic Energy Agency. Five States (Federal Republic of Germany, Republic of Korea, United Kingdom, Thailand and Denmark) of the eleven States now parties to the Agreement on the Agency's Privileges and Immunities⁶⁰ have made reservations on acceptance of the Agreement. The reservations were communicated by the Director-General to all member States of the Agency in accordance with section 38 of the Agreement. As no objections have so far been formulated to any of these reservations, the Agency has no practice in the matters referred to in sections E or F (questions 18 to 20).

Organization of American States. The answer is (d) (i).

United Nations Educational, Scientific and Cultural Organization. The Director-General did not attribute any effect to the objections received from interested States to the reservation mentioned in the answer to question 11. All observations received from interested States, whether containing objections or not, were communicated to the Government which had made the reservation with the indication that the Director-General would postpone the transmission of these observations to the interested States in order to enable the said Government to study the communications received and, eventually, to transmit to the Organization any new communication it might wish to make. No new communication having been received from the Government which had made the reservation, the full text of all communications received were transmitted to the interested States in their original language. The letter transmittal did not contain any appreciation by the Director-General of the legal effect, if any, of the objections contained in the communications received.

World Health Organization. In the case of the International Sanitary Regulations, reservations are submitted to the World Health Assembly. It is the Assembly that decides whether or not to accept them, after taking note of the relevant recommendation by the Panel on quarantine. If the Assembly objects to a reservation, a letter is sent to the State in question asking whether it is able to withdraw its reservation or to modify it so as to make it acceptable. If the answer is negative, the Regulations do not enter into force with respect to that State.

In the case of the Regulations regarding Nomenclature of Diseases and Causes of Death, the problem of the entry into force of the Regulations in respect of States which have made reservations was raised at the first session of the Health Assembly.

The Legal Committee, basing its view on article 22 of the Constitution, recommended in its report to the Assembly that the Regulations should come into force for all member States, including those making reservations, and that only those parts on which reservations had been made would not apply. The Assembly adopted this report at its fifteenth plenary meeting. Consequently, for States which have made reservations the date of entry into force of the articles of the Regulations which are not the subject

⁶⁰ United Nations, *Treaty Series*, vol. 374, p. 148.

of any reservation is determined in the same manner as it is in respect of States which have not made any reservations.

Question 15. In any of the cases comprised under 14 (c) or (d) above, does your practice make a distinction in the legal effect of an objection according to whether it was received from a State

- (a) merely entitled to become a party;
- (b) signatory;
- (c) which has ratified or acceded?

Dominican Republic. An objection submitted by a State which is merely entitled to become a party to the convention has no legal effect. If the objection is submitted by a signatory State, it is communicated to the other States for comment. Of course, if the convention is subject to later ratification by the State submitting the objection, the legal effect of the objection extends only to the parties in contention, as from the time of ratification, according to whether or not the objecting State maintains its objection.

Netherlands. No practice.

United Kingdom of Great Britain and Northern Ireland. See answer to question 13.

United States of America. The situation in regard to this matter is somewhat clearer. Unless the convention provides specifically to the contrary, it is usually considered that an objection made by a State which is merely entitled to become a party or by a State which is a signatory but has not deposited its instrument of ratification is not conclusive until such time as the objecting State has itself taken the definitive measures necessary to become a party. Otherwise, it would be possible theoretically for a State which may never become a party and may even have no intention of becoming a party to prevent a reserving State from becoming a party merely by objecting to the reservation. If an objecting State thereafter becomes a party or if it has already deposited a valid instrument of ratification, acceptance, adherence, or accession, as the case may be, then its objection to the reservations has full legal effect to the extent that, in the circumstances, legal effect can be attributed to it. The situation may, of course, be complicated in some cases by exceptional factors, as where the convention, according to its terms, will not enter into force until all or a specified number or percentage of the negotiating States have deposited their respective instruments. It may be considered that definitive legal effect cannot be given to any objection in such a case, even when the objecting State has deposited its own instrument, until the convention actually enters into force. It may, as in the case of the Genocide Convention, become a serious question whether the instrument containing a reservation to which objection has been made can be counted among those which bring the convention into force. A rational view must be taken in each case, according to the circumstances, and depending on the necessity for applying the "unanimity" (so-called League of Nations) rule or the possibility of applying the "compatibility" rule expounded in the Opinion of the International Court of Justice in regard to the Genocide Convention.⁵¹

⁵¹ *I.C.J. Reports, 1951*, pp. 15 *et seq.*

Council of Europe. No practice, because the question has never been raised within this organization.

Food and Agriculture Organization of the United Nations. Objections have legal effect only when formulated by States parties to the convention or agreement concerned at the appropriate time, as indicated in the answer to question 13.

Inter-Governmental Maritime Consultative Organization. Inapplicable.

Organization of American States. No.

United Nations Educational, Scientific and Cultural Organization. In the one instance mentioned in the answer to question 11, the Director-General was not called upon to make such a distinction. However, one of the States signatory to the Protocol to which the text of the reservation had been transmitted indicated in reply that, since it was not a party to the Protocol, it did not consider it necessary to formulate any observation.

World Health Organization. Not relevant.

Question 16. To what extent would the answer to 14 and 15 above differ if the objections were to reservations made on signature rather than ratification or accession?

Dominican Republic. Objections to a reservation made on signature do not necessarily produce permanent effects, since they may induce the reserving State to modify or withdraw its reservation on ratification. However, objections to a reservation made on ratification or accession produce the known legal effects on a permanent basis.

Netherlands. No practice.

United Kingdom of Great Britain and Northern Ireland. See answer to question 13.

United States of America. Objections to reservations made on signature would appear to be no less valid than those made to reservations at the time of ratification or accession, but such objections may become meaningless if the reserving State thereafter withdraws its reservation or fails thereafter to become a party to the convention.

Council of Europe. No practice, because the question has never been raised within this organization.

Food and Agriculture Organization of the United Nations. In this context, no distinction would be made between reservations made on signature, on ratification or on accession.

Inter-Governmental Maritime Consultative Organization. The same procedure is followed (communication to interested States); see answer to question 4.

Organization of American States. None.

United Nations Educational, Scientific and Cultural Organization. No practice.

World Health Organization. Not relevant.

F—ENTRY INTO FORCE

Question 17. What distinction, if any, is made under 13 above—as to which States are consulted about a reserva-

tion, or as to any time-limit set for their reply—according to whether the convention has yet entered into force at the time the reservation is received?

Dominican Republic. All signatory States are consulted. The time-limit indicated in the answer to question 13 applies in all cases.

Netherlands. No practice.

United Kingdom of Great Britain and Northern Ireland. See answer to question 13.

United States of America. The United States Government as depositary customarily continues, even after a convention has entered into force, to send to all interested States notifications regarding actions taken with respect to the convention, including additional signatures and reservations, if any, accompanying them, the deposit of instruments of ratification, acceptance, adherence, or accession and reservations, if any, contained therein, etc. For this purpose, all States which participated in the conference at which the convention was formulated and adopted, whether signatories or not, and all other States which, being non-signatories, have deposited instruments of adherence or accession are considered to be interested States.

Council of Europe. Not applicable.

Food and Agriculture Organization of the United Nations. The categories of States to be notified and consulted about reservations—depending on whether such reservation is made before or after the coming into force of the convention or agreement—are defined in paragraph 10 of the Principles mentioned in the answer to question 1. The time-limit set for their reply is three months in all cases.

Inter-Governmental Maritime Consultative Organization. Inapplicable.

Organization of American States. None.

United Nations Educational, Scientific and Cultural Organization. In the one case mentioned in the answer to question 11, the Protocol had entered into force at the time the reservation was received.

World Health Organization. Not relevant.

Question 18. *Would the reply to 15 above differ according to whether the convention had entered into force by the time of the objection?*

Dominican Republic. No.

Netherlands. No practice.

United Kingdom of Great Britain and Northern Ireland. See answer to question 13.

United States of America. The reply to question 15 is applicable whether the convention has entered into force or not.

Council of Europe. Not applicable.

Food and Agriculture Organization of the United Nations. See answers to questions 13 and 15.

Inter-Governmental Maritime Consultative Organization. Inapplicable.

Organization of American States. No.

United Nations Educational, Scientific and Cultural Organization. No practice.

World Health Organization. Not relevant.

Question 19. *If the convention has not yet entered into force by the time of the circulation of the terms of the reservation attached to a ratification or accession, do you at once count the reserving State among the number necessary for bringing it into force—either in the absence of a stated time-limit or prior to its expiry?*

Dominican Republic. A State attaching a reservation to a ratification may be counted among the number necessary for bringing the convention into force.

Netherlands. No practice.

United Kingdom of Great Britain and Northern Ireland. See answer to question 13.

United States of America. As indicated above in the reply to question 15, it is difficult to lay down an absolute rule applicable in all cases. If the convention terms and character are such as to require unanimity, the United States Government as depositary would consider that it had no competence to consider the instrument containing the reservation as being deposited until accepted by all States qualified to accept or reject it or until a prescribed time-limit had expired without any objection having been made to the reservation. If the instrument containing the reservation could not be considered as having been definitively deposited, it would not appear to be possible to count the reserving States among the number necessary for bringing the convention into force.

Council of Europe. Yes, the State concerned is immediately counted among the number of countries necessary for bringing the convention into force.

Food and Agriculture Organization of the United Nations. Pursuant to paragraph 10 of the Principles mentioned in the answer to question 1, nations having made reservations are not included for the purpose of calculating the number of acceptances required to bring the convention or agreement into force.

Inter-Governmental Maritime Consultative Organization. The case has not arisen. It may do so in the near future, unless reservations or declarations made at the time of signing are not included in the instruments of acceptance. Since the date of entry into force of the Convention is determined by the depositary, how could this date be fixed without adopting a position regarding the legal effect of the reservation? The problem is still untouched upon.

Organization of American States. No.

United Nations Educational, Scientific and Cultural Organization. No practice.

World Health Organization. Not relevant.

Question 20. *If the convention has not yet entered into force by the time of the receipt of an objection to a reservation, do you notwithstanding the objection count the ratification or accession of the reserving State among those necessary for bringing the convention into force?*

Dominican Republic. See answer to question 19.

Netherlands. No practice.

United Kingdom of Great Britain and Northern Ireland. See answer to question 13.

United States of America. The answer to this question seems implicit in the above reply to question 19. If, in particular circumstances, it is possible to consider an instrument containing a reservation as having been definitively deposited notwithstanding an objection to the reservation, it may be possible to count the reserving State among those necessary for bringing the convention into force.

Council of Europe. Yes, see answer to question 19.

Food and Agriculture Organization of the United Nations. No.

Inter-Governmental Maritime Consultative Organization. See answer to question 19.

Organization of American States. No. The reserving State is counted only when its instrument of ratification is accepted for deposit.

United Nations Educational, Scientific and Cultural Organization. No practice.

World Health Organization. Not relevant.

Part II. Depositary practice of the Secretary-General in relation to reservations

Introduction

The summary follows as closely as possible the "Questionnaire" annexed to the present document, which was enclosed in the Secretary-General's circular letter of 25 July 1962. The summary also reflects the dual function of the Secretary-General acting, on the one hand, as depositary of multilateral conventions and, on the other, as the registering authority of international agreements under Article 102 of the Charter and the regulations adopted by the General Assembly to give effect to that Article. This duality of function sometimes raises practical difficulties which are outlined briefly in the summary. The problems facing the depositary essentially concern multilateral conventions which contain no provisions in regard to reservations. Therefore, the basic difference regarding the Secretary-General's practice when dealing with agreements containing provisions on reservations and when dealing with those which do not contain such provisions has been underlined. An historical survey of the examination by United Nations organs of the question of reservations has already been published in an earlier document.⁵³ The two resolutions of the General Assembly governing the practice of the Secretary-General in respect of reservations are reproduced in annex III.

A. Rules governing reservations

1. The General Assembly in two resolutions (resolution 598 (VI) of 12 January 1952 and 1452 B (XIV) of 7 December 1959) requested the Secretary-General to

follow certain directives in the performance of his depositary functions in relation to reservations to multilateral conventions concluded under the auspices of the United Nations, "until such time as the General Assembly may give further instructions".⁵³ The Secretary-General has followed these directives and adapted his depositary practice accordingly. These directives will be subsequently referred to in the present summary as "General Assembly directives".

2. Paragraph 1 of resolution 1452 B (XIV) requests the Secretary-General to apply the procedure laid down by resolution 598 (VI) to all conventions concluded under the auspices of the United Nations "which do not contain provisions to the contrary". The Secretary-General continues therefore to observe such provisions relating to reservations as are contained in the agreements concerned (see paragraphs 20 and 21 below). There are no standard clauses and the General Assembly only recommended in its resolution 598 (VI) that "organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them". Examples of reservation clauses inserted in conventions concluded under the auspices of the United Nations are reproduced in annex II to the present report.

3. The Secretary-General also follows the provisions embodied in the final act of a conference or in a protocol of signature with respect to reservations. The Secretary-General therefore receives for deposit and registers instruments of ratification or accession accompanied by reservations previously recorded in a final act or protocol of signature and accepted by the conference which adopted the convention. The Secretary-General thereafter notifies such reservations to all States concerned, drawing their attention to the fact that the reservations had been accepted in advance at the close of the conference.

B. Reservation v. declaration

4. Under the General Assembly directives the Secretary-General does not determine whether a statement transmitted by a State contains a reservation, but is only required to communicate the text of the statement to all interested States—those eligible to become parties to the agreement, unless otherwise provided—and leave it up to those States to determine the legal effect of such a statement.

5. The Secretary-General is, however, called upon to determine—at least tentatively—the character of a statement when the agreement concerned indicates the procedure to be followed in respect of reservations⁵⁴ or when it expressly provides that no reservation will be permitted, or when it concerns a convention establishing an international organization. In such instances, the Secretary-General ascertains the character of the statement, what-

⁵³ See annex III.

⁵⁴ See, for instance, the Customs Convention on the Temporary Importation of Private Road Vehicles, done at New York on 4 June 1954, article 39 (see *infra*, annex II, para. 2) and the Single Convention on Narcotic Drugs, done at New York on 30 March 1961. (United Nations publication, Sales No.: 62.XI.1), articles 49 and 50.

⁵³ See *Yearbook of the International Law Commission, 1962*, vol. II, pp. 176-178.

ever its title may be, and if, in his opinion, it contains a reservation expanding or diminishing the scope of the convention and/or its application between the reserving State and the other States parties, he applies the procedure laid down by the article on reservations contained in the convention or follows his practice in other relevant cases (see paragraphs 22 and 23 below).

C. Reservations upon signature

6. Under the General Assembly directives, the plenipotentiaries of Governments, duly authorized, may sign a convention subject to a reservation, provided that the convention contains no provision to the contrary. In this latter case, the Secretary-General would not be in a position to receive such signature. For example, the plenipotentiary of a Government having asked to sign an agreement subject to a reservation which excluded part of the territory of his State from the application of the agreement, the Secretary-General pointed out the relevant clause precluding all and any reservations and the plenipotentiary, after consultations with his Government, signed without reservation.

7. Among the reservations made at the time of signature, it appears from the records that thirty-seven were either repeated in the instrument of ratification or otherwise maintained; three were either maintained or repeated in the letter accompanying the instrument of ratification. In three instances the text of the reservations made at the time of signature differed from those made upon ratification and the Secretary-General notified all interested States accordingly. In five instances, reservations made at the time of signature were not confirmed at the time of ratification. In three of these cases, the convention provided that such reservations could be made at the time of signature *or* ratification.

8. There has been no instance in which a State has informed the Secretary-General of the terms of a reservation before signing in order for him to notify other interested States in advance. However, pursuant to article 50, paragraph 3, of the Single Convention on Narcotic Drugs, a State, when signing the Convention, gave notice of its intention to make reservations to certain articles. The Secretary-General brought this declaration to the attention of the interested States as well as the relevant provisions of article 50 which reads in part as follows: "Unless by the end of twelve months after the date of the Secretary-General's communication of the reservation concerned this reservation has been objected to by one third of the States that have ratified or acceded to this Convention before the end of that period, it shall be deemed to be permitted, it being understood however that States which have objected to the reservation need not assume towards the reserving State any legal obligation under this Convention which is affected by the reservation". There has also been one case in which a State requested the Secretary-General to circulate a proposed reservation to the States having already ratified or acceded to the agreement in question (which established an international organization and was not yet then in force) so that their attitude might be ascertained prior to the deposit of the instrument of ratification. The proposed reservation was circu-

lated as requested, no objections were received and the State deposited its instrument of ratification with the reservation as proposed.

9. Under the depositary practice of the Secretary-General, reservations submitted at the time of signature are entered above the signature in the space reserved for that purpose on the original text of the agreement, or are set forth in a separate document which is signed by a duly authorized plenipotentiary and to which the plenipotentiary refers in a statement written above his signature. A *procès-verbal* of signature is drawn up if either provided for by the agreement or requested by the State concerned.

10. In all instances, reservations made at the time of signature are notified to the interested States, that is, to those eligible to become parties to the convention, unless otherwise provided by the relevant article of the convention. Notification of reservations made upon signature is given either by sending States certified true copies of the convention, or by circular letter, depending upon the circumstances. When an agreement remains open for signature without any time-limit, or when the date of closure is distant, the certified true copies are prepared as soon as possible and include all signatures affixed to the agreement up to the date on which the copies are sent for reproduction, together with the text of any reservations. States eligible to become parties are notified by circular letter of the Secretary-General of all subsequent actions.

11. When the agreement provides that it shall be closed for signature at a given date, the Secretary-General awaits this closing date, if it is not too distant, and then proceeds to transmit to the interested States a certified true copy of the convention which reproduces all signatures affixed to the original and all reservations made at the time of signing.

12. When the agreement stipulates that States may become parties by a definitive signature, the Secretary-General notifies such signatures, together with the text of any reservations, to the interested States prior to the dispatch of certified true copies, unless the signatures have been affixed to the agreement at the close of a conference where all States concerned were represented. In the latter case, additional signatures are notified by the Secretary-General to interested States as soon as possible.

13. Certified true copies of all conventions concluded under the auspices of the United Nations are forwarded by the Secretary-General to new Member States, together with an up-to-date list showing all signatories, signature dates, dates of receipt of instruments of ratification, accession or acceptance, and the text of previously recorded reservations, objections, and statements.

14. The English and/or French translation of a reservation is made by the Secretariat, if the reserving State does not supply a translation. Should that State furnish an official translation of its reservation at a later date, this translation is circulated by the Secretary-General in lieu of the Secretariat version. The Secretary-General always mentions the source of the translation circulated.

15. Whenever a State withdraws a reservation made at the time of signature, ratification or accession, the Secre-

tary-General notifies all interested States of such withdrawal.

D. *Reservations upon ratification or accession*

16. In the course of the debates before the Sixth Committee of the General Assembly during its fourteenth session the Legal Counsel was asked to clarify the practice which the depositary would follow upon the adoption of resolution 1452 B (XIV). In his answer, the Legal Counsel stated that he understood that the General Assembly had requested the Secretary-General to continue to act as depositary, in connexion with the deposit of instruments containing reservations, or the receipt of objections thereto, without passing upon the legal effect of such acts. Accordingly, the Secretary-General, when receiving instruments of ratification or acceptance with appended reservations, would consider that his main function was merely to circulate these documents to the interested States, quoting the reservation but without asking their attitude. Similarly the Secretary-General would also circulate, without comment, any objections to those reservations which might subsequently be received. Once the Secretary-General had accepted an instrument of ratification or accession, he would include the country concerned in all the processes of operation of the convention, so far as concerned the Secretary-General's functions in respect of that convention. That would involve, for instance, the circulation to that country of all documents appertaining to the status of the convention. If, in carrying out those functions, the Secretary-General should be confronted with some unexpected legal problem which could not be solved by agreement between the parties, the only possibility open to him would be to ask the General Assembly to request an advisory opinion from the International Court of Justice.⁵⁵

17. In practice, therefore, the Secretary-General follows the General Assembly directives whenever he receives an instrument of ratification, accession or acceptance accompanied by a reservation not expressly permitted or prohibited by the convention. The Secretary-General notifies all States entitled to become parties to the convention (unless otherwise provided) of the date of deposit of the instrument, giving the full text of the reservation. However, no effective date is given concerning the entry into force of the convention in respect of the State concerned nor is such date specified in the Register, as the Secretary-General is not to pass upon the legal effects of such acts.

18. All actions concerning reservations are recorded in the Secretariat publication *Status of Multilateral Conventions* (ST/LEG/3/Rev.1).⁵⁶ The latter indicates which States have made reservations or transmitted objections or comments and gives the text thereof. The entry in this publication concerning instruments of ratification or accession refers to the date of receipt of such instruments.

19. Reservations made at the time of ratification or accession are included in the text of the instrument trans-

mitted by the State concerned or in a document accompanying the instrument, and emanate either from the Head of the State or Government, or from the Minister for Foreign Affairs. They are sometimes formulated by the duly accredited Permanent Representative to the United Nations of the State concerned, acting under instructions from his Government.

20. Whenever a convention contains provisions relating to the procedure for the acceptance of reservations, the Secretary-General follows the procedure laid down by the relevant articles. He treats the instruments as having been tendered for deposit pending the outcome of consultations with the States specified in the procedure; in notifying those States of the receipt of the instrument he communicates the text of the reservations and draws their attention to the provisions setting forth the procedure. When a time-limit is specified in the article on reservations, it is considered that a State which has not replied within the stated time has implicitly consented to the reservations concerned—unless otherwise stipulated in the agreement.

21. Should the convention provide that no reservations are permissible, or that only reservations in respect of certain articles are permissible, the Secretary-General is unable to receive an instrument for deposit accompanied by reservations. He informs the Government accordingly and he withholds the notification to other interested States pending clarification with the Government concerned. In one instance the Secretary-General informed the State that he was not in a position to receive its instrument of ratification because the latter was accompanied by reservations not permitted by the agreement concerned. In another instance the Secretary-General questioned the character of the statement accompanying the instrument of ratification and stated *inter alia* in his letter to the Government concerned that it would be his understanding that the statement, which was termed an "observation", was merely intended to note the fact of the relation between articles of the convention and that it should therefore in no way be construed as a reservation. He added: "I am raising this matter bearing in mind the provisions of resolutions 598 (VI) and 1452 B (XIV) on reservations to multilateral conventions, adopted by the General Assembly on 12 January 1952 and 7 December 1959, respectively. In particular, I wish to refer to paragraph 3 (b) of resolution 598 (VI) as amended by resolution 1452 B (XIV), under which the Secretary-General is not permitted to receive for deposit an instrument of ratification subject to a reservation made contrary to the provisions of the convention. In view of the above, I would appreciate it if, before proceeding to notify the interested States of the deposit of the instrument of ratification in question, I could have your confirmation of my understanding, referred to in the third paragraph above, regarding the nature of the statement contained in the same instrument." The receipt of the first of these instruments has not been notified, nor has the instrument been registered, no answer having been received so far from the submitting Government. In the second case, the ratification was formally received in deposit on the date of receipt of the reply confirming the understanding of the Secretary-

⁵⁵ See *Official Records of the General Assembly, Fourteenth Session, Sixth Committee*, 628th meeting, para. 1.

⁵⁶ United Nations publication, Sales No.: 59.V.6.

General, and all interested Governments were notified accordingly.

22. When a convention embodies a constitution establishing an international organization, the Secretary-General transmits any reservations accompanying an instrument of ratification or accession to that organization for its consideration and informs the State concerned accordingly. The Secretary-General then makes his actions conform, in respect of such instrument, with the decision of the competent organ of the organization concerned. In this connexion it will be noted that the International Law Commission, in its commentary on the provisional draft articles covering the topic of the conclusion of treaties as adopted at its fourteenth session, considered "that in the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and that it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable".⁵⁷

23. The Convention on the Privileges and Immunities of the Specialized Agencies⁵⁸ also requires additional procedural steps on the part of the depositary, since not only States are parties to the Convention but under its terms the specialized agencies themselves must participate in its operation and take various actions under its final articles. In accordance with the established procedures under this Convention the Secretary-General, when he receives an instrument of accession accompanied by a reservation, communicates its text to all States parties and to all other States Members either of the United Nations or of any specialized agency, as well as to the executive heads of the specialized agencies. He so informs the State acceding subject to the reservation. As in the case of other conventions of which he is depositary (see paragraph 17 above), the Secretary-General refrains from stating in his Circular Note the date of entry into force as between the acceding State and the specialized agencies to which it undertakes to apply the Convention.

24. In addition, it is to be noted that the Administrative Committee on Co-ordination (ACC), which is composed of the executive heads of the specialized agencies and presided over by the Secretary-General of the United Nations, at its sixteenth session in May 1953, adopted a policy statement requesting the Secretary-General as depositary to continue to notify all the executive heads of the specialized agencies of the terms of any reservations to the Convention on the Privileges and Immunities of the Specialized Agencies, and simultaneously to place the question of any such reservation on the agenda of the Administrative Committee on Co-ordination. In practice, however, there has always been a specific request from one or more specialized agencies to have each given reservation to the Convention discussed in the Preparatory Committee of the ACC, so that the Secretary-General has not in fact had occasion to act on his own initiative in this matter.

⁵⁷ See *Yearbook of the International Law Commission, 1962*, vol. II, p. 181.

⁵⁸ United Nations, *Treaty Series*, vol. 33, p. 261.

25. In every instance of a reservation to this Convention the Administrative Committee on Co-ordination has requested the Secretary-General of the United Nations on behalf of the specialized agencies to communicate with the governments which proposed reservations, indicating the respects in which the agencies considered the reservations incompatible with the objects and purposes of the Convention and seeking to reach an understanding acceptable both to the Governments presenting the reservations and to the specialized agencies. Such consultations have resulted in the withdrawal of reservations in three out of the four cases which had arisen in the past; the fourth case has remained in abeyance for some time. Upon withdrawal of the reservations the Secretary-General notifies all interested States of this action and then proceeds with the *ex officio* registration of the accession. In addition to the four previous cases, two instruments recently submitted by Governments were subject to reservations which have encountered objections on the part of specialized agencies. The Secretary-General is now acting on a request transmitted to him by the Preparatory Committee of the ACC that he consults the Governments concerned.

E. *Objections to reservations*

26. Objections to reservations are notified to the Secretary-General in writing and emanate either from the Head of Government or Minister for Foreign Affairs or from the duly accredited Permanent Representative to the United Nations, acting under instructions from his Government.

27. According to General Assembly resolution 598 (VI) it is for each State to draw the legal consequences resulting from reservations or objections thereto. The Secretary-General circulates the objections to the same States to which the text of the pertinent reservations was communicated, whether they emanate from a signatory State or from a State having deposited an instrument of ratification or accession. Such objections are recorded in the Secretariat publication *Status of Multilateral Conventions* (ST/LEG/3/Rev.1).

28. The Secretary-General is, however, faced with a problem concerning objections where the convention requires him to announce its entry into force after the deposit of a given number of instruments of ratification or accession (see paragraphs 32 and 33 below).

29. Unless otherwise provided for by the convention, the Secretary-General leaves it to the reserving and objecting States to decide whether the convention shall be in force between them with the exception of the provisions to which the reservation relates, or whether the convention shall not be in effect between them at all. It is not the practice of the Secretary-General to request a clarification in this respect from the reserving and objecting States.

30. When the convention contains a provision stipulating the legal effect which an objection to a reservation will have on the relationship between the States parties, the Secretary-General makes his actions as depositary conform to the relevant provisions of the convention.

F. *Entry into force*

31. In the absence of contrary provisions in the convention, the Secretary-General includes in his count of the number of instruments of ratification or accession required to bring a convention into force those instruments accompanied by reservations to which no objection has been made after ninety days from the date of circulation. The same practice applies to signature without reservation as to ratification when a convention also provides for that manner of becoming a party.

32. A different situation prevails when objections have been entered to reservations made by one or more States whose instruments would *prima facie* be included within the number requisite to bring a convention into force. The Secretary-General considers that he is not in a position to determine the date of entry into force. This is because, pursuant to resolutions 598 (VI) and 1452 B (XIV), he is not to pass upon the legal effect of documents containing reservations or objections. Naturally, one such legal effect is the power of an instrument containing a reservation to count in bringing a convention into force—or, in the alternative, the power of a document containing an objection to prevent the effectiveness necessary for that purpose of the instrument containing the reservation. Under the resolutions it is for each State to draw legal consequences from the communications in question.

33. In one instance, a convention contained a provision requiring the Secretary-General to announce its entry into force after a specified number of instruments had been deposited. Although the required number of instruments had been received, some of them contained reservations to which certain States, having ratified or acceded to the convention without reservations, objected. The Secretary-General, in a circular letter addressed to all interested States, called their attention to the provision of the convention stipulating the conditions for its entry into force and informed them that he had received the specified number of instruments from States eligible to become parties thereto, reserving and objecting States included. Since the convention provided for only a thirty-day delay for its entry into force—a time not considered sufficient to give an opportunity to the States concerned to draw the legal consequences of the reservations and objections and communicate their conclusions—the Secretary-General waited ninety days from the date of his communication, the traditional time-lapse considered necessary to assume tacit consent. Having received no objection to the entry into force of the convention, he proceeded with the registration at the end of the ninety-day period, specifying the date of entry into force, pursuant to the relevant provisions of the convention, that is to say thirty days after the deposit of the required number of instruments.

ANNEX I

Questionnaire annexed to the Secretary-General's letter of 25 July 1962 with respect to depositary practice in relation to reservations in accordance with General Assembly resolution 1452 B (XIV)

A. *Rules governing reservations*

1. Does the organization, or any organization for which you act as depositary, maintain standard reservations clauses for use in mul-

tilateral conventions? If so, please supply them, together with references to any conventions in which they occur.

2. In the alternative, is there a resolution or other set of rules for the regulation or guidance of the depositary in dealing with reservations? If so, a copy of the latest text would be appreciated.

3. Have you a practice to follow in case of the submission of a reservation which is clearly excluded by the terms of a reservations article contained in the convention?

B. *Reservation v. declaration*

4. Do you make a distinction in your practice between a reservation and a declaration?

5. If a different procedure is followed according to whether a statement is deemed to constitute a reservation or merely a declaration:

(a) Do you accept the characterization of the State submitting the statement or do you make the necessary determination, for the purposes of depositary procedures, according to the content or effect of the statement, whether it constitutes a reservation?

(b) If the latter,

(i) Do you first consult the State submitting the statement as to its reasons for considering it a declaration rather than a reservation (or *vice versa*)?

(ii) What criteria do you apply in testing whether a statement is a reservation or merely a declaration?

C. *Reservations upon signature*

6. When a State indicates a desire to sign a convention subject to a reservation which is not expressly permitted by the text of the convention or otherwise already accepted,

(a) do you receive the signature, or

(b) before doing so, do you consult the interested States, and if so which ones?

7. When a signature is accompanied by a reservation, have you a fixed procedure for establishing the terms of the reservation:

(a) By inscription on the face of the convention at the place of signature;

(b) By inclusion in a formal *procès-verbal* or in the final act of a conference;

(c) By accompanying letter from the signatory State, the terms of which are then notified to interested States?

8. At what point of time do you notify interested States of the terms of the reservation:

(a) Before receiving the signature (as under 6 (b) above);

(b) On receiving the signature;

(c) Only on circulating a certified true copy of the convention;

(d) Only when the reservation is confirmed by or upon ratification?

9. Is a distinction made under 8 above according to whether all interested States had effective notice of the terms of all reservations at the time of the adoption of the convention or, on the other hand, if further signatures are authorized and received subsequent to the closing of the conference adopting the convention?

10. Have you a practice or understanding as to the force and effect of a reservation made on signature but not reiterated in the instrument of ratification—i.e., whether it is deemed to have been abandoned or continuous in effect even though not expressly confirmed on ratification?

D. *Reservations upon ratification or accession*

11. When an instrument of ratification, accession or acceptance is accompanied by a reservation which is not expressly permitted or

prohibited by the text of the convention and not otherwise already accepted:

- (a) Do you receive the instrument for definitive deposit; or
 - (b) Do you treat the instrument as having been tendered for deposit pending consultation with the interested States regarding the reservation?
12. In notifying the interested States of the receipt of the instrument:
- (a) Do you merely communicate the text of the reservation; or
 - (b) Do you request the interested States to inform you of their attitude towards the reservation; or
 - (c) Do you merely communicate to some States, and ask the attitudes of others?
13. If 12 (b) or 12 (c) above is answered in the affirmative:
- (a) To which States do you address such a request:
 - (i) All States eligible to become parties to the convention;
 - (ii) Signatory States; or
 - (iii) States which have deposited their instruments of ratification, accession or acceptance?
 - (b) What time-limit, if any, do you set in the notification within which the States should inform you of their attitude, and how is any such time-limit determined?
 - (c) Do you consider a State which has not replied within the prescribed time-limit as having consented to the reservation?
 - (d) If no objections are received within the prescribed time-limit, do you receive the instrument for definitive deposit and inform the interested States accordingly?

E. *Objections to reservations*

14. In the event of your receiving an objection from an interested State to a reservation, what, if any, legal effect does your practice attribute to the objection?
- (a) Do you consider the objection without force, on the grounds of an absolute sovereign right of States to make reservations?
 - (b) Does your practice make no assumption as to any given legal effect but merely give notice to interested States of the terms of the objection?
 - (c) Do you inform the reserving State that it has the alternative of withdrawing the reservation or failing to become a party to the convention?
 - (d) Do you treat the objection as affecting only the relations between the reserving and objecting States under the convention? If so, is the effect of the objection to prevent the creation of any rights and obligations between the reserving and objecting States
 - (i) under the whole of the convention (i.e., to treat them as not being parties to the convention in respect of each other), or
 - (ii) only under the article or articles reserved?
15. In any of the cases comprised under 14 (c) or (d) above, does your practice make a distinction in the legal effect of an objection according to whether it was received from a State
- (a) merely entitled to become a party;
 - (b) signatory;
 - (c) which has ratified or acceded?
16. To what extent would the answer to 14 and 15 above differ if the objections were to reservations made on signature rather than ratification or accession?

F. *Entry into force*

17. What distinction, if any, is made under 13 above—as to which States are consulted about a reservation, or as to any time-limit set for their reply—according to whether the convention has yet entered into force at the time the reservation is received?

18. Would the reply to 15 above differ according to whether the convention had entered into force by the time of the objection?

19. If the convention has not yet entered into force by the time of the circulation of the terms of the reservation attached to a ratification or accession, do you at once count the reserving State among the number necessary for bringing it into force—either in the absence of a stated time-limit or prior to its expiry?

20. If the convention has not yet entered into force by the time of the receipt of an objection to a reservation, do you notwithstanding the objection count the ratification or accession of the reserving State among those necessary for bringing the convention into force?

ANNEX II

Examples of reservation clauses appearing in conventions concluded under the auspices of the United Nations

1. The International Convention to Facilitate the Importation of Commercial Samples and Advertising Material, done at Geneva on 7 November 1952:*

Article XIV

1. Any State may at the time of its signature or of the deposit of its instrument of ratification, acceptance or accession declare that it shall not be bound by specified provisions of this Convention.
2. Any State may at the time of making a notification under article XIII that the present Convention shall extend to any of the territories for the international relations of which it is responsible make a separate declaration in accordance with paragraph 1 of this article in respect of all or any of the territories to which the notification applies.
3. If any State submits a reservation to any of the articles of this Convention at the time of signature, ratification, acceptance or accession, or at the time of making a notification under article XIII, the Secretary-General of the United Nations shall communicate the text of such reservation to all States which are or may become parties to this Convention. Any State which has signed, ratified, accepted or acceded before the reservation is made (or, if the Convention has not entered into force, which has signed, ratified, accepted or acceded by the date of its entry into force), shall have the right to object to any reservation. If no objection is received by the Secretary-General of the United Nations from any State entitled to object by the ninetieth day from the date of his communication (or from the date of entry into force of the Convention, whichever is the later), the reservation shall be deemed to be accepted.
4. In the event of an objection being received by the Secretary-General of the United Nations from any State entitled to object, he shall notify the State making the reservation of such objection, and request it to inform him whether it is prepared to withdraw the reservation or whether it prefers to abstain from ratification, acceptance or accession or from extending the Convention to the territory or territories to which the reservation applies, as the case may be.
5. A State which has made a reservation in regard to which an objection has been presented in accordance with paragraph 3 of this article shall not become a party to this Convention unless the objection has been withdrawn or has ceased to have effect as provided in paragraph 6; neither shall a State have the right to claim the benefits of this Convention in respect of any territory for the international relations of which it is responsible and in respect of which it has made a reservation if any objection has been made to the reservation in accordance with paragraph 3 of this article,

* United Nations, *Treaty Series*, vol. 221, p. 255.

unless the objection has been withdrawn or has ceased to have effect as provided in paragraph 6.

6. An objection by a State which has signed but not ratified the Convention shall cease to have effect if, within a period of twelve months from the date of making its objection, the objecting State has not ratified or accepted the Convention.

2. The Convention concerning Customs Facilities for Touring, done at New York on 4 June 1954;^b the Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the Importation of Tourist Publicity Documents and Material, done at New York on 4 June 1954;^b and the Customs Convention on the Temporary Importation of Private Road Vehicles, done at New York on 4 June 1954^c contain a similar article on reservations:

1. Reservations to this Convention made before the signing of the Final Act shall be admissible if they have been accepted by a majority of the members of the Conference and recorded in the Final Act.

2. Reservations made after the signing of the Final Act shall not be admitted if objection is expressed by one-third of the Signatory States or of the Contracting States as hereinafter provided.

3. The text of any reservation submitted to the Secretary-General of the United Nations by a State at the time of the signature, the deposit of an instrument of ratification or accession or of any notification under article ... shall be circulated by the Secretary-General to all States which have at that time signed, ratified or acceded to the Convention. If one-third of these States expresses an objection within ninety days from the date of circulation, the reservation shall not be accepted. The Secretary-General shall notify all States referred to in this paragraph of any objection received by him as well as of the acceptance or rejection of the reservation.

4. An objection by a State which has signed but not ratified the Convention shall cease to have effect if, within a period of nine months from the date of making its objection, the objecting State has not ratified the Convention. If, as the result of an objection ceasing to have effect, a reservation is accepted by application of the preceding paragraph, the Secretary-General shall so inform the States referred to in that paragraph. The text of any reservation shall not be circulated to any signatory State under the preceding paragraph if that State has not ratified the Convention within three years following the date of signature on its behalf.

5. The State submitting the reservation may, within a period of twelve months from the date of the notification by the Secretary-General referred to in paragraph ... that a reservation has been rejected in accordance with the procedure provided for in that paragraph, withdraw the reservation, in which case the instrument of ratification or accession or the notification under article ... as the case may be shall take effect with respect to such State as from the date of withdrawal. Pending such withdrawal, the instrument or the notification as the case may be shall not have effect, unless, by application of the provisions of paragraph..., the reservation is subsequently accepted.

6. Reservations accepted in accordance with this article may be withdrawn at any time by notification to the Secretary-General.

7. No Contracting State shall be required to extend to a State making a reservation the benefit of the provisions to which such reservation applies. Any State availing itself of this right shall notify the Secretary-General accordingly and the latter shall communicate this decision to all signatory and Contracting States.

3. The Customs Convention on Containers, done at Geneva on 18 May 1956;^d the Customs Convention on the Temporary Impor-

tation of Commercial Road Vehicles, done at Geneva on 18 May 1956;^e and the Customs Convention on the Temporary Importation for Private Use of Aircraft and Pleasure Boats, done at Geneva on 18 May 1956^f contain a similar article on reservations:

1. Each Contracting Party may, at the time of signing, ratifying, or acceding to, this Convention, declare that it does not consider itself as bound by article... of the Convention. Other Contracting Parties shall not be bound by article... in respect of any Contracting Party which has entered such a reservation.

2. Any Contracting Party having entered a reservation as provided for in paragraph... may at any time withdraw such reservation by notifying the Secretary-General of the United Nations.

3. No other reservation to this Convention shall be permitted.

4. The Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention), done at Geneva on 15 January 1959;^g the European Convention on Customs Treatment of Pallets used in International Transport, done at Geneva on 9 December 1960;^h the Convention on the Contract for the International Carriage of Goods by Road, done at Geneva on 19 May 1956;ⁱ the Convention on the Taxation of Road Vehicles Engaged in International Goods Transport, done at Geneva, on 14 December 1956;^j the Convention on the Taxation of Road Vehicles Engaged in International Passenger Transport, done at Geneva on 14 December 1956;^k the European Agreement concerning the International Carriage of Dangerous Goods by Road, done at Geneva on 30 September 1957;^l the European Agreement on Road Markings, done at Geneva on 13 December 1957;^m the Agreement concerning the Adoption of Uniform Conditions of Approval and Reciprocal Recognition of Approval for Motor Vehicle Equipment and Parts, done at Geneva on 20 March 1958;ⁿ and the Agreement on Special Equipment for the Transport of Perishable Foodstuffs and on the Use of such Equipment for the International Transport of some of those Foodstuffs, done at Geneva on 15 January 1962;^o contain a similar clause on reservations:

1. Any country may, at the time of signing, ratifying or acceding to this Agreement, declare that it does not consider itself bound by paragraphs ... and ... of article ... of the Agreement. The other Contracting Parties shall not be bound by these paragraphs with respect to any Contracting Party which has entered such a reservation.

2. Any Contracting Party which has entered a reservation under paragraph ... of this article may at any time withdraw the reservation by notice addressed to the Secretary-General of the United Nations.

3. With the exception of the reservation provided for in paragraph ... of this article, no reservation to this Agreement shall be permitted.

5. The European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport, done at Geneva on 19 January 1962:^p

^e *Ibid.*, vol. 327, p. 123.

^f *Ibid.*, vol. 319, p. 21.

^g *Ibid.*, vol. 348, p. 13.

^h *Ibid.*, vol. 429, p. 211.

ⁱ *Ibid.*, vol. 399, p. 189.

^j *Ibid.*, vol. 436, p. 115.

^k *Ibid.*, vol. 436, p. 131.

^l E/ECE/322—E/ECE/TRANS/503, 1958.

^m United Nations, *Treaty Series*, vol. 372, p. 159.

ⁿ *Ibid.*, vol. 335, p. 211.

^o E/ECE/456—E/ECE/TRANS/526, 1962.

^p E/ECE/457—E/ECE/TRANS/527, 1962.

^b *Ibid.*, vol. 276, p. 266.

^c *Ibid.*, vol. 282, p. 249.

^d *Ibid.*, vol. 338, p. 103.

Article 23

1. Any country may, at the time of signing, ratifying or acceding to the present Agreement, declare that it does not consider itself bound by paragraphs 2 and 3 of article 22 of the Agreement. The other Contracting Parties shall not be bound by these paragraphs with respect to any Contracting Party which has entered such a reservation.

2. If, at the time of depositing its instrument of ratification or accession, a country enters a reservation other than that provided for in paragraph 1 of this article, the Secretary-General of the United Nations shall communicate the reservation to the countries which have previously deposited their instruments of ratification or accession and have not since denounced this Agreement. The reservation shall be deemed to be accepted if, within six months after such communication, none of these countries has expressed its opposition to the acceptance of the reservation. Otherwise, the reservation shall not be admitted, and, if the country which entered the reservation does not withdraw it, the deposit of that country's instrument of ratification or accession shall be without effect. For the purpose of the application of this paragraph, the opposition of countries whose accession or ratification is without effect under this paragraph, by reason of the reservations entered by them, shall be disregarded.

3. Any Contracting Party which has entered a reservation in the Protocol of signature of the present Agreement or has entered a reservation which has been accepted pursuant to paragraphs 1 and 2 of this article may at any time withdraw such reservation by a notification addressed to the Secretary-General.

6. The Convention on the Political Rights of Women, done at New York on 31 March 1953:^a

Article VII

In the event that any State submits a reservation to any of the articles of this Convention at the time of signature, ratification or accession, the Secretary-General shall communicate the text of the reservation to all States which are or may become parties to this Convention. Any State which objects to the reservation may, within a period of ninety days from the date of the said communication (or upon the date of its becoming a party to the Convention), notify the Secretary-General that it does not accept it. In such case, the Convention shall not enter into force as between such State and the State making the reservation.

7. Convention on the Nationality of Married Women, done at New York on 20 February 1957:^b

Article 8

1. At the time of signature, ratification or accession, any State may make reservations to any article of the present Convention other than articles 1 and 2.

2. If any State makes a reservation in accordance with paragraph 1 of the present article, the Convention, with the exception of those provisions to which the reservation relates, shall have effect as between the reserving State and the other Parties. The Secretary-General of the United Nations shall communicate the text of the reservation to all States which are or may become Parties to the Convention. Any State Party to the Convention or which thereafter becomes a Party may notify the Secretary-General that it does not agree to consider itself bound by the Convention with respect to the State making the reservation. This notification must be made, in the case of a State already a Party, within ninety days from the date of the communication by the Secretary-General; and, in the case of a State subsequently becoming a Party, within ninety

days from the date when the instrument of ratification or accession is deposited. In the event that such a notification is made, the Convention shall not be deemed to be in effect as between the State making the notification and the State making the reservation.

3. Any State making a reservation in accordance with paragraph 1 of the present article may at any time withdraw the reservation, in whole or in part, after it has been accepted, by a notification to this effect addressed to the Secretary-General of the United Nations. Such notification shall take effect on the date on which it is received.

8. The Convention on Fishing and Conservation of the Living Resources of the High Seas, done at Geneva on 29 April 1958:^c

Article 19

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 6, 7, 9, 10, 11 and 12.

2. Any Contracting State making a reservation in accordance with the preceding paragraph may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

9. The Convention relating to the Status of Refugees, done at Geneva on 28 July 1951,^d and the Convention relating to the Status of Stateless Persons, done at New York on 28 September 1954^e contain a similar provision on reservations:

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles ... and

2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

10. The Convention on the Reduction of Statelessness, done at New York on 30 August 1961:^f

Article 17

1. At the time of signature, ratification or accession any State may make a reservation in respect of articles 11, 14 or 15.

2. No other reservations to this Convention shall be admissible.

11. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, done at Geneva on 7 September 1956,^g and the International Coffee Agreement, 1962,^h provide that no reservations may be made with respect to any of their provisions.

ANNEX III

General Assembly resolutions governing the practice of the Secretary-General in respect of reservations

1. *General Assembly resolution 598 (VI) of 12 January 1952*

The General Assembly,

Bearing in mind the provisions of its resolution 478 (V) of 16 November 1950, which (1) requested the International Court of Justice to give an advisory opinion regarding reservations to the Convention

^a United Nations Conference on the Law of the Sea, 1958, *Official Records*, vol. II (United Nations publication, Sales No.: 58.V.4, vol. II), p. 139.

^b United Nations, *Treaty Series*, vol. 189, p. 137.

^c *Ibid.*, vol. 360, p. 130.

^d A/CONF.9/15, 1961; text also in Cmnd. 1825 (Misc. No. 27), H.M. Stationery Office, London, 1962.

^e United Nations, *Treaty Series*, vol. 266, p. 40.

^f See *United Nations Coffee Conference, 1962*, (United Nations publication, Sales No.: 63.II.D.1), annex III, p. 56.

^a United Nations, *Treaty Series*, vol. 193, p. 135.

^b *Ibid.*, vol. 309, p. 65.

on the Prevention and Punishment of the Crime of Genocide and (2) invited the International Law Commission to study the question of reservations to multilateral conventions,

Noting the Court's advisory opinion of 28 May 1951 and the Commission's report, both rendered pursuant to the said resolution,

1. *Recommends* that organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them;

2. *Recommends* to all States that they be guided in regard to the Convention on the Prevention and Punishment of the Crime of Genocide by the advisory opinion of the International Court of Justice of 28 May 1951;

3. *Requests* the Secretary-General:

(a) In relation to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, to conform his practice to the advisory opinion of the Court of 28 May 1951;

(b) In respect of future conventions concluded under the auspices of the United Nations of which he is the depositary:

(i) To continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

(ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications.

2. *General Assembly resolution 1452 (XIV) of 7 December 1959*

A

The General Assembly,

Having considered the item entitled "Reservations to multilateral conventions: the Convention on the Inter-Governmental Maritime

Consultative Organization", as well as India's instrument of acceptance of the Convention on the Inter-Governmental Maritime Consultative Organization and the report of the Secretary-General,

Noting that the Secretary-General of the United Nations acts as the depositary authority in respect of that Convention,

Noting the statement made on behalf of India at the 614th meeting of the Sixth Committee on 19 October 1959, explaining that the Indian declaration was a declaration of policy and that it does not constitute a reservation,

1. *Expresses its appreciation* of the information and materials made available to the General Assembly;

2. *Expresses the hope* that, in the light of the above-mentioned statement of India, an appropriate solution may be reached in the Inter-Governmental Maritime Consultative Organization at an early date to regularize the position of India;

3. *Requests* the Secretary-General to transmit to the Inter-Governmental Maritime Consultative Organization the present resolution together with the relevant records and documentation.

B

The General Assembly

Recalling its resolution 98 (VI) of 12 January 1952,

1. *Decides* to amend paragraph 3 (b) of that resolution by requesting the Secretary-General to apply the aforesaid paragraph to his depositary practice, until such time as the General Assembly may give further instructions, in respect of all conventions concluded under the auspices of the United Nations which do not contain provisions to the contrary;

2. *Requests* the Secretary-General to obtain information from all depositary States and international organizations with respect to depositary practice in relation to reservations, and to prepare a summary of such practices, including his own, for use by the International Law Commission in preparing its reports on the law of treaties and by the General Assembly in considering these reports.

SPECIAL MISSIONS

[Agenda item 3]

DOCUMENT A/CN.4/179

Second Report on Special Missions, by Mr. Milan Bartoš, Special Rapporteur

[Original text: French]
[21 April 1965]

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Preliminary note

1. In submitting this report, the Special Rapporteur considers it necessary to explain that:

(a) He has confined himself to making a few minor corrections to the draft on special missions adopted by the International Law Commission at its sixteenth session, while observing the rule that these corrections and additions should consist only of those strictly necessary;

(b) In the present report he submits to the Commission the full revised text of those articles which it was unable to discuss during its sixteenth session. These articles form the fourth part of this second report;

(c) He is submitting to the Commission a proposal regarding the line to be followed with respect to the rules concerning so-called high-level special missions, and he hopes that the Commission, by expressing its opinion on the subject, will give him an opportunity to submit the final text of the rules relating thereto during the seventeenth session;

(d) He is unable to submit to the Commission a joint proposal by the Special Rapporteur on relations between States and inter-governmental organizations and the Special Rapporteur on special missions concerning the legal status of delegations to international conferences and congresses. For technical reasons, it was impossible to prepare such a joint report, even though the Commission had instructed the two Special Rapporteurs to do so.

History of the idea of defining rules relating to special missions¹

2. At its tenth session, in 1958, the International Law Commission adopted a set of draft articles on diplomatic intercourse and immunities. The Commission observed, however, that the draft "deals only with permanent diplo-

¹ For the most part, this section is taken from the report of the International Law Commission on the work of its sixteenth session, 1964 (see *Yearbook of the International Law Commission, 1964*, vol. II, document A/5809, chap. III: Special Missions, paras. 25-35). These passages are reproduced since they contain information necessary to the reader of the second report on special missions.

matic missions. Diplomatic relations between States also assume other forms that might be placed under the heading of 'ad hoc diplomacy', covering itinerant envoys, diplomatic conferences and special missions sent to a State for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and requested the Special Rapporteur to make a study of the question and to submit his report at a future session."² The Commission decided at its eleventh session (1959)³ to include the question of *ad hoc* diplomacy as a special topic on the agenda of its twelfth session (1960).

3. Mr. A. E. F. Sandström was appointed Special Rapporteur. He submitted his report⁴ at the twelfth session, and on the basis of this report the Commission took decisions and drew up recommendations for the rules concerning special missions. The Commission's draft was very brief. It was based on the idea that the rules on diplomatic relations in general prepared by the Commission should on the whole be applied to special missions by analogy. The Commission expressed the opinion that this brief draft should be referred to the Conference on Diplomatic Intercourse and Immunities convened at Vienna in the spring of 1961. But the Commission stressed the fact that it had not been able to give this subject the thorough study it would normally have done. For that reason, the Commission regarded its draft as only a preliminary survey, carried out in order to put forward certain ideas and suggestions which should be taken into account at the Vienna Conference.⁵

4. At its 943rd plenary meeting on 12 December 1960, the United Nations General Assembly decided,⁶ on the recommendation of the Sixth Committee, that these draft articles should be referred to the Vienna Conference with the recommendation that the Conference should consider them together with the draft articles on diplomatic intercourse and immunities. The Vienna Conference placed this question on its agenda and appointed a special Sub-Committee.⁷

5. The Sub-Committee noted that these draft articles did little more than indicate which of the rules on permanent missions applied to special missions and which did not. The Sub-Committee took the view that the draft articles were unsuitable for inclusion in the final convention without long and detailed study which could take place only after a set of rules on permanent missions had been finally adopted.⁸ For this reason, the Sub-Committee recommended that the Conference should refer this question back to the General Assembly so that the Assembly could recommend to the International Law Commission further study

² *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, para. 51.

³ *Yearbook of the International Law Commission, 1959*, vol. II, document A/4169, para. 43.

⁴ *Yearbook of the International Law Commission, 1960*, vol. II, document A/CN.4/129.

⁵ *Ibid.*, document A/4425, para. 37.

⁶ Resolution 1504 (XV).

⁷ The Sub-Committee was composed of the representatives of Ecuador, Iraq, Italy, Japan, Senegal, USSR, United Kingdom, United States and Yugoslavia. See *Yearbook of the International Law Commission, 1963*, vol. II, document A/CN.4/155, para. 44.

⁸ United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, document A/CONF.20/C.1/L.315, p. 45.

of the topic, i.e., that it continue to study the topic in the light of the Vienna Convention on Diplomatic Relations which was then drawn up. At the fourth plenary meeting of the Vienna Conference on 10 April 1961, the Sub-Committee's recommendation was adopted.⁹

6. The matter was again submitted to the United Nations General Assembly. On 18 December 1961, the General Assembly, on the recommendation of the Sixth Committee, adopted resolution 1678 (XVI) in which the International Law Commission was requested to study the subject further and to report thereon to the General Assembly.

7. Pursuant to this decision, the question was referred back to the International Law Commission, which, at its 669th meeting on 27 June 1962, decided to place it on its agenda.¹⁰ The Commission requested the United Nations Secretariat to prepare a working paper¹¹ which would serve as a basis for the discussions on this topic at its 1963 session. The Commission then placed this question on the agenda of its fifteenth session (1963).

8. During its fifteenth session, at the 712th meeting, the Commission appointed Mr. Milan Bartoš as Special Rapporteur for the topic of special missions.¹²

9. In that connexion, the Commission took the following decision:

"With regard to the approach to the codification of the topic, the Commission decided that the Special Rapporteur should prepare a draft of articles. These articles should be based on the provisions of the Vienna Convention on Diplomatic Relations, 1961, but the Special Rapporteur should keep in mind that special missions are, both by virtue of their functions and by their nature, an institution distinct from permanent missions. In addition, the Commission thought that the time was not yet ripe for deciding whether the draft articles on special missions should be in the form of an additional protocol to the Vienna Convention, 1961, or should be embodied in a separate convention or in any other appropriate form, and that the Commission should await the Special Rapporteur's recommendations on that subject."¹³

10. In addition, the Commission considered again whether the topic of special missions should also cover the status of government delegates to congresses and conferences. On this point, the Commission at its fifteenth session inserted the following paragraph in its annual report to the United Nations General Assembly:

"With regard to the scope of the topic, the members agreed that the topic of special missions should also cover itinerant envoys, in accordance with its decision at its 1960 session.¹⁴ At that session the Commission had also decided not to deal with the privileges and immunities

⁹ *Ibid.*, document A/CONF.20/10/Add.1, resolution I, p. 89.

¹⁰ *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, para. 76.

¹¹ Circulated as document A/CN.4/155, published in *Yearbook of the International Law Commission, 1963*, vol. II, pp. 151-158.

¹² *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, para. 65.

¹³ *Ibid.*, para. 64.

¹⁴ *Yearbook of the International Law Commission, 1960*, vol. I, 565th meeting, para. 26.

of delegates to congresses and conferences as part of the study of special missions, because the topic of diplomatic conferences was connected with that of relations between States and inter-governmental organizations. At the present session, the question was raised again, with particular reference to conferences convened by States. Most of the members expressed the opinion, however, that for the time being the terms of reference of the Special Rapporteur should not cover the question of delegates to congresses and conferences."¹⁵

11. The Special Rapporteur submitted his report,¹⁶ which was placed on the agenda of the Commission's sixteenth session.

12. The Commission considered the report twice.¹⁷ First, at the 723rd, 724th and 725th meetings, it engaged in a general discussion and gave the Special Rapporteur general instructions on continuing his study and submitting the rest of his report at the following session. Secondly, at the 757th, 758th, 760th-763rd, and 768th-770th meetings, it examined a number of draft articles and adopted sixteen articles, to be supplemented, if necessary, during its seventeenth session. These articles were submitted to the General Assembly and to the Governments of Member States for information.

13. Owing to the circumstances prevailing at the time of its regular session in 1964, the General Assembly did not discuss the report and consequently did not express its opinion to the Commission. Accordingly, the Commission will be resuming its work on the topic at the point it reached at its sixteenth session in 1964. The Special Rapporteur hopes that the reports on this topic submitted to the 1964 and 1965 sessions will be consolidated in a single report.

Questions of principle raised during the general debate in the International Law Commission

14. During the general debate at the 1964 Session of the International Law Commission (723rd, 724th and 725th meetings) on the report on special missions, several questions of principle arose. In the case of some of these, the Committee reached express decisions. In the case of others, while the Commission did not specifically endorse what its Chairman had said, the opinion of the majority of its members was clear, and in these cases the question can therefore be regarded as having been settled by the Commission. There was a third group of questions which were asked by certain members of the Commission but concerning which no decision was taken and no definite conclusions were reached by the other members of the Commission who took part in the discussion. Nevertheless, as the Special Rapporteur considers that all these questions touch on principle, they are referred to in this section.

15. The Commission requested the Special Rapporteur to confine himself to the views which had crystallized during the general debate, and he therefore regards these views as

binding instructions. The present account will refer not only to these questions but also to the opinions of members of the Commission on which the Special Rapporteur has based his position. These opinions are cited from the provisional summary records of the above-mentioned meetings of the International Law Commission. The Special Rapporteur used the French text of the summary records, indicating, as regards each speaker, the number of the meeting and the paragraph number in the summary record. While, naturally, the Special Rapporteur was careful to reproduce faithfully the ideas and attitudes of each member of the Commission, a word of caution is indicated in two respects. First, many of these statements were made in English or Spanish, and possibly the French translation differs from the original thought. Secondly, as mentioned above, the passages cited are taken from the provisional summary records; no doubt, members of the Commission will have made certain corrections to the provisional records which probably altered the substance of what was originally recorded. The Special Rapporteur realizes that he, too, may have made some mistakes. Consequently, he regards this part of his second report as provisional and subject to correction later.

16. *The legal basis of the rules relating to special missions.* In view of the theoretical discussion in the literature as to whether the rules relating to special missions should be based on law or on international courtesy, the Special Rapporteur asked the Commission what it considered to be the legal basis of the rules on special missions which the Commission was drafting. The most categorical reply to this question was given by Mr. Tunkin, a member of the Commission. He said that the Commission's function was to codify or to draft rules of international law; consequently, the rules relating to special missions provided by the Commission were rules of law (SR.725, para. 32). Mr. Amado (SR.725, paras. 40-43), Mr. Yasseen (SR.725, para. 21), Mr. Verdross (SR.725, para. 18) and Mr. de Luna (SR.724, para. 40) took the same view.

17. Particular attention is drawn to the very clear answer given by Mr. de Luna, who said that the privileges and immunities of temporary missions were based on law, *ex jure*, and not on the comity of nations, *comitas gentium* (SR.724, para. 40). So far as *comitas gentium* is concerned, that view was shared by Mr. Verdross (SR.725, para. 18). Mr. Amado also opposed the notion that the legal basis of the rules was *comitas gentium* rather than law (SR.725, para. 40).

18. During the discussion, Mr. Briggs (SR. 725, para. 48), Mr. Castrén (SR.725, para.23), Mr. Elias (SR.725, para. 29), Mr. El-Erian (SR.725, para. 37), Mr. Rosenne (SR.725, paras. 8 to 11 and 46), Mr. Tabibi (SR.725, paras. 12, 15 and 16), Mr. Tsuruoka (SR.725, para. 47) and Sir Humphrey Waldock (SR.725, para. 35) took the view that the status of special missions should be governed by rules of law. All these members of the Commission stated that the Commission's function was to draft legal rules without determining whether the whole question of special missions had hitherto been governed by rules of law or whether international relations of that kind were to some extent founded on *comitas gentium*.

¹⁵ *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, para. 63.

¹⁶ *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/166.

¹⁷ The summary records of the sixteenth session will be found in *Yearbook of the International Law Commission, 1964*, vol. I.

19. The Commission therefore adopted the view that the rules it was drafting on special missions were rules of law and that they were not based on *comitas gentium*. No member of the Commission opposed that view.

20. *Relationship between the rules relating to special missions and customary international law.* Neither the Special Rapporteur nor the members of the Commission failed to realize that certain rules applicable to the legal status of special missions may be found in customary international law. That was Mr. Ago's opinion (SR.723, para. 55). Mr. de Luna also considered that supplementary rules on the subject were derived from international custom (SR.724, para. 40). Accordingly, in drawing up specific rules on legal institutions, the Commission applied the idea that the legal rules relating to special missions are influenced by customary international law and relied on the practice of customary law in cases where it was satisfied that a universally-recognized custom existed.

21. *Codification or progressive development.* It is the invariable practice of the Commission when drafting articles incorporating rules of international law to combine straightforward codification (if there are sufficient customary or written rules of international law) with the method of progressive development of international law (in cases where, although there are no such rules, certain trends exist in international relations, or in cases where it is necessary to make good a deficiency or to alter existing rules).

22. During the general debate on the rules relating to special missions, reference was made to the question of applying the method of the progressive development of international law. Mr. de Luna (SR.723, para. 63) was the first to mention this method and he was followed by Mr. Castrén (SR.724, para 10) and Mr. Amado, who considered that the Commission should feel its way step by step (SR.724, para. 21). No member of the Commission insisted that it should confine itself strictly to codification in drawing up these rules.

23. *The relationship between the rules on special missions drafted by the Commission and the Vienna Convention on Diplomatic Relations.*¹⁸ At the time when the Special Rapporteur was asked to undertake this task, the Commission considered the preliminary question whether the instrument it would be drafting would be complementary to the Vienna Convention on Diplomatic Relations or a separate convention.

24. During the discussion on this point, a further preliminary question arose, namely whether the instrument to be drafted would be in the nature of a treaty or would be a set of model rules. The majority of the members was in favour of the idea that the purpose was to draft provisions.

25. The question whether the object should be to draw up a set of model rules was considered in particular by Mr. de Luna. He said that the history of diplomatic relations had shown that the method of drawing up model rules was not satisfactory, whereas a separate convention had an authoritative status, even if its ratification might cause some diffi-

culties, and might serve as a model. Mr. de Luna went on to say, however, that those were simply preliminary remarks; the Commission would be better able to weigh the advantages of one solution against the other at a later stage in its work (SR.725, para. 28). Mr. de Luna's point of view was virtually adopted by the Commission, and all the subsequent comments, while subject to Mr. de Luna's proviso that the Commission would decide later on the final form of the instrument, were based on the tacit understanding that for the time being the Commission was drafting an instrument in the nature of a treaty.

26. Following up this idea, the Commission considered whether the rules to be laid down in the instrument should be regarded as *jus cogens* or *jus dispositivum*. Mr. Rosenne maintained that the draft articles should contain elements of both. He described *jus dispositivum* rules as "residual rules" which he defined as "a set of rules made available to States for incorporation in their own agreements as desired" (SR.725, paras. 8-10). Mr. Yasseen gave a much more stringent definition of these residual rules, since he made a reservation limiting the rights of States. In his view a State would be free to derogate from the general convention by means of bilateral agreements, to the extent that such derogations *did not conflict* with *jus cogens* rules (SR.725, para. 21). Mr. Castrén was also of this opinion; he said that only exceptionally could the rules be rules of *jus dispositivum* (SR.725, para. 23). Still more light was thrown on the subject by Mr. de Luna, who expressed a like opinion, saying that the articles which the Commission was drafting involved inviolable rules of *jus cogens*, or rules of *jus dispositivum* which ranked as residual rules in cases where States had not otherwise provided by bilateral agreement (SR.725, para. 26). Mr. de Luna's view therefore was that the text itself would decide from which rules it would be possible to derogate, whereas Sir Humphrey Waldock thought that the Commission should follow the example of the two Vienna Conferences and refrain from trying to determine which rules governing special missions were of the character of *jus cogens* (SR.725, para. 35). The Special Rapporteur considers that when the Commission drafted the rules in the operative part of the articles, it followed the course suggested by Mr. de Luna; a clear instance will be found in the language of article 9.

27. *Should the Commission draft an additional protocol to the Vienna Convention on Diplomatic Relations, 1961, or a separate instrument?* This was another of the preliminary questions, and three opinions were expressed during the general debate in the Commission.

28. The first of these was that the Commission should decide in favour of an additional protocol. Mr. Tabibi stated that the Commission was called upon to complete diplomatic law by adding a new chapter to the two Vienna Conventions (SR.725, para. 15).

29. Other members of the Commission, especially Mr. de Luna (SR.725, para. 27), expressed a different opinion, namely that the Commission was dealing with a separate topic and that a separate convention was therefore required.

30. This view was shared by Mr. Verdross, who held that the convention should be complementary to the two existing Vienna Conventions (SR.723, para. 62). Sir Humphrey

¹⁸ For the text of this Convention, see United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II (United Nations publication, Sales No.: 62.XI.1), p. 82.

Waldock expressed a like opinion (SR.723, para. 68) but later changed his mind (see below).

31. Many members of the Commission who endorsed this second opinion thought that it might still be necessary, in drafting an independent instrument relating to special missions, to adhere as far as possible to the ideas, structure and terminology of the Vienna Convention on Diplomatic Relations. Statements to that effect were made by Mr. Ago (SR.724, para. 57), Mr. Castrén (SR.725, paras. 23, 24 and 25), Mr. Elias (SR.725, para. 30), Mr. El-Erian (SR.723, paras. 44 and 46; SR.725, paras. 38 and 39), Mr. Jiménez de Aréchaga (SR.723, para. 50), Mr. Rosenne and Mr. Briggs—more especially in the Drafting Committee but, as regards Mr. Rosenne, also in the general debate (SR.724, paras. 35, 63 and 64; SR.725, paras. 3, 4, 8 and 46). To some extent this was also Mr. Tunkin's opinion (SR.724, para. 50).

32. Mr. Amado's view was that the Commission should produce a self-contained draft and should not let itself be excessively preoccupied with existing conventions, especially the Vienna Convention on Diplomatic Relations, though there would be no objection to cross-references (SR.725, para. 42; SR.724, para. 61). Similarly, Mr. Yasseen thought that the Commission should draft a separate convention, though this would not preclude a reference to other conventions (SR.725, paras. 21 and 22).

33. The third point of view was that, for the time being, the Commission should deal with the substance of the topic; later, after completing its work, it might see whether the results showed that the rules relating to special missions corresponded with or, on the contrary, differed from the provisions of the Vienna Convention on Diplomatic Relations, and then decide whether it would adopt the first or the second of the opinions described above. This was the view put forward by Mr. Tunkin (SR.725, para. 44) and it was supported by Sir Humphrey Waldock (SR.725, para. 45) and Mr. Briggs (SR.725, para. 48). Mr. Tunkin gave the reasons for his attitude in another statement (SR.725, paras. 33 and 34), which was supported by Mr. Tsuruoka (SR.725, para. 47) and by Sir Humphrey Waldock (SR.725, paras. 35 and 36).

34. The Commission provisionally adopted the third solution, and the rules are being drafted as to substance, the decision concerning the formal relationship between those rules and the Vienna Convention on Diplomatic Relations being postponed.

35. *The relationship between the rules relating to special missions and the Vienna Convention on Consular Relations.*¹⁹ During the general debate, members of the Commission also mentioned the 1963 Vienna Convention on Consular Relations as a source of legal rules which should be taken into account in the drafting of articles on special missions. All of these members, however, regarded that Convention either as part of the future code of diplomatic law or as a secondary instrument, and they considered the Vienna Convention on Diplomatic Relations to be more important.

¹⁹ For the text of this Convention, see United Nations Conference on Consular Relations, *Official Records*, vol. II (United Nations publication, Sales No.: 64.X.1), p. 175.

36. In this connexion, Mr. Amado protested against any attempt to take the rules concerning consular immunities as a model in dealing with the question of the immunities of special missions, for (he said) the Commission's duty was precisely to take into account the development of modern diplomacy, which tended to make increasing use of special missions (SR.724, para. 61). Although Mr. Amado's view was that the rules relating to special missions should be drafted without undue preoccupation with existing conventions, his specific reference was to the Vienna Convention on Diplomatic Relations (SR.725, para.42) and not to the Convention on Consular Relations.

37. Mr. Elias made only an indirect reference to the Vienna Convention on Consular Relations; he considered that it would not be easy to assimilate the status of members of special missions to that of consuls because special missions differed so widely in their composition (SR.724, para. 37).

38. Mr. Castrén mentioned the Vienna Convention on Consular Relations only when comparing it with the Vienna Convention on Diplomatic Relations (SR.725, para. 24); he did not recommend that it should be used.

39. Mr. Jiménez de Aréchaga's view was that the privileges and immunities granted to members of purely technical missions should be limited to those necessary for the exercise of their duties: they should be similar to those enjoyed by consuls under the Vienna Convention on Consular Relations rather than to those enjoyed by diplomatic agents under the Vienna Convention on Diplomatic Relations (SR.723, para. 50).

40. Mr. Rosenne stated that, although certain special missions fulfilled quasi-consular functions, as, for example, when they dealt with migration problems, he had in no way wished to suggest in his statement at the 711th meeting²⁰ that there should be separate rules for special missions which fulfilled quasi-consular functions. He was of the opinion, however, that the Commission should not only draw inspiration from the Vienna Convention on Diplomatic Relations but should also bear in mind the contents of the Vienna Convention on Consular Relations (SR.724, para. 63).

41. Mr. Tabibi considered that the rules relating to special missions should complete diplomatic law, including the two Vienna Conventions (SR.725, para. 15).

42. The conclusion to be drawn from these comments, more especially from those of Mr. Ago (SR.724, para. 58), is that the Commission should not draw dangerous analogies with the position of consular missions. Accordingly, the position is that, although the Commission has not declined to use the Vienna Convention on Consular Relations, it attaches greater importance to the Vienna Convention on Diplomatic Relations as a source, and even then it will take into account the peculiar characteristics of special missions.

43. *The position of the rules relating to special missions in the general code of diplomatic law.* This question was raised by Mr. Verdross. His view was that the Commission should codify the whole of diplomatic law: if it wanted its

²⁰ *Yearbook of the International Law Commission, 1963, vol. I, 711th meeting, para. 77.*

work to be useful it should leave no point uncovered. In addition to the Convention on Diplomatic Relations and the Convention on Consular Relations, the field to be covered included relations between States and inter-governmental organizations and the other problems of special diplomacy in the broadest possible sense of the term (SR.723, para. 62). The same opinion was voiced by Mr. Castrén (SR.724, para. 12; SR.725, para. 23), Mr. Elias (SR.725, para. 30) and Mr. Yasseen (SR.725, para. 21). Mr. Tabibi (SR.725, para. 12), Mr. Rosenne (SR.725, paras. 3-11) and Mr. El-Erian (SR. 725, para. 37) held that all those rules were interrelated.

44. Several members who spoke in the discussion considered that the rules relating to special missions should, so far as possible, be drafted in such a way that the result would be the unification of the rules concerning special missions. It was not suggested, however, that the rules must be absolutely identical.

45. For instance, Mr. Yasseen, though supporting the unification of the rules, said that that did not mean that all special missions should be governed by identical rules (SR.723, para. 18). Special missions were so varied that it was impossible to draft uniform rules; the rules would have to differ in certain respects (SR.724, para. 34).

46. Mr. Jiménez de Aréchaga took the same view as Mr. Yasseen (SR.723, paras. 49 and 50).

47. Mr. de Luna considered that all the rules should also apply to those special missions which were delegations to conferences (SR.723, para. 63).

48. Mr. Castrén's view was that the rules might certainly cover all sorts of official functions performed by special missions, but immediately afterwards he went on to say that the rules governing special missions might vary with their functions (SR.724, para. 10).

49. Mr. Cadieux, too, thought that it was impossible to envisage a single uniform status for all categories of special missions (SR.724, para. 45).

50. The statements cited above show that, despite opposing arguments, the members of the Commission have a common attitude. On the one hand, it is desired to achieve a uniform body of rules for all special missions—a *lex generalis*—and on the other hand it is held that there should be special rules—*lex specialis*—for certain types of mission that would derogate from the uniform rules.

51. *The relationship between the rules relating to special missions and the Convention on the Privileges and Immunities of the United Nations.*²¹ Several members pointed out that, in addition to the Vienna Conventions on Diplomatic and Consular Relations, the Convention on the Privileges and Immunities of the United Nations should also be regarded as a source for the rules relating to special missions. The Convention in question was referred to by Mr. Jiménez de Aréchaga (SR.723, paras. 50 and 67), Mr. Elias (SR.723, para. 65), Mr. Rosenne (SR.723, para. 77) and Mr. Verdross (SR.724, para. 39). Some of these members pointed out that the Convention on the Privileges and Immunities of the

United Nations imposed fewer restrictions on the territorial State.

52. In the course of its work the Commission, while giving priority to the Vienna Conventions, also took into account the Convention on the Privileges and Immunities of the United Nations.

53. *The law of conferences.* In discussing the question whether the rules relating to special missions should also cover the legal status of delegations of States to international conferences, several members of the Commission were in some doubt whether that subject should be included in the rules on special missions or whether it constituted a separate topic. Mr. Yasseen thought that the Commission might consider entrusting the entire question of conferences to a third special rapporteur; but there seemed to be no insurmountable obstacle to assigning it to the Rapporteur on special missions (SR.723, para. 76). Mr. Tunkin also took that view; referring to the rules concerning international conferences, he said that they were now becoming a separate subject in international law (SR.724, para. 19). Mr. Tabibi expressed the same opinion (SR.725, para. 17).

54. The Commission did not come to a decision to treat this as a different subject and to entrust it to a separate special rapporteur.

55. *The expressions "special missions" and "ad hoc diplomacy".* Mr. Cadieux suggested that the Commission should not use the expression "*ad hoc* diplomacy" since it was apt to offend career diplomats (SR.723, para. 28). The Commission adopted Mr. Ago's suggestion that it would be as well to drop the term "*ad hoc* diplomacy" altogether and to speak only of "special missions" (SR.723, para. 34).

56. The Commission accordingly refrained from using the expression "*ad hoc* diplomacy" and used only the expression "special missions". Proof of this will be found in the sixteen articles already adopted.

57. *Definition of "special mission".* Mr. Tunkin in particular dealt with this question. In his view, special missions formed part of diplomacy. The essential point was that they should represent the State; it was immaterial whether their task was political or technical. Special missions, he said, had varied tasks which were not always limited; often they were of a very general kind. The main point was that a special mission was temporary (SR.724, paras. 14 to 16).

58. A number of references to Mr. Tunkin's ideas were made by members of the Commission in the course of the discussion of articles 1 and 2 of the draft on special missions. The Commission's view was that special missions were temporary in character and had specific tasks.

59. *Temporary character of special missions.* All those who spoke in the general debate stressed that one of the essential characteristics of special missions was their temporary nature. This point was made for instance by Mr. Cadieux (SR.723, para. 26). Mr. Tsuruoka described the special mission as "sporadic and partial" (SR.724, para. 5). Mr. Tunkin made further reference to that characteristic in his statement and suggested therefore that the term "special mission" should be dropped in favour of "temporary mission" (SR.724, paras. 16 and 53). Mr. Amado made a distinction between permanent contacts through

²¹ United Nations, *Treaty Series*, vol. 1, p. 15.

ordinary missions and temporary contacts through special missions (SR.724, para. 20). He said later that temporary diplomacy had become a tree in the forest of law (SR.725, para. 43). Mr. Verdross (SR.724, para. 39) and Mr. Ago (SR.724, para. 59) stressed the same characteristic.

60. It was evident that the Commission was unanimous in regarding special missions as temporary in character. It therefore endorsed with little discussion the Special Rapporteur's view that a distinction should be drawn between special missions which are temporary and specialized missions of a permanent character existing side by side with regular missions.

61. *Special missions of a political or technical character.* During the general debate many members of the Commission spoke on the question whether the expression "special missions" should be construed to mean only those of a definitely political character or also those which represented States in matters of a technical nature. Mr. Verdross was the first to speak on the subject. He considered that special missions of a technical character as well as those of a political character were employed in official relations between States and that the rules should therefore cover all special missions (SR.723, paras. 15 and 16). Mr. Yasseen expressed the same view (SR.723, para. 17). Mr. de Luna did not think that a distinction should be drawn between special missions of a political character and those of a technical character (SR.723, para. 19). Mr. Cadieux likewise considered that it was not so important to stress the political or technical character of the special mission as to take into account the level and importance of that mission (SR.723, para. 26). Mr. Pal said that there was no reason to restrict the concept of special missions to purely political activities; in the light of recent developments, it was clear that special technical missions should also be covered (SR.723, para. 29). Mr. Elias thought that it was difficult to differentiate in special missions between political and technical matters (SR.723, para. 30). Mr. Ago was even more categorical. He thought that it would be absurd to try to draw a distinction between a political special mission and a technical special mission (SR.723, para. 33). Mr. El-Erian agreed that it was not easy to draw a distinction between political special missions and other special missions (SR.723, para. 44). Mr. Jiménez de Aréchaga said that, while he agreed that technical special missions should be studied as well as political special missions, their inclusion did not mean that all special missions should be subject to the same body of rules (SR.723, para. 49). Mr. Tsuruoka thought that the distinction between political and technical missions was not very great in practice (SR.724, para. 7). Mr. Castrén was prepared to accept that view in principle but thought that rules governing special missions might vary according to the functions assigned to them (SR.724, para. 10). Mr. Tunkin agreed with the general view that it was immaterial whether a mission was to carry out a political or a technical task; the essential point was that it should represent the State in its relations with another State (SR.724, paras. 13 to 15). Mr. Amado, the last speaker in the debate on this point, drew a logical conclusion when he said with regard to the substance of the question: "The Commission was right to resist the idea that technical missions should be regarded as a special class, for in modern

times sovereignty found expression in technical matters as much as in the traditional processes of politics" (SR.724, para. 20).

62. Thus all those who spoke in the general debate expressed their unanimous belief that special missions may have a purely political or technical character, but in either case they represent the same concept. At the same time, some speakers pointed out that the level, importance and particular function of special missions should be taken into account (Mr. Cadieux, Mr. Jiménez de Aréchaga, Mr. Castrén and Mr. Tunkin). Hence, in the case of certain missions there could be special rules (a view expressed by Mr. Cadieux, Mr. Jiménez de Aréchaga and Mr. Castrén).

63. *Relationship between special missions and other forms of diplomacy.* The Commission held that special missions were undoubtedly an instrument of a special character for the purpose of representing States. By reason of the temporary nature of special missions and the specific character of their tasks, this instrument differs from the instrument constituted by the regular permanent diplomatic missions. It differs from specialized resident diplomacy by its temporary character, in that specialized resident diplomacy, although having specific tasks, is in principle of a permanent character. Lastly, special missions also differ from consular representation, although they may from time to time perform quasi-consular tasks. The Commission further considered that in modern international life special missions are an instrument much employed by States at every level (which varies according to their composition) and for widely differing tasks.

64. The Commission did not, however, pursue the question of the line of demarcation between the competence of regular diplomacy and specialized resident diplomacy on the one hand and that of special missions on the other. Mr. Cadieux and Mr. Tsuruoka stressed the greater competence and responsibilities of traditional resident diplomacy, but the Commission neither adopted nor rejected their views. Similarly, when drafting article 7, the Commission rejected the efforts of the Special Rapporteur to initiate a discussion on the delimitation of the authority of special missions as compared with that of regular diplomatic missions. While the Special Rapporteur treats this attitude of the Commission as having the force of a binding direction, he must point out once again that the Commission did not indicate its views on the subject. He thinks that the Commission's attitude is accounted for by the great divergence in practice, the vagueness of views and the political character of the subject. This is perhaps one of the cases where the question cannot be considered ripe for codification.

65. *Unity of the will of the State.* During the general debate some members of the Commission said that great caution was needed in formulating rules on special missions, for if an equal right to represent the State was granted both to regular missions and to special missions, the unity of expression of the sovereign will of States might be jeopardized. Mr. Cadieux, in particular, drew attention to this point, saying that the Commission would have to be very tactful in its handling of diplomats of the traditional kind (SR.723, para. 28). Mr. Tsuruoka was even more explicit;

he said: "The co-existence of those two forms of diplomacy raised a question of responsibility. Conflict between the permanent diplomatic mission and a special mission of one State in another State was not inconceivable. However, the presumption was always that the will of the State was single: both missions had the same purpose and the special mission became part of the permanent diplomacy". He thought that even in the case of a visit by a head of State the responsibility in any case fell on the ambassador (SR.724, para. 6). Although the Special Rapporteur pointed out that the maintenance of the unity of the State's will was a question which should be settled within the State, whereas international legal relations required that statements made by special missions should have binding force, Mr. Tsuruoka insisted that such questions must be regulated by international law since the fact that the will of the State was expressed in two different ways might affect relations between two States (SR.724, para. 28). Mr. Ago, speaking as Chairman, agreed that the problem was an extremely delicate one which he thought was connected rather with the law of treaties, the attribution to the State of the will expressed by its representative. He suggested that for the time being the Commission consider only the question of privileges and immunities (SR.724, paras. 31 and 32).

66. Accordingly, no solution was found for this important problem in the general debate in the Commission. The uncertainty was the more marked on account of a divergence of fundamental views between the members of the Commission who had raised the question and the Special Rapporteur. The Special Rapporteur held that any organs or representatives of the State, acting within the scope of their competence or full powers, validly expressed the will of the State they represented and that the other contracting State had no obligation or need to verify whether the representative of a State acted according to internal rules on consultation or co-ordination so long as he acted within the limits laid down in his terms of reference or within those customary in international law. The Special Rapporteur indicated moreover in his statement of principle that the modern practice of special missions had met with opposition from the so-called regular diplomacy in different States, and that the problem of co-ordination was an internal matter for each State, not the concern of the State receiving the mission.

67. *Privileges and immunities.* The question of the extent and basis of the privileges and immunities of a special mission and its members and of the members of its staff was discussed at length in the Commission's general debate on special missions.

68. The first question to be inquired into was whether the functional or the representative theory should be the basis; this question is discussed in a separate section of this report.

69. Some members said that national parliaments were not prepared to enlarge the scope of privileges and immunities in general, and in particular were reluctant to enlarge those of special missions, their members and members of their staffs, and that accordingly the Commission should proceed cautiously, if it wished parliaments to adopt the rules drafted. Mr. Cadieux first drew attention to that point (SR.723, para. 28), and this tendency to restrict the im-

munities and privileges granted to special missions was also stressed by Mr. Verdross (SR.724, para. 39) and Mr. Elias (SR.724, para. 38).

70. Mr. de Luna mentioned, as a practical point not to be overlooked, the reluctance of parliaments and Governments to grant immunities (SR.723, para. 73).

71. Sir Humphrey Waldock also referred to the tendency to keep the privileges and immunities of special missions within certain bounds, a tendency evident even in the United Kingdom. He was however in favour of giving such missions the maximum protection necessary for the efficient performance of their functions while at the same time confining privileges within reasonable limits (SR.724, para. 56).

72. Mr. Amado agreed that States were very circumspect with regard to the extent of the privileges and immunities granted, but in his view States were chiefly concerned with their own interests. Hence they not only restricted the extent of privileges but at the same time they weighed their own interests and decided whether reciprocity would yield them the equivalent of what they granted to others. The concern of States should be interpreted in that light (SR.724, para. 62).

73. Some members of the Commission stressed that immunities and privileges should vary according to the various categories of missions and staff. That was the view expressed by Mr. Cadieux (SR.724, para. 46) and Mr. Castrén, who said that the rules governing special missions might vary with their functions (SR.724, para. 10).

74. Mr. Jiménez de Aréchaga said that States might be unwilling to grant immunities to the members of purely technical missions, for example to a mission for the control of animal diseases (SR.723, para. 50).

75. Mr. Yasseen thought that restrictions should not be excessive; the fundamental consideration should be the need to safeguard the normal and regular performance of functions (SR.724, paras. 33 and 34).

76. Mr. Tunkin said that in any discussion on limitations of privileges and immunities the functional needs of special missions should be considered. No limitations should be imposed that would hinder them in the performance of their tasks (SR.724, para. 53).

77. Mr. Ago, speaking as Chairman, said that States did not seem prepared to treat permanent diplomatic missions and special missions on an equal footing; he added, however, that special missions should have at least the minimum of privileges and immunities essential for the performance of their tasks (SR.724, paras. 30 and 57).

78. Some members of the Commission thought that uniform rules should govern privileges and immunities in general. Mr. Elias thought that identical rules should be made in the matter for members of special missions and United Nations experts (SR.723, para. 65). Mr. El-Erian pointed out that a like problem arose in connexion with special missions to international organizations (SR.723, para. 70). The same point was also raised by Mr. Jiménez de Aréchaga, who opposed a difference in treatment as between special missions in bilateral relations and special missions participating in conferences convened by international

organizations. Mr. de Luna said that the Commission would have to prepare rules covering delegations to conferences convened by States (SR.723, para. 73).

79. Mr. Rosenne thought that the problem of the unification of the rules governing immunities and privileges for special missions and for all international conferences should be settled within the framework of the United Nations and at the highest level (SR.723, para. 77). He pointed out that, although they appeared similar in substance, there was a difference between the rules laid down for privileges and immunities in the Vienna Convention on Diplomatic Relations and the various conventions on the privileges and immunities of international organizations. There might be a close similarity between the two sets of rules but their legal basis was entirely different (SR.723, para. 79). Later, however, he stressed the need to consider, in the drafting of rules concerning privileges and immunities, their effectiveness in the protection of functions, which meant that the legal regulation should draw a distinction between the different categories of persons composing a mission (SR.724, paras. 63 and 64).

80. Mr. Yasseen also thought that special missions were so varied that it was impossible to draft uniform rules for all of them. In his view, criteria should be found by which special missions could be differentiated according to their importance and their tasks. He thought therefore that rules should be drafted which would differ in certain respects (SR.724, para. 33).

81. From all the statements made in the debate it was evident that the Commission was convinced of the need to provide special missions with the facilities, privileges and immunities essential to the efficient performance of their functions, including not only the accomplishment of their tasks but also the function of representing the State. Nevertheless, the Commission realized that it was not necessary to grant identical facilities, privileges and immunities to all members of mission staffs or even to all special missions, for these differ in their respective tasks, importance and levels.

82. *Functional theory or representative theory.* In the general debate the question arose whether the legal status of special missions should be regulated on the basis of the functional or on that of the representative theory.

83. In his statement Mr. Tunkin made a decisive contribution to the solution of the problem. He pointed out that the Vienna Convention on Diplomatic Relations should be taken as a starting-point. In the first place, he said, the Vienna Conference of 1961 had based its conclusions not only on the functional theory but also on the representative theory; that was clear from the fourth paragraph of the preamble to the Convention adopted at the Conference. Secondly, special missions might also, by reason of their tasks, have a representative character (SR.724, paras. 50-54). Mr. Ago thought that in order to find a solution the Commission should look to both theories (SR. 724, para. 57). Mr. Rosenne also supported Mr. Tunkin's view (SR. 724, para. 64). Sir Humphrey Waldock considered that the Commission should find a practical solution and avoid taking a stand on theoretical issues (SR.724, para. 55).

84. Mr. de Luna based his views on the functional theory, adding that even in the case of special missions there were, in addition to what was necessary for the performance of their functions, additional privileges and immunities deriving from international custom with regard to the position of the head of the special mission (SR.724, para. 40).

85. Other members of the Commission also spoke on this question.

86. Mr. Castrén said that, in devising solutions and establishing legal rules for special missions the Commission should bear in mind the importance of the function of such missions (SR.724, para. 10).

87. Mr. Elias also supported the functional theory. (SR. 723, para. 32).

88. Mr. El-Erian, who based his views on the functional theory, pointed out, however, that at the Vienna Conference on Diplomatic Intercourse and Immunities (1961) it had been thought necessary to couple the theory of functional necessity with that of the representative character of diplomatic missions (SR.723, para. 46).

89. Mr. Yasseen thought that the functional theory should especially be followed (SR.724, para. 34).

90. Despite the diversity of views held by members of the Commission on this question, the Commission may be said to have combined the two theories in drawing up and adopting the first sixteen articles of the draft.

91. *Level of the special mission.* A number of members suggested that the Special Rapporteur should, in the body of the articles, stress the idea that not all special missions could receive identical treatment, owing to the difference in the levels of heads of mission. Mr. Cadieux, who first drew attention to this point, said that the concept of uniformity of treatment for all special missions according to the tasks assigned to them could not be taken as a basis, and he quoted as an especially important criterion the level of the special mission or rather the level of its head (SR.723, paras. 27 and 28). He concluded that the rank of the head of the mission also contributed to the importance of the mission, particularly if it had a political character, which should influence the treatment due to the mission (SR.724, para. 46). In that connexion, Mr. Elias also stressed the question of the rank of the head of the mission (SR.724, para. 37). Mr. Tunkin suggested that such rank should be taken into account in the drafting of the rules governing special missions (SR.724, para. 53). Sir Humphrey Waldock endorsed Mr. Tunkin's view (SR.724, para. 55). Mr. Ago likewise thought that the rank of the head of the mission should be considered but added that the status of the head of the mission should not be given too much weight (SR.724, para. 59). Mr. Amado also spoke on the question of the rank of the head of the mission (SR.724, para. 61).

92. In view of this attitude prevailing in the Commission, the Special Rapporteur concluded that it would be necessary to revise the draft articles, with special reference to the level of the mission.

93. *Classes of special missions and their staff.* The opinion which emerged during the Commission's general debate was that not all missions and not all the mission staff could

have the same legal status, but that this status depends on the specific class of the mission and its staff.

94. Mr. Yasseen pointed out that the classes of missions were, by virtue of their respective tasks, numerous and varied. He did not, however, reach the conclusion that separate rules were needed concerning the status of each (SR.724, para. 33). He was even opposed to any tendency to impose excessive restrictions, by reason of the functional theory concerning special missions (SR.724, para. 34).

95. Mr. Elias thought that special provision would have to be made for subordinate members of special missions (SR.724, para. 37).

96. Mr. Verdross favoured the idea of introducing a different set of rules for members of special missions, especially in view of the general tendency to restrict the immunities and privileges of special missions (SR.724, para. 39).

97. Mr. de Luna thought that as many immunities as possible should be accorded to members of special missions but that they should be limited to those necessary for the performance of their functions without prejudice to the accomplishment of the mission (SR.724, para. 40).

98. Mr. Cadieux thought that the Commission should classify special missions according to their functions and in particular should draw a distinction between State agents and their assistants in special missions, with due regard to the level (SR.724, paras. 45 and 46).

99. Mr. Tunkin thought it might prove difficult to draft a single text which would cover every category of special mission and that it might be better to distinguish between the various categories and to accord them different status (SR. 724, para. 54).

100. Mr. Rosenne agreed that a distinction should be drawn between the different categories of persons serving on a special mission; such a distinction would serve as a basis for the legal regulation of privileges and immunities along the lines of the two Vienna Conventions (1961 and 1963) (SR.724, para. 64).

101. Mr. Ago, speaking as Chairman, said it would be difficult to classify missions according to the level of their head (SR.724, para. 59).

102. The Special Rapporteur considers that the Commission accepted in principle the division of mission staff into categories, as is evident from article 6, paragraph 2, as adopted. It is therefore his task to formulate the facilities, privileges and immunities of the members of the staff of special missions in different ways according to the categories of staff.

103. *Position of third States.* During the general debate it was pointed out on several occasions that the rules concerning the legal status of special missions should also, in certain cases, apply to third States as well as to the States sending and receiving special missions. That was emphasized by Mr. Rosenne (SR.723, para. 23) and Mr. Ago (SR. 723, para. 35).

104. The idea received expression in article 16, as adopted, of the rules relating to special missions. The Special Rapporteur hopes that this idea will be supplemented and

developed by the additions to be made to the text already accepted by the Commission.

105. *Delegations to conferences and congresses.* In establishing the terms of reference of the Special Rapporteur for the topic of special missions the Commission decided that the question of the legal status of delegations to international conferences and congresses would not be dealt with in the report on special missions but would be within the scope of the work of the Special Rapporteur on relations between States and inter-governmental organizations (Mr. Abdullah El-Erian).²²

106. In making his report on special missions the Special Rapporteur asked the preliminary question: should the rules governing special missions cover the regulation of the legal status of delegations and delegates to international conferences and congresses? He was of the opinion that such delegations were by their nature and characteristics special missions, whether the international conferences and congresses were convened by a single State, several States, a group of States or an international organization.²³

107. The question was fully discussed in the Commission, which considered whether it was possible to distinguish in substance between such delegations and delegates and special missions, and whether it was in fact necessary to give different treatment to those delegations according to the identity of the convener of the international congress or conference. Opinions differed on the subject and the Commission therefore decided to postpone the question and to invite two Special Rapporteurs to study it. Mr. El-Erian and the present Special Rapporteur were asked to come to an agreement in this respect and to report to the Commission. In their report they were to state which of them would make himself responsible for drafting the section relating to this particular subject.

108. The present Special Rapporteur has to inform the Commission that for practical reasons it was not possible for the two Rapporteurs to concert their work. Mr. El-Erian was unable to study the question in detail on account of the excessively long duration of the regular session of the United Nations General Assembly of 1964 which he attended as a representative of the United Arab Republic. Moreover, Mr. El-Erian's numerous commitments at the time when the present Special Rapporteur arrived at Cairo (visits of three Heads of State and Mr. El-Erian's participation in the negotiations conducted during those visits) made it impossible for the two Special Rapporteurs to prepare their joint report. They hope to be able to do so during the seventeenth session of the International Law Commission (1965) and to submit the report in question to the Commission before the end of the session.

109. *Special missions in connexion with visits by foreign Heads of State.* The Special Rapporteur did not cover in his report on special missions (A/CN.4/166) the special missions which take place in connexion with the visit of a foreign Head of State, on the ground that, in the opinion

²² See *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, para. 63.

²³ See *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/166, paras. 20 *et seq.*

of learned authors, such missions are governed by international custom. Nevertheless, during the discussion on the report several members of the Commission expressed the opinion that the question should be covered in the part of the report dealing with special aspects of special missions.

110. Mr. Yasseen proposed that special missions should also include visits by Heads of State and Ministers for Foreign Affairs (SR.723, paras. 18 and 40).

111. Mr. Rosenne said he was not convinced that visits by Heads of State, Heads of Government and Ministers should be covered by the rules since few important practical legal problems arose in connexion with such visits (SR.723, para. 24).

112. Mr. Elias thought that the rules relating to visits by Heads of State and Ministers should be included in the system of legal rules on special missions (SR.723, para. 31). In his view, special rules were needed in the case of such missions according to whether they were led by the Head of State, the Head of Government, the Minister for Foreign Affairs, some other head of department or permanent secretary. The rules would depend on the level and the rank of the head of mission (SR.724, para. 37).

113. Mr. Cadieux was unwilling to exclude the visits of Heads of State from a definition of special missions, since Heads of State had the right to enter into commitments binding the State (SR.723, para. 27). He stressed the same idea in speaking of the level of the special mission (SR.724, para. 46).

114. Mr. Jiménez de Aréchaga said that Heads of Government, Heads of State and Ministers often led special missions and that the difference in rank of the heads of the mission had to be taken into account, but in his view the Commission could go no further than put forward rules governing precedence (SR.723, para. 51).

115. Mr. Tsuruoka also referred to such visits (SR.724, para. 6).

116. Mr. Tunkin stressed particularly the importance of such visits and thought that appropriate rules should perhaps be inserted in the draft (SR.724, para. 17).

117. Mr. de Luna thought that there were special international customs covering the position of the Head of State who acted as head of a special mission (SR.724, para. 40).

118. Mr. Amado said that while, in modern times, Heads of State and other high-ranking personages frequently made journeys, they did so not as envoys but always as Heads of State (SR.724, para. 61).

119. Mr. Tabibi thought that the question of visits by Heads of State was outside the scope of the study of special missions and their legal status. In his view Heads of State did not carry out negotiations; that task was usually left to the specialists who accompanied them (SR.725, para. 14).

120. Mr. Castrén considered that the question of official visits was worth examining in greater detail (SR.724, para. 11).

121. Mr. El-Erian thought that the status of visiting Heads of State and Ministers should be excluded from the scope of the present study. The question was regulated by general

international law (SR.723, para. 45). It was not advisable to discuss visits by Heads of State, Heads of Government and Ministers for Foreign Affairs in conjunction with special missions. It was true that the position of the members of the suite of such a visiting personage probably needed regulation, but the status of the Head of State or the Head of Government was governed by general international law and there was no reason to codify the relevant rules within the framework of the articles on special missions (SR.724, paras. 47 to 49).

122. Mr. Ago, speaking as a member of the Commission, had some doubts about the identification of visits by Heads of State or Heads of Government with special missions in general and, speaking as the Chairman of the Commission, expressed the view that the Commission should decide later whether the rules governing such visits ought to be included in the system of special missions (SR.723, paras. 52, 53 and 57). He noted that the Commission had agreed to postpone its decision (SR.723, par. 57).

123. *Other questions raised during the general debate.* During the general debate some members raised certain other questions which were not discussed at great length. Those questions concerned:

124. Envoys of States—Mr. de Luna (SR.723, para. 64).

125. Possibility of special missions between States when diplomatic relations are severed or suspended—Mr. Rosenne (SR.725, paras. 5 and 6).

126. Regional conferences—Mr. de Luna (SR. 723, para. 64).

127. Powers of special missions—Mr. El-Erian (SR.723, para. 45).

128. Relationship between the rules governing special missions and the law of treaties—Mr. El-Erian (SR.723, para. 45).

129. Special missions at international ceremonies—Mr. Castrén (SR.724, para. 11).

130. The consent of the receiving State as a condition of the acceptance of the special mission (other speakers referred to this during the discussion on the definition of "special mission")—Mr. Cadieux (SR.723, para. 26).

131. Observers at conferences or negotiations—Mr. de Luna (SR.723, para. 64).

132. Waiver of immunities—Mr. Rosenne (SR.723, para. 77).

133. Several other legal institutions mentioned frequently during the general debate have probably escaped the attention of the Special Rapporteur. The reason why he has not given prominence to those questions is that he did not draw from the discussion any conclusion which he might have taken to be instructions from the Commission for his future work. Nevertheless, he feels bound to mention that some of those questions were raised again during the discussion on individual articles, and that the Commission then came to a decision concerning them either in the text of the articles adopted or in their commentaries, or else the decision is reflected in the fact that those institutions are not mentioned either in the text or in the commentaries.

Draft articles prepared at the Commission's sixteenth session

(Articles 1 to 16 and commentary)

134. At its sixteenth session, the Commission adopted the first sixteen articles, with commentary, of the draft on special missions. The Special Rapporteur considers it unnecessary to reproduce the text here, for it has been published.²⁴ When adopting those articles and the commentary the Commission reserved the right to supplement them, if necessary.²⁵

135. The Special Rapporteur considered it his duty to review the articles as adopted, with a view to supplementing and revising them. In so doing, he took it as his guiding principle that what had been adopted should be changed as little as possible. Accordingly, he confines himself to:

Making a few suggestions for supplementing the articles or the commentary;

Requesting the Commission to take his comments into account ; and

Requesting the members of the Commission likewise to suggest emendations to the articles or to the commentary, though without reopening questions that were settled during the Commission's sixteenth session.

136. The Special Rapporteur offers the following suggestions to supplement the articles and the commentary.

ad article 2

137. He considers that the following paragraph should be added to the commentary on article 2 as adopted:

"(7) It happens in practice that, in conformity with the processes of international relations, the fact of sending and receiving a special mission whose task is not specified but whose field of activity is known is regarded as tantamount to a mutual agreement concerning that mission's task. An example would be the sending and receiving of a special mission of hydro-engineering experts at a time when an area liable to flooding is threatened by floods, the States concerned not having entered into prior conversations concerning the sending and receiving of a special mission of this sort. In such a case, the fact that such a mission is sent and received is regarded as sufficient evidence *per se* of a tacit agreement concerning that special mission's task. The mission is presumed to be authorized to carry out whatever work is generally within the competence of special missions of this kind. On the other hand, this practice is not to be recommended, for, in the Commission's opinion, disputes are apt to arise during the special mission's activity concerning the limits of its field of activity, inasmuch as each State judges unilaterally what is considered usual and normal for special missions of this type."

138. The Special Rapporteur proposes this addition to the commentary in the light of a case of like nature which has occurred in practice.

²⁴ *Yearbook of the International Law Commission, 1964*, vol. II, document A/5809, pp. 210-226.

²⁵ *Ibid.*, para. 35.

ad article 7

139. The Special Rapporteur proposes that the following paragraph 3 should be added to article 7.

"3. The head of the special mission may also authorize a specified member of the staff to perform certain acts and to send and to receive communications."

140. The Special Rapporteur considers this addition necessary. In this respect, there is a discrepancy between the *body of article 7* and the commentary.

141. Article 6 as adopted draws a distinction between the members of a special mission (paragraph 1) and the members of its staff. As article 6 does not treat the members of the staff as members of the special mission, there is a risk that article 7, paragraph 2, may be construed as referring only to the members of the special mission properly so called, to the exclusion of the members of the staff, and hence as meaning that the head of the special mission cannot delegate his powers to the staff. It is, however, current practice for the head of a special mission to delegate powers of this nature to members of its staff; indeed, most of the mission's acts are in practice performed by the secretary to the delegation. This is also the practice described in the commentary to article 7 as adopted, paragraph (11) of which refers to this possibility. This paragraph is, however, in contradiction with the literal terms of article 7, paragraph 2. This patent contradiction ought, accordingly, to be removed. For this purpose, the best method would be to add another paragraph (paragraph 3) to article 7 (or, possibly, to make the appropriate correction in paragraph 2 of article 7, though this would, in the Special Rapporteur's opinion, be the less elegant and even less advisable method, for its effect would be in some way to place the members of the special mission and the staff on a footing of equality).

ad article 12

142. The Special Rapporteur considers it his duty to mention that, according to his original proposal, the authority given to the head or to particular members of a special mission was expressed to be for a limited term. Accordingly, upon the expiry of that term, the special mission does not, from the formal and legal point of view, cease to exist; yet, if the authority of all the members of the special mission came to an end at its term, does such a special mission continue to exist? Neither article 12 nor the commentary thereto make provision for such a case, and the question therefore remains unanswered.

143. The Special Rapporteur wonders whether the article in question, and hence also the commentary, ought to be supplemented on the lines described above, or whether it would suffice simply to mention such a case in the commentary.

144. The Special Rapporteur considers that, for the sake of completeness, some such addition would be desirable. It would hardly affect in any way the subject-matter dealt with in article 12 as the substantive rule. The purpose of article 12 is to determine objectively the end of the functions of the special mission as such. It is, however, arguable that the expiry of the term of all the members of the special

mission is only a subjective moment. In reply to such a possible argument the Special Rapporteur would say that such a moment, while seemingly subjective (duration of assignment of particular persons, e.g. the head or members of the special mission), is in reality an event which produces an objective effect on the actual existence of the special mission. Despite the difference between two situations (disappearance of the person of the head or of the members of the special mission and disappearance of the special mission itself), the Special Rapporteur feels bound to point out that, in such a case, a virtually objective phenomenon occurs, with the consequence that the question whether the special mission as such, as an institution, continues or does not continue to exist remains in suspense. To hold that in such a case the special mission continues to exist would be an unnecessary abstraction.

ad article 16

145. The Special Rapporteur considers it his duty to point out once again that it is necessary to express clearly, in the body of article 16, the idea of the revocability of the approval given by a third State in whose territory the special mission is carrying on its activity. At its sixteenth session, the Commission adopted the idea that the territorial State (the third State) has the right to revoke the approval given but did not consider it necessary to state this idea expressly in the body of the article, on the ground that it would suffice simply to mention it in the commentary (see paragraph (8) *in fine* of the commentary to article 16). In view of the reaction of legal circles to this provision, the Special Rapporteur considers that article 16 would become clearer if this idea found expression in the body of the article.

Draft articles on special missions not considered by the Commission at its sixteenth session

(Articles 17 to 40)

146. At its sixteenth session, the Commission discussed the first fifteen articles of the draft rules relating to special missions on the basis of the report on special missions submitted by the Special Rapporteur.²⁶ This discussion led to the adoption by the Commission of articles 1 to 16, which were submitted to the General Assembly of the United Nations in the Commission's report on the work of its sixteenth session (11 May-24 July 1964).²⁷

147. The Commission requested its Special Rapporteur to continue his work on the remaining articles, to revise their style and terminology in the light of the general discussion at the Commission's sixteenth session and, if necessary, to amplify and improve the text. In accordance with these instructions, the Special Rapporteur submits to the Commission the new text of these rules, the introduction to the rules and the commentaries. The new text differs appreciably from the previous one, and the Special Rapporteur has accordingly considered it advisable to set forth the whole of the new revised and amended text in this section,

in order to save the Commission the trouble of having to consult the previous text during its discussions on these articles.

148. The new text is set out below:

INTRODUCTION ON FACILITIES, PRIVILEGES AND IMMUNITIES

General considerations

(1) In the literature, in practice, and in the drafting of texts *de lege ferenda* on the law relating to special missions, apart from matters of rank and etiquette, special attention has been given to the question what facilities, privileges and immunities are enjoyed by a special mission. Even on this fundamental question, however, opinions are not unanimous. While the drafts of proposed rules (Institute of International Law, London, 1895; International Law Association, Vienna, 1924; Sixth International Conference of American States, Havana, 1928; International Law Commission of the United Nations, Geneva, 1960) all agree that special missions have in the past been entitled to facilities, privileges and immunities by juridical custom, and should in the future—it is believed—be entitled to them under a law-making treaty, the literature and the practice are still uncertain about the question whether at the present time such privileges attach to special missions as of right or by virtue either of the comity of nations, or of mere courtesy. One school of thought goes so far to assert that the recognition of this juridical status in the case of special missions rests entirely on the good will of the receiving State or even, perhaps, on mere tolerance. Fortunately, the International Law Commission re-affirmed, at its sixteenth session, that facilities, privileges and immunities attach *ex jure* to special missions.

(2) The question of the legal right of special missions to the enjoyment of facilities, privileges and immunities is, of course, one of substance. It arises perhaps more in connexion with the consequences which may ensue in the rare cases where they are denied or refused than in regular practice. So long as they are granted, no one asks on what grounds; but if they are refused, the first question which arises is on what basis and to what extent the *ad hoc* representative in question is entitled to them. At the same time a further question arises: does this right attach to the *ad hoc* representative himself or to his State? For this reason, the Special Rapporteur feels obliged to consider all the arguments relating to the grounds on which the juridical status of special missions is based. He will begin with those which he considers least sound and will emphasize, in the case of each, the following points: the obligation of the receiving State, the right of the *ad hoc* representative, and the right of the sending State.

(3) If mere tolerance is taken as the basis, the whole structure becomes precarious. In this case, the *ad hoc* representative has no right to the enjoyment of facilities, privileges and immunities. Indeed, the receiving State may at any time declare or hold that no such tolerance exists (although some authorities maintain that it must be presumed to exist until such time as the receiving State expresses a contrary intention) or else, if the tolerance has been practised in the past, whether in general or in a specific instance, that it may be discontinued. In other words, according to

²⁶ See *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/166, p. 67.

²⁷ *Ibid.*, document A/5809, pp. 210-226.

this view, the receiving State has no obligation in this respect towards an *ad hoc* representative, and the latter has no ground for asserting his rights *vis-à-vis* the receiving State. In these circumstances, the sending State can clearly have no legal authority either to demand the enjoyment of such facilities, privileges and immunities or to protest against their denial. All it can do in such a case is to make political representations or objections, according to the benefit or the harm which might accrue to good, normal international relations from such action.

(4) As will be indicated below, the Special Rapporteur has no hesitation in rejecting this theory summarily, for it is not in conformity with the principles essential to the maintenance of international relations—respect for State sovereignty, safeguarding of the normal functioning of a special mission and safeguarding of the freedom and security of its members. This conception of *ex jure* safeguards was also adopted by the International Law Commission during the general discussion on special missions at its sixteenth session.

(5) The case is similar, though by no means identical, if the enjoyment of these facilities, privileges and immunities by a special mission is based on the good will of the receiving State. In this case the good will displayed—provided that the other party has been notified of it—at least constitutes a right created by the independent will of a State that is operative even in the sphere of public international law; and it can be invoked by foreigners and by foreign States. This is an action by the receiving State falling within the category of unilateral juridical acts operative in public international law.²⁸ Consequently, a State is obliged to keep such unilateral promises, at least for such time as the special missions with respect to which the sending State has been notified that such good will exists, in the form of a unilateral act, remain in its territory. This does not mean that a unilateral promise of this kind could not have been revoked, but such revocation would have no effect on situations already created and established; at the very most, it might have effect as regards future cases.

(6) Thus a special mission may invoke a promise made by unilateral act, regardless of whether the mission or its State was notified of the act. Similarly, in this case the sending State has the legal right to demand the fulfilment of the unilateral promise.

(7) The Special Rapporteur must reject this theory also, even though it is less precarious than that of mere tolerance. His reasons for doing so are the same as in the preceding case. Nevertheless, he is prepared to accept, at least in part, the application of the theory of the unilateral good will of the receiving State, though only in cases where a unilateral promise of the kind referred to improves the position of the special mission, and to the extent that it does so effectively by granting the mission more than is necessary to conform to the principles essential to the maintenance of international relations, mentioned above, and to existing juridical customs in the matter (although there is some doubt as to their true scope). A sovereign State may grant to other States more than the minimum it is obliged to grant under

positive international law, but it may not of its own accord deny them this minimum.

(8) The theory of international courtesy does not differ in any respect from the foregoing. In this case also, it depends on the good will of the State whether the rules of international courtesy should be applied, and to what extent. There is, however, a shade of difference in the way in which this good will is formed. Convenience is not the sole criterion, as in the preceding case (para. 5). Here again, the receiving State acts in accordance with its own notions of international courtesy, which usually lead it to the conclusion that the comity of nations is obligatory, at least between States maintaining good relations with each other. In this case, however, there is a presumption of reciprocal observance of the rules of the comity of nations, and a presumption of the right of the receiving State not to apply those rules if its expectations of reciprocity are not fulfilled.

(9) The Special Rapporteur is convinced that in this instance both the special mission and the sending State may demand the enjoyment of facilities, privileges and immunities, and if they are denied, may challenge this breach of the rules of international courtesy by protesting in moderate terms. In the Special Rapporteur's view, such complaints and protests would be of a purely diplomatic and, one might say, political nature. Considerations of law enter into the matter in two cases, namely:

(a) If the sending State grants the same facilities, privileges and immunities in its own territory to special missions of the receiving State. Where this is the case, the sending State may consider that the reciprocal granting of facilities, privileges and immunities has established a *modus vivendi* and that the two States have, by practice, adopted the rule *do ut des*; consequently, the denial of such facilities, privileges and immunities is regarded as an infringement of the *modus vivendi* and as a breach of the international obligation to requite what has been received. In this instance, the State whose representative has not been allowed such facilities, privileges and immunities is entitled to demand, by virtue of a legal title, what is its due;

(b) If the receiving State does not give identical treatment, from the standpoint of international courtesy, to all the special missions of various States. In this case, the legal ground for the complaint and protest is not a breach of the rules of international courtesy, but the violation of the general principle of non-discrimination between States.²⁹ In this case, however, the sending State must offer the same facilities, privileges and immunities (principle of reciprocity) since, according to the general principle, there is no discrimination if a State does not grant to other States the facilities, privileges and immunities which it claims for itself, even in cases where the receiving State grants them to other States observing the principle of reciprocity.

(10) The Special Rapporteur believes that this system also is unacceptable in principle. One can speak of international

²⁸ Eric Suy, *Les actes juridiques unilatéraux en droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1962).

²⁹ This principle was adopted, as regards diplomatic law in the Vienna Convention on Diplomatic Relations, 1961, and its application to *ad hoc* diplomacy was provided for by the International Law Commission in its draft rules on special missions.

courtesy only if the range of facilities, privileges and immunities is to be extended, whereas the basic facilities, privileges and immunities are granted *ex jure* and not by the comity of nations.

(11) A superior basis would be a bilateral treaty between the States concerned, and this undoubtedly the juridical basis frequently applied in this connexion. However, the agreements of this kind known to the Special Rapporteur are either very brief (containing references to the general rules of diplomatic law on facilities, privileges and immunities) or very specific, in which case they lay down the particular powers given to the special missions or itinerant envoys in question (for instance, an agreement between Italy and Yugoslavia on the joint use of an aqueduct having its sources in Yugoslav territory and operated by a Yugoslav State organ specifies the rights of the Italian inspectors in the performance of their functions on Yugoslav territory; various bilateral conventions concerning the interconnexion of electricity networks specify the rights of delegates of the respective States with respect to checking the quality and quantity of electric power, etc.). Accordingly, two series of legal questions arise:

(a) What is meant by the right of special missions to the enjoyment of diplomatic facilities, privileges and immunities? Does it mean the right to a status identical with or similar to, that of permanent diplomatic missions? In the Special Rapporteur's view, it simply implies the reciprocal recognition by States of the application to special missions of the general treatment accorded as a rule to resident diplomacy. The whole matter, however, even in a case explicitly provided for in a treaty, depends on the nature of the special mission's functions.

(b) Where the treaty grants certain exceptional rights to special missions without mentioning the general code of treatment, does this mean that special missions enjoy only the rights specified in the treaty, and not other rights also? The Special Rapporteur's view is that in this case special missions, in addition to being covered by the normal rules relating to the status of diplomats, enjoy facilities, privileges and immunities which are not usually granted to permanent missions but are essential to the performance of the functions of special missions.

(12) The Special Rapporteur is convinced that in either case both the *ad hoc* representative and the sending State are entitled to demand of the receiving State *ex jure* the application of the existing rules on facilities, privileges and immunities which are valid for special missions and, in addition, of the provisions specifically laid down in the agreement. This, however, leaves unresolved the main question what these general rules of international law are and what their scope is by analogy to the rules governing the treatment of the head and members of a permanent diplomatic mission. Thus, there is a certain vagueness about this whole question.

(13) There still remains the fundamental question—what is the general legal custom (since codified rules are as yet lacking) with regard to the legal status of special missions as regards the enjoyment of facilities, privileges and immunities? On this point theory, practice and the authors of the draft for the future regulation of this question are in

agreement. The International Law Commission took as its starting-point the assumption that special missions composed of State representatives are entitled to diplomatic facilities, privileges and immunities.³⁰ This does not, however, answer the question; for it has not yet been determined, either by the Commission or in practice, precisely to what extent a special mission enjoys these diplomatic facilities, privileges and immunities. In 1960, the Commission itself wavered between the application of the *mutatis mutandis* principle and the direct (or analogous) application of the relevant rules applicable to permanent diplomatic missions. In any case, it was realized that this point could not be settled without further studies, for the purpose either of codifying the cases where practice is undetermined and vague (such as matters not yet ripe for codification) or of applying by rational solutions the method of progressive development of international law.

(14) Whichever course is chosen, however, it is necessary to decide on the method of approach. What concept should be followed—the representative theory or the functional theory?

(15) The representative nature of diplomacy in general, which was recognized in the Regulation of Vienna (1815)³¹ in the case of ambassadors, has lost some of its significance with the passage of time. The Head of State is no longer the absolute repository of the diplomatic capacity of his State. Democratic methods of exercising the authority of the State, irrespective of the varied forms of democracy, link the process of the representation of the State in international relations to the constitutional order of the sending State. Diplomats represent the State, not the Head of State. Consequently, the Vienna Convention on Diplomatic Relations (1961)³² did not entirely dismiss the concept of the representative nature of resident diplomacy, yet—while preserving the idea of the representative nature of permanent diplomatic missions in the fourth paragraph of its preamble—it nevertheless stresses the functional nature of diplomacy, thereby recognizing the combined application of the representative theory and the functional theory. It would therefore be logical to assume that if this is so in the case of permanent missions, it must be even more so in the case of special missions. The Special Rapporteur considers that this is correct in principle; but here again the concept of relativity in legal matters re-emerges, for there is no rule without an exception. Special ambassadors appointed for certain occasional ceremonial or formal missions are the exception. Although, even in these cases, it is increasingly being made clear that all acts are performed on behalf of the State, and not on behalf of the Head of State, there still remain vestiges of the former representative nature of such special ambassadors, and this is reflected, in the law, in certain norms of custom and protocol. However, as an increasing number of special missions have taken on an essential character by reason of their political or technical functions, the approach based on the representative theory can no longer serve as the

³⁰ See *Yearbook of the International Law Commission, 1963*, vol. II, document A/CN.4/155 (working paper on special missions prepared by the Secretariat), para. 11.

³¹ The text of the Regulation of Vienna is quoted in *Yearbook of the International Law Commission, 1958*, vol. II, p. 93, footnote 29.

³² See United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, p. 82.

sole basis for determining the extent of the facilities, privileges and immunities granted to special missions.

(16) On the other hand, the functional theory of facilities, privileges and immunities which the Vienna Conference (1961) took as one of the starting-points for understanding and determining the status of resident diplomacy, together with the concept underlying the Convention on the Privileges and Immunities of the United Nations (1946)³³ and the Convention on the Privileges and Immunities of the Specialized Agencies,³⁴ indicate the correct approach to determining the extent of the facilities, privileges and immunities which the receiving State is legally obliged to grant to special missions and itinerant envoys. Special missions and itinerant envoys represent a sovereign State, its dignity and its interests. They perform certain specific tasks on behalf of that State, and they should enjoy all the safeguards they need in order to carry out, freely and without hindrance, the mission entrusted to them. For this reason, the receiving State is required *ex jure* to grant them all the facilities, privileges and immunities appropriate to their mission and to accord to them all the privileges and immunities which are conferred on such representatives of the sending State and all the safeguards and immunities without which a mission of this kind could not be accomplished in a free and normal manner. All these facilities, privileges and immunities, however, are not granted by the receiving State to special missions for the personal benefit of their head and their members; they enjoy these advantages only because this assists them in the discharge of their duties and is necessary to their State. It is for this reason that there exists, through the combined application of the representative theory and the functional theory, a direct juridical relation between the receiving State and the sending State. It is only by reflection that the heads and members of special missions enjoy such rights and such facilities, privileges and immunities, their status depending on the right which belongs to their State and on the latter's willingness to ensure their enjoyment of them (the State is entitled to waive the immunity enjoyed by the *ad hoc* representative, since such immunity attaches to the State and not to the representative in question).

(17) Thus, there is a general legal rule concerning the duty to grant facilities, privileges and immunities to special missions; but in view of the combined representative and functional basis on which this legal custom is applied, legal rules have to be drafted specifying to what extent and in what circumstances the enjoyment of such rights is necessary to special missions, for the existing rules are imprecise and the criteria are uncertain.

(18) In establishing this basis, the Special Rapporteur believes that he has provided guide-lines for a solution that is correct in substance. The juridical nature of these privileges, the legal relationship between States in matters affecting their mutual respect, the linking of these privileges to function in international relations, and the effect of these rules *ex lege* and *ipso facto*, are the criteria on which the study and determination of the particular forms of

facilities, privileges and immunities applicable to special missions should be founded. This view was accepted by the International Law Commission during the general discussion at its sixteenth session.

Article 17.—General facilities

The receiving State shall offer a special mission all the facilities necessary for the smooth and regular performance of its task, having regard to the nature of the special mission.

Commentary

(1) Proceeding from the fundamental principle that the direct effect of the rules on the facilities due to special missions depends on the nature and level of the special mission in question, the Special Rapporteur considers that what must be ensured is the regular functioning of special missions and itinerant envoys. In this connexion, he does not share the view expressed by the International Law Commission in 1960 that all the provisions applicable to permanent diplomatic missions should also be applied to special missions. He is more inclined to follow the fundamental idea underlying the resolution adopted by the Vienna Conference on Diplomatic Intercourse and Immunities,³⁵ namely, that the problem of the application of the rules governing permanent missions to special missions deserves detailed study in the light of the Vienna Convention on Diplomatic Relations. In his opinion, this means that these rules may not all be applicable to the same extent, and that each type of mission must be considered separately.

(2) It is undeniable that the receiving State has a legal obligation to provide a special mission with all the facilities necessary for the performance of its functions. In the literature, this rule is generally criticized on the ground that it is vague. The Special Rapporteur considers that its content changes according to the task of the mission in question, and that the facilities to be provided by the receiving State vary. Accordingly, the legal issue concerns not only the obligation to make such facilities available, but also the adequacy of the facilities provided, which depends not only on the special mission's task, but also on the circumstances in which it is performed. Consequently, the assessment of the extent and content of this obligation is not a question of fact but an *ex jure* obligation, whose extent must be determined by the special mission's needs, which depend on the circumstances, nature, level and task of the specific special mission. There remains the legal question whether the extent is determined fairly by the receiving State and thus matches what is due.

(3) The Special Rapporteur is of the opinion that the difficulties which arise in practice are due to the fact that some special missions consider the receiving State obliged to provide them with all the facilities normally given to regular diplomatic missions. He is more inclined to agree with the approach of those States which in practice offer a special mission only such facilities as are necessary, or at

³³ United Nations, *Treaty Series*, vol. I, p. 15.

³⁴ *Ibid.*, vol. 33, p. 261.

³⁵ United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, document A/CONF. 20/10/Add.1, resolution I, p. 89.

least useful, according to some objective criterion, for the performance of its task, whether or not they correspond to the list of facilities granted to permanent diplomatic missions as enumerated in the Vienna Convention on Diplomatic Relations. Special missions may, however, in some cases, enjoy more facilities than regular diplomatic missions, when this is necessary for the performance of their special tasks outside the field of competence of regular diplomatic missions. This argument is consistent with the resolution on special missions adopted by the Vienna Conference on Diplomatic Intercourse and Immunities.

(4) The Special Rapporteur believes that, as often happens in practice, the parties may specify in treaties what facilities should be provided for special missions. When this is done, the receiving State has the further duty to offer to special missions any other facilities they need for the performance of their tasks, even if these other facilities are not listed in the treaties. The fact that facilities are listed in a treaty simply means that the facilities mentioned in the treaty must be made available to the special mission as an obligation; it does not follow that the parties have waived all other facilities that may be needed if the special mission's task is to be performed in a smooth and regular manner. Facilities that are not listed may be required and due under the general norms of international law.

(5) The facilities offered to a special mission should include those which are essential to the normal life of its members. They must be enabled to lead a civilized life, since a special mission cannot be regarded as being in a position to perform its task properly if the receiving State makes it impossible for its members to enjoy civilized standards in such matters as hygiene. For example, they should have the right to medical care and personal services (e.g. hair-dressing) of the highest quality available in the receiving State, due allowance being made for the specific circumstances, and at least of the customary quality by world standards.

(6) It is open to question whether these facilities should include everything which constitutes courteous treatment of the special mission and its members, even if not essential to the performance of its task. The Special Rapporteur believes that a special mission should also receive this special consideration.

Article 18.—Accommodation of the special mission and its members

1. The receiving State shall facilitate the accommodation of the special mission at, or in the immediate vicinity of, the place where it is to perform its task.

2. If the special mission, owing to the nature of its task, has to change the site of its activities, the receiving State shall enable it to remove to other accommodation at any place where its activities are to be pursued.

3. This rule also applies to the accommodation of the head and the members of the special mission, and of the members of the staff of the special mission.

Commentary

(1) This article relates in substance to the problem dealt with in article 21 of the Vienna Convention on Diplomatic

Relations and in article 30 of the Vienna Convention on Consular Relations. However, the text proposed is not identical with the provisions of those articles. In the first place, the Special Rapporteur is of the opinion that the sending State cannot claim, by reason of the fact that it is sending special missions, the right either to acquire land for the construction of accommodation for special missions or to acquire the premises required for accommodating them, as is provided for by the above-mentioned articles of the Vienna Conventions in regard to regular diplomatic missions and permanent consulates. The Special Rapporteur considers that in this connexion it is sufficient to ensure the provision of temporary accommodation for special missions which are temporary in character. The rules on the status of special missions should not go further than that.

(2) Special missions should, however, have their accommodation guaranteed, and the accommodation should be adequate for the special mission in question. In this respect, the same rules should in principle apply as in the case of permanent diplomatic missions. In view of the Special Rapporteur, however, there is no obligation upon the receiving State to permit the acquisition of the necessary premises in its territory on behalf of the sending State, although this does not rule out the possibility that some sending States may purchase or lease premises for the accommodation of a number of successive special missions. But this is an exception.

(3) According to the normal criteria, if there is a sufficient number of hotels in the places where the special mission has its seat, the question does not arise in practice. If, however, the hotel facilities are inadequate, then—in the Special Rapporteur's opinion—the receiving State is obliged to ensure comfortable accommodation for special missions in a hotel with the usual amenities. This question has arisen on several occasions recently in the United States of America in connexion with special missions whose members were not of the white race, and the State Department has had to obtain accommodation for these delegates in hotels normally occupied by other special missions of this kind.

(4) This question is of particular importance, however, in places where there are not enough hotels, for example, in the case of special missions concerned with frontier demarcation, or where negotiations are held in small towns. When several special missions from different States meet for the same purpose, the rules of non-discrimination must be observed. On such occasions, in the absence of special agreements, each mission is provided with an equal number of rooms in hotels of specific classes so that the staff of the missions are accommodated according to the rank they hold in their own country.

(5) In some cases the cost of the accommodation may constitute a legal question. Is the receiving State obliged to prevent overcharging?

(6) A similar question arises with regard to food and other services needed by the special mission, if they are not available or are not of the desired standard at the place where the meeting is held. The Special Rapporteur considers that the receiving State has a legal obligation to supply all these needs.

(7) This rule does not exclude some differentiation with regard to the custom of providing special missions with courtesy accommodation in luxuriously appointed villas and the like. There is no legal obligation in this connexion, but it would be considered an infringement of the law if any appreciable discrimination were shown in bestowing such honours on different special missions.

(8) In article 2 of its draft articles on special missions (1960), the International Law Commission took this case into account and took the view that the rules applicable to permanent diplomatic missions should apply.³⁶

(9) There is a difference between what is proposed in this article for special missions and the fundamental idea underlying article 21 of the Vienna Convention on Diplomatic Relations and article 30 of the Vienna Convention on Consular Relations. Both those Conventions are based on the idea that for permanent diplomatic missions and consulates the receiving State is required to facilitate the acquisition of the necessary premises only in the locality where the permanent diplomatic mission or consulate has its seat. In the case of special missions, however, their task may be such that they need more than one seat. This is clear from paragraph 5 of the commentary to article 13 as adopted by the Commission at its sixteenth session.³⁷ In particular, cases occur in practice where either the special mission as a whole or a section or group of the mission has to travel frequently in the territory of the receiving State. Such travel often involves a swift change in the seat of the special mission or the arrival of groups of the special mission at specific places, and the mission's or group's stay in a particular locality is often very brief. These circumstances generally make it impossible for the sending State itself to arrange accommodation for its special mission or a section thereof. For this reason, in practice it is generally the authorities of the receiving State which arrange accommodation.

Article 19.—Inviolability of the premises of the special mission

1. The premises of a special mission shall be inviolable. This rule shall apply even if the special mission is accommodated in a hotel or other public building, provided that the premises used by the special mission are identifiable.

2. The receiving State has a duty to take all appropriate steps for the protection of the premises of the special mission, and in particular to prevent any intrusion into or damage to those premises, any disturbance of the special mission in its premises, and any impairment of its dignity.

3. Agents of the receiving State shall not enter the said premises without the special consent of the head of the special mission or the permission of the head of the regular diplomatic mission of the sending State accredited to the receiving State.

Commentary

(1) The text proposed for this article corresponds in substance to the ideas set forth in article 22 of the Vienna

Convention on Diplomatic Relations and article 31 of the Vienna Convention on Consular Relations. However, the Special Rapporteur has been obliged to depart to some extent from those provisions and to adapt them to the requirements imposed by the nature and practice of special missions.

(2) In 1960 the International Law Commission considered that, even in this matter, the rules applicable to permanent diplomatic missions should also apply to special missions. The Commission's previous Special Rapporteur, in his first draft, took the view that "The official premises of... a special mission... shall enjoy... inviolability...".³⁸

(3) The present Special Rapporteur cannot agree with that view, and he believes that special provisions are necessary for special missions, primarily because their position so far as accommodation is concerned is not always comparable to that of regular diplomatic missions. In addition, the premises of a special mission are often together with the living quarters of the members and staff of the special mission. It is for these reasons that special provisions are needed.

(4) Generally, the offices of special missions are not installed in special premises (they are usually located in the premises of the ordinary or specialized permanent diplomatic mission, if there is one at the place). If, however, the special mission occupies special premises, the guarantee of inviolability must be respected, in order that it may perform its functions without hindrance and in privacy, irrespective of the location of the premises in question. This inviolability is distinct from that of the domicile. It follows that, in cases where the mission premises are installed in a hotel, the conduct of certain local authorities which claim that the inviolability does not apply to hotel rooms is unjustifiable. This argument made it necessary to amplify paragraph 1 of this draft article.

(5) In practice, the head of a special mission sometimes refuses, with or without good reason, to allow representatives of the authorities of the receiving State to enter the premises of the special mission. In such cases, the Ministry of Foreign Affairs of the receiving State asks the head of the regular diplomatic mission of the sending State for permission to enter the premises occupied by the special mission. This practice of seeking the consent of the head of the sending State's permanent diplomatic mission is already written into paragraph 2 of article 31 of the Vienna Convention on Consular Relations. Its justification lies in the fact that what is at issue here is the protection of the interests of the sending State, and not those of the special mission itself. The Special Rapporteur therefore considers that the necessity of obtaining such permission is a sufficient safeguard for the sending State.

(6) The protection of the premises of a special mission is more important in practice than the protection of the premises of a regular diplomatic mission, for several reasons. In particular, a special mission, unless it is accommodated in the permanent mission's building, has less means at its disposal for its own protection and is less able itself to exercise effective control (for instance, in a hotel);

³⁶ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 117, 179-180.

³⁷ *Yearbook of the International Law Commission, 1964*, vol. II, p. 224.

³⁸ *Yearbook of the International Law Commission, 1960*, vol. II, p. 112.

in addition, a special mission does not often have settled premises (if its task involves travel). For this reason, sending States rent or purchase private buildings in certain centres, particularly where they have no permanent diplomatic mission or where their permanent diplomatic mission's premises are inadequate, in order to ensure the inviolability of the premises of special missions. Immediately after the Second World War, the great Powers rented entire floors in large hotels for this purpose and protected their own security by denying any outsider entry to these premises. This is still being done, but more discreetly.

(7) The question arises in practice whether it is possible to distinguish between the official premises of a special mission and the living quarters of its members and staff, since in most cases both are in the same premises. The Special Rapporteur considers that this is a question of fact.

(8) A separate question is that of secret intrusion into the premises of a special mission—in other words, the installation of special listening devices which are used by the intelligence service of the receiving State. The Special Rapporteur considers that, from the legal standpoint, this is a breach of the inviolability of the special mission's premises. He deems it his duty to bring this point to the Commission's notice but he is not convinced that it should receive prominence in the body of the article.

Article 20.—Inviolability of archives and documents

The archives and documents of a special mission shall be inviolable at any time and wherever they may be. Documents in the possession of the head or members of the special mission or of members of its staff or in the rooms occupied by them shall likewise be deemed to be documents of the special mission.

Commentary

(1) This article is drafted in the light of the provisions of article 24 of the Vienna Convention on Diplomatic Relations and article 33 of the Vienna Convention on Consular Relations.

(2) In this case, too, the International Law Commission took the view in 1960 that the rules applicable to permanent diplomatic missions apply also to special missions, which otherwise would scarcely be able to function normally.

(3) It is important, in this connexion, to bear in mind that the archives and documents of special missions are often in the possession of certain members of the special mission, or of members of its staff, and that in such cases the rule included in both Vienna Conventions, that archives and documents are inviolable wherever they may be, must apply.

(4) Because of various controversies which arise in practice, the Special Rapporteur considers it particularly important to stress the point concerning documents in the possession of the members or of the staff of a special mission. This is especially pertinent in the case of a special mission which does not have premises of its own and in cases where the special mission or a section or group of the special mission is itinerant. In such cases, the documents transported from place to place in the performance of the special mission's

task are mobile archives rather than part of the mission's baggage.

(5) In article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations and article 31, paragraph 4, of the Vienna Convention on Consular Relations there are some provisions relating to the safeguards concerning "furnishings and other property... and the means of transport". The Special Rapporteur has taken the view that it is inappropriate to insert these provisions in the present article, but he has introduced them in the article entitled "Inviolability of the property of the special mission".³⁹ His main reason is that the above-mentioned provisions of the Vienna Conventions relate to property owned by the sending State and situated in the permanent premises of a permanent diplomatic mission or consulate, which is not the case with the property to be protected in the interest of special missions.

Article 21.—Freedom of movement

1. The head and members of a special mission and the members of its staff shall have the right to freedom of movement in the receiving State for the purpose of proceeding to the place where the special mission performs its task, returning thence to their own country, and travelling in the area where the special mission exercises its functions.

2. If the special mission performs its task elsewhere than at the place where the permanent diplomatic mission of the sending State has its seat, the head and members of the special mission and the members of its staff shall have the right to movement in the territory of the receiving State for the purpose of proceeding to the seat of the permanent diplomatic mission or consulate of the sending State and returning to the place where the special mission performs its task.

3. If the special mission performs its task by means of teams or at stations situated at different places, the head and members of the special mission and the members of its staff shall have the right to unhindered movement between the seat of the special mission and such stations or the seats of such teams.

4. When travelling in zones which are prohibited or specially regulated for reasons of national security, the head and members of the special mission and the members of its staff shall have the right to freedom of movement, if the special mission is to perform its task in precisely those zones. In such a case, the head and members of the special mission and the members of its staff shall be deemed to have been granted the right to freedom of movement in such zones, but they shall be required to comply with the special rules applicable to movement in such zones, unless this question has been settled otherwise either by mutual agreement between the States concerned or else by reason of the very nature of the special mission's task.

Commentary

(1) The draft of this article is based on the ideas expressed in article 26 of the Vienna Convention on Diplomatic Relations and article 34 of the Vienna Convention on Consular Relations. However, in applying these ideas to the

³⁹ Article 24.

present draft, the Special Rapporteur has made substantial changes reflecting the special circumstances in which the task of special missions is performed. This article includes certain provisions which do not apply to either permanent diplomatic missions or consulates. This question will be dealt with in greater detail in the succeeding paragraphs of this commentary.

(2) The Special Rapporteur does not share the view expressed by the International Law Commission in 1960, namely, that special missions must be given the same treatment as permanent diplomatic missions in this respect. General freedom of movement in the territory of the receiving State (except in prohibited zones) is granted to permanent diplomatic missions because permanent diplomatic missions are authorized to observe events in the country. Special missions, on the other hand, have limited tasks. From this derives the rule that they should be guaranteed freedom of movement only to the extent necessary for the performance of their tasks (this does not mean that they cannot go also to other parts of the territory of the receiving State, subject to the normal conditions applicable to other aliens). It is considered, however, that the receiving State has a legal obligation to ensure freedom of movement to special missions in so-called prohibited zones (e.g., along the border or in military zones) if this is necessary for the performance of their task. Thus, certain exceptions, both negative and positive, are allowed in the case of special missions.

(3) In view of the difference between the conception taken as his starting-point by the Special Rapporteur and the conception underlying the Vienna Conventions (special missions, including their heads and members and the members of their staffs, to be guaranteed freedom of movement in the territory of the receiving State only to the extent required to ensure the smooth performance of their tasks, contrary to the principle adopted in the Vienna Convention on Diplomatic Relations which recognizes as a diplomatic privilege the right to travel throughout the territory of the receiving State), it will be necessary for the Commission to decide in advance whether it opts in principle for the one or for the other of these conceptions and to indicate its choice.

(4) This difference in status between special missions and permanent diplomatic missions is particularly important with respect to States which impose restrictions on the movement of aliens in their territories. In such countries, special missions are in effect confined to the areas in which they perform their functions.

(5) To cite a practical illustration, special missions which have functions to perform at the United Nations are considered in the United States of America to have the right *ex jure* to freedom of movement only in the New York area, and between New York and Washington for the purpose of maintaining contact with their embassies (Section 15 of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, signed at Lake Success on 26 June 1947).⁴⁰ Travel in other parts of the United States is not guaranteed, although it is not prevented in

practice. Special permits are issued for such journeys, but they are seldom applied for.

(6) Guaranteed freedom for special missions to proceed to the seat of the sending State's permanent diplomatic mission to the receiving State and to return to the place where the special mission performs its task is in practice not only a daily occurrence but also a necessity. The reasons for this are that the special mission usually receives its instructions through the regular diplomatic mission and that the latter is the protector of the special mission and has a direct interest in being kept informed of the progress of the special mission's work.

(7) One of the peculiarities of special missions is that they may operate through stations or teams situated in different places or responsible for specific tasks in the field. Because of the need for constant liaison between the different sections of a special mission—a need which permanent diplomatic missions do not experience—there should be freedom of movement between the main body of the mission and the individual stations or the seats of the special teams.

(8) Another specific characteristic of special missions which has been noted in practice is that they are often in touch with their own country across the frontier. Thus, special missions often perform their task in a neighbouring country during the day and return to their own country at night. They also return to their own country on days when they are not working, unlike regular diplomatic missions.

(9) The bilateral treaties under which States agree on the *modus operandi* of special missions frequently make provision for the right of the special missions to freedom of movement in the territory of the receiving State. In practice, such clauses are a regular feature of agreements concerning special missions appointed to demarcate frontiers or maintain frontier markers and demarcation lines, to inquire into frontier incidents, and to settle matters relating to territorial servitudes, hydro-engineering works and other border questions. However, these agreements should also be regarded as enlarging upon the general rules relating to the rights of special missions and the right to movement in the area where the special mission performs its task, without affecting the validity of the general rules themselves.

(10) These rules concerning freedom of movement apply also in cases where the special mission performs its task in the territory of a third State.

(11) The Special Rapporteur has specified in the draft article that the members and staff of the special mission are also entitled to freedom of movement for the purpose of proceeding to the seat of the sending State's consulate within whose jurisdictional territory the special mission or a section or group of the special mission is performing its task (or to the seat of the sending State's nearest consulate). He is of the opinion that the same rules should apply as in the case where the special mission proceeds to the seat of the permanent diplomatic mission.

Article 22.—Freedom of communication

1. The receiving State shall permit and protect free communication on the part of the special mission for all

⁴⁰ United Nations, *Treaty Series*, vol. II, p. 11.

official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the special mission may employ all appropriate means, including its couriers. However, the special mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the special mission shall be inviolable. Official correspondence means all correspondence relating to the special mission and its functions.

3. The bag of the special mission shall not be opened or detained.

4. The packages constituting the bag of the special mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the special mission.

5. The courier of the special 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 receiving 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. Special missions shall have, first and foremost, the right to permanent contact with the permanent diplomatic mission of their State accredited to the country in which they are performing their task and with the consuls of their own State within whose jurisdictional territory they are exercising their functions.

7. Special missions shall not have the right to send messages in code or cipher unless they have been accorded this right by an international agreement or by an authorization of the receiving State.

8. Only members of the special mission or of its staff may act as couriers of the special mission.

Commentary

(1) The text proposed for this article is based on article 27 of the Vienna Convention on Diplomatic Relations, with changes corresponding to the nature of special missions and to the nomenclature used so far in the present draft.

(2) In 1960 the International Law Commission took the position that special missions enjoy the same rights as permanent diplomatic missions in this respect. In the Special Rapporteur's view, this is correct in principle.

(3) It should be noted, however, that in practice special missions are not always granted the right to use messages in code or cipher. For this reason, the Special Rapporteur has not embodied in the text proposed the provision concerning the use of messages in code or cipher. Instead, he has included in paragraph 7 of the proposed text the stipulation that special missions may not use this means of communication unless they are accorded the right to do so by an international agreement or are authorized to do so by the receiving State.

(4) For the most part, information and correspondence for special missions are forwarded through the permanent diplomatic missions of the sending State, if there is one in the receiving State. If there is no permanent diplomatic mission, complications may arise. It is customary for the special mission to conduct all its relations through the

permanent diplomatic mission of the sending State. For this reason, the special mission has the right to send and to receive the courier who maintains relations between it and the permanent diplomatic mission.

(5) If the special mission performs its task in a frontier area, it is in practice generally accorded the right to maintain relations through its own couriers with the territory of its own country, without the intermediary of the permanent diplomatic mission.

(6) Special missions are not usually allowed to use wireless transmitters, unless there is a special agreement on the subject or a permit is given by the receiving State. This prohibition is generally very strict in frontier zones.

(7) The head and members of a special mission and the members of its staff do not always travel by normal public transport. They often use motor-cars or special buses, but these means of transport must be duly registered in the sending State and their drivers must be in possession of the regular papers required for crossing the frontier and driving abroad. If the special mission uses special aircraft—particularly helicopters—for its movements in the field, or if it uses special sea-going or inland waterway vessels, there is, in practice, a requirement that notice should be given of the use of such means of transport in good time and that permission for their use should be obtained from the receiving State or at least that the latter should not have objected to their use after receiving such notice. The Special Rapporteur wonders whether the rule on this point should be included in the draft article.

(8) The Vienna Convention on Diplomatic Relations (article 27, paragraph 3) lays down the principle of the absolute inviolability of the diplomatic bag. Under this provision, the diplomatic bag may not be opened or detained by the receiving State. The Vienna Convention on Consular Relations, on the other hand, confers limited protection on the consular bag (article 35, paragraph 3). It allows the consular bag to be detained if there are serious reasons for doing so and provides for a procedure for the opening of the bag. The question arises whether absolute inviolability of the special mission's bag should be guaranteed for all categories of special missions. The Special Rapporteur has been unable to decide whether the guarantees in this respect should be limited in the case of particular categories of special missions. He therefore requests the Commission to give its attention to this matter. His personal opinion is that it would be dangerous to decide summarily to limit the guarantees in the case of all special missions of a technical nature. Such limitation might, he believes, constitute a threat to good relations between States, to preservation of the dignity of the State whose special mission is affected by it and to the smooth performance of such a mission's task.

(9) In view of the nature of special missions, the Special Rapporteur has made no provision for the possibility of the special mission's using couriers *ad hoc* (article 27, paragraph 6 of the Vienna Convention on Diplomatic Relations) or for the possibility of its employing as courier a national or resident of the receiving State. He considers, however, that the courier might be any person, irrespective of his nationality, who forms part of the special mission

under the terms of article 14 as already adopted. He believes that it is not necessary to insert a special rule on this point in the draft.

(10) Nor has the Special Rapporteur included any provisions on the use of the captain of a commercial aircraft (article 27, paragraph 7 of the Vienna Convention on Diplomatic Relations and article 35, paragraph 7 of the Vienna Convention on Consular Relations) or the captain of a ship (article 35, paragraph 7 of the Vienna Convention on Consular Relations) as courier for the special mission. Such persons are not generally used for these purposes. However, this is not an absolute rule in practice. It has been observed recently that in exceptional cases special missions employ such persons as couriers *ad hoc*. For this reason, the provision of article 35, paragraph 7 of the Vienna Convention on Consular Relations should perhaps also be inserted in the present article.

Article 23.—Exemption of the mission from taxation

1. The sending State, the special mission, the head and members of the special mission and the members of its staff shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the special mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the special mission.

3. The special mission may not, as a general rule, levy any fees, dues or charges in the territory of the receiving State, except as provided by special international agreement.

Commentary

(1) The drafting of this article is based on a combination of articles 23 and 28 of the Vienna Convention on Diplomatic Relations. Article 23 is taken over as a whole *mutatis mutandis*, whereas the sense of the provision of article 28 is reversed, since special missions do not as a general rule levy any kind of due. The sole exception would occur where the levying of dues had been provided for in advance under an agreement. The ideas expressed in articles 32 and 39 of the Vienna Convention on Consular Relations have also been taken into account.

(2) The International Law Commission took the view in 1960 that, in this respect all the provisions of the legal rules relating to diplomatic relations were applicable to special missions. The Special Rapporteur considers this correct as regards the matter dealt with in paragraphs 1 and 2 of the above article, which simply reproduces article 23, paragraphs 1 and 2, of the Vienna Convention on Diplomatic Relations.

(3) Despite the considerations and views set forth by the International Law Commission regarding the application of the Vienna Convention on Diplomatic Relations (at that time in the draft stage) to special missions, the Special Rapporteur believes that article 28 of the Vienna Convention on Diplomatic Relations cannot be applied in prin-

ciple to special missions. As a general rule, special missions have no authority to levy any fees, dues or charges in foreign territory except as provided in special cases by international agreements. However, it would be incorrect to deduce from this that special missions do not charge such dues; they do so in certain exceptional cases provided for in international agreements.

Article 24.—Inviolability of the property of the special mission

All property used in the operation of the special mission, for such time as the special mission is using it, and all means of transport used by the special mission, shall be immune from attachment, confiscation, expropriation, requisition, execution and inspection by the organs of the receiving State. This provision shall likewise apply to property belonging to the head and members of the special mission and to property belonging to the members of its staff.

Commentary

(1) After consulting article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations and article 31, paragraph 4, of the Vienna Convention on Consular Relations, the Special Rapporteur came to the conclusion that it was not possible to adopt those provisions for the draft articles on the status of special missions. However, in preparing this draft article, he was guided by some of the ideas contained in those provisions.

(2) The Special Rapporteur is of the opinion that a broader approach to the inviolability of property should be adopted in the case of special missions than in that of permanent diplomatic missions, since it is very difficult in practice to determine what belongs to the special mission and what belongs to its members and staff.

(3) In this connexion, the International Law Commission took the view in 1960 that the rules applicable to permanent diplomatic missions apply also to special missions. The Special Rapporteur believes that this is correct in practice; but in view of the temporary nature of special missions, this guarantee must be limited to property which is linked to the performance of the special missions's task and to the personal needs of its members while they are carrying out their functions. He therefore considers that this guarantee should be limited to articles which are necessary to the accomplishment of the mission (e.g. office equipment, seals and books), personal baggage, articles required for personal needs, means of transport (e.g. motor-cars and boats) and money.

(4) If frequently happens in practice that measures of execution are taken under regular court orders, for the purpose of harassment, against property leased by the special mission for the performance of its functions. A guarantee must therefore be provided with respect to such property also, and it is logical likewise that a similar guarantee should extend to property which may belong to third parties, so long as it is being used by members of the special mission (e.g. the furniture in their bedrooms).

Article 25.—Personal inviolability

The head and members of the special mission and the members of its staff shall enjoy personal inviolability. They shall not be liable to arrest or detention in any form. The receiving State shall treat them with respect and shall take appropriate steps to prevent any attack on their person, freedom or dignity.

Commentary

(1) Although this article merely reproduces the ideas contained in article 29 of the Vienna Convention on Diplomatic Relations, the Special Rapporteur considered it necessary to give his own wording of this provision. However, he considers that he has not departed in this respect from the ideas and the conception expressed in the said article 29.

(2) With regard to the Vienna Convention on Consular Relations, the Special Rapporteur deems it his duty to point out that the text proposed for this article corresponds to article 40 of that Convention but that he has deliberately refrained from incorporating articles 41 and 42 of that Convention, which provide for incomplete immunity from criminal jurisdiction. He is of the opinion that it is very difficult to adopt the so-called minor consular immunity for the head and members of special missions and the members of their staffs, although he is under the impression that some members of the Commission argued in favour of that approach during the general discussion. The Special Rapporteur believes that the technical and administrative staff of special missions should be guaranteed personal freedom. For further details on this point, see below the article on immunity from jurisdiction.⁴¹

(3) The principle of the inviolability of the head and members of the special mission and the members of its staff is respected in practice. This was also the view taken by the International Law Commission in 1960, to which the Special Rapporteur has nothing to add. The only question is to what extent the receiving State treats these persons with the respect due to them. The respect accorded is generally less than in the case of career diplomats who are members of permanent diplomatic missions. This general rule, however, does not always operate to the advantage of the career diplomat, for receiving States frequently pay greater honours to the head and members of a special mission than to the heads of permanent diplomatic missions in the case of what are known as high-level special missions.

Article 26.—Inviolability of residence

The residences of the head and members of the special mission and of the members of its staff shall enjoy inviolability and the protection of the receiving State, whether they reside in a separate building, in certain parts of another building, or even in a hotel.

Commentary

(1) This article reproduces the idea expressed in article 30, paragraph 1, of the Vienna Convention on Diplomatic Relations. Paragraph 2 of that article is not incorporated because, in the Special Rapporteur's view, the point is

already covered in the article entitled "Inviolability of archives and documents".⁴² An explanation is given in paragraph 4 of the commentary on that article.

(2) The question arises whether the above solution is correct, for it goes beyond article 30 of the Vienna Convention on Diplomatic Relations, which limits these guarantees to "diplomatic agents" alone, whereas the text here proposed extends the guarantee to all members of the staff of the special mission, including those who cannot perhaps be treated on the same footing as diplomatic agents. The Special Rapporteur wishes to point out in this connexion that draft article 6 as already adopted by the Commission states that the special mission may include diplomatic staff, administrative and technical staff and service staff. He believes, however that this guarantee is also required for the inviolability of the residence of all the members of the staff of the special mission in order to ensure the normal functioning of the special mission, and that it should therefore cover all the members of the staff of the special mission, regardless of the place where their residence is situated.

Article 27.—Immunity from jurisdiction

1. The head and members of the special mission and the members of its staff shall enjoy immunity from the criminal jurisdiction of the receiving State.

2. They shall also enjoy immunity from its civil and administrative jurisdiction in respect of acts performed in the exercise of their functions in the special mission.

Commentary

(1) The International Law Commission took the view in 1960 that the rules of immunity from jurisdiction which apply to members of permanent diplomatic missions⁴³ are also applicable to special missions and itinerant envoys. While in principle this should be the case, in practice the matter gives rise to certain problems. The first and most important problem is whether this rule applies equally to all special missions, regardless of the nature of their task. In practice, it was formerly the custom to make a distinction between political (diplomatic) missions and technical missions. The former were in principle accorded complete immunity, while the latter were granted only what is known as minor (functional) immunity, which means that a member of such a mission is not subject to the jurisdiction of the receiving State in respect of any act committed by him in connexion with the exercise of his functions. In the Special Rapporteur's view, however, this point became unimportant once the difference in the enjoyment of privileges and immunities between diplomatic agents on the one hand and the administrative and technical staff of permanent diplomatic missions on the other was eliminated. Since these two groups have been put on an equal footing, there is no longer any reason to make distinctions among special missions according to the nature of their task.

(2) Another question arises in principle: should the members of special missions be granted complete and unlimited

⁴² Article 20.

⁴³ See article 31 of the Vienna Convention on Diplomatic Relations (1961).

⁴¹ Article 27.

immunity from jurisdiction, or only to the extent necessary to the performance of their functions? United Nations practice inclines towards this latter point of view, which was not adopted by the International Law Commission in 1960.

(3) In the Special Rapporteur's view, the proper solution would be to grant functional immunity in principle to all special missions. He believes that there should be no deviation from this rule, except in the matter of immunity from criminal jurisdiction; for any interference with the liberty of the person, on whatever grounds, prevents the free and unfettered accomplishment of the mission's tasks. He appreciates, however, that there are arguments of some validity and weight in favour of the notion that members of special missions of a technical nature should not enjoy more extensive guarantees than those accorded to consuls (who may be arrested if they have committed a grave crime not connected with their functions).⁴⁴

(4) There is perhaps some basis for the idea, put forward by some members of the Commission during the general discussion at the sixteenth session, that the immunity of the members and staff of special missions should, in certain cases, be determined in accordance with or by analogy with the rules governing consular relations rather than in accordance with those applicable to diplomatic relations. It would probably be excessive and wrong that, in matters within the competence of consuls, special missions should enjoy greater privileges and guarantees than consuls themselves. However, the Special Rapporteur cannot go into this matter more deeply until the Commission has come to a decision regarding the criterion for distinguishing between special missions of a diplomatic nature and those of a consular nature. The Special Rapporteur has been unable to find such criteria in practice. In certain bilateral conventions, however, there are elements of a functional limitation of immunities, and in such cases the members of special missions are guaranteed only minor functional immunity.

(5) The above text gives no details concerning immunity from the civil and administrative jurisdiction of the receiving State.

The Special Rapporteur, guided by the idea that allowance should be made for the sensitiveness of receiving States to the limitation of their sovereignty through the granting of far-reaching immunities to special missions, has reviewed present practice and the exigencies of the representative character and functional nature of special missions. In the light of his researches, he has revised his opinion on immunities so far as civil and administrative jurisdiction is concerned. He considers that, because a special mission remains for only a short time in the territory of the receiving State and because there is little likelihood that its members and staff will become involved in complicated legal relationships during their temporary stay in the receiving State, it is a sufficient safeguard if these persons are guaranteed immunity from civil and administrative jurisdiction solely in respect of acts relating to the exercise of their functions within the special mission.

⁴⁴ Article 41 of the Vienna Convention on Consular Relations (1963). The question arises whether the territorial State should intervene in the case of a murder committed by a member of a special mission.

For this reason, he has gone no further in assimilating them to diplomatic agents.

(6) Nor does the text mention the question of giving evidence as a witness. This means that the question arises whether it is justifiable to apply the rule laid down in article 31 of the Vienna Convention on Diplomatic Relations. However, in the Special Rapporteur's view it should be mentioned that a member of a special mission, while exercising his functions, ought not to be summoned for questioning or called as a witness by organs of the receiving State, since this might affect the performance of his task and his personal psychological condition.

(7) Finally, the Special Rapporteur also considers that measures of execution should not be taken against the property of the special mission, of the head and members of the special mission and of the members of its staff. Such property, as stated above, enjoys the guarantee of inviolability. Such a guarantee is necessary to protect these persons against harassment and in this connexion the question arises whether there is any need to go beyond what has already been stipulated in the article entitled "Inviolability of the property of the special mission".⁴⁵ The Special Rapporteur is of the opinion that the said article confers full protection on the special mission and its members and that it is not necessary to reproduce expressly in the present article the provisions of article 31, paragraph 3 of the Vienna Convention on Diplomatic Relations.

(8) It goes without saying that the member of a special mission should also enjoy immunity from any measures which would impair his right of communication or the confidential nature of information and documents (it is for this reason that any kind of search, whether of his person or of his property, is prohibited).

(9) The Special Rapporteur also considers the fact that the mission is a temporary one to be of particular importance in determining the proper extent of immunity from jurisdiction, as is the further fact that its members, as a general rule, have their domicile in the sending State and actions may be brought against them there.

(10) Another question which arises in this connexion and which has not been settled even as regards resident diplomacy concerns the obligation of the sending State either to waive immunity or to undertake to bring the matter before its own courts. The Special Rapporteur is inclined to favour the broader use of the waiver of immunity for all acts of members of special missions and members of their staffs which are not of a functional character. He believes that, under the terms of his proposed text, this question is dealt with in accordance with article 32 of the Vienna Convention on Diplomatic Relations.

(11) In the draft article proposed above, the Special Rapporteur has not referred to the question of measures of execution, as he considers this matter to be covered by the article entitled "Inviolability of the property of the special mission". The special mission, its members and its staff need the same guarantees as permanent diplomatic missions. But this means that only the movable property of

⁴⁵ Article 24.

the head of the special mission and of its members and its staff which is used in the performance of their task, and their personal baggage, enjoy protection.

Article 28.—Exemption from social security legislation

1. The head and members of the special mission and the members of its staff shall be exempt, while in the territory of the receiving State for the purpose of carrying out the tasks of the special mission, from the application of the social security provisions of that State.
2. The provisions of paragraph 1 of this article shall not apply to nationals or permanent residents of the receiving State regardless of the position they may hold in the special mission.
3. Locally recruited temporary staff of the special mission, irrespective of nationality, shall be subject to the provisions of social security legislation.

Commentary

(1) This article does not entirely correspond to article 33 of the Vienna Convention on Diplomatic Relations, but it reflects the actual conditions usually encountered in special missions. The proposed text likewise does not fully correspond to article 48 of the Vienna Convention on Consular Relations.

(2) Exemption from social security legislation is one of the privileges concerning which in 1960 the International Law Commission laid down in principle the rule that what is valid for permanent diplomatic missions is also applicable to special missions. In view of the fact that the special mission's stay in the territory of the receiving State is temporary, this question is not of great importance for the actual members of special missions, and hardly arises even as regards persons domiciled in the receiving State who are employed by the special mission or by its members.

(3) In practice, it is found necessary, for a number of reasons, not to exempt from the social security system of the receiving State persons locally employed for the work of the special mission. The Social Security Department in Yugoslavia suggests the following reasons: the short duration of the special mission; the great danger to life and health frequently presented by the difficulty of the special mission's tasks, especially in the case of special missions working in the field; and the still unsettled question of insurance after the period of employment and the termination of the special mission, if the employee was not engaged through and on the responsibility of the permanent diplomatic mission. In addition, difficulties have arisen with regard to the collection of insurance contributions. Consequently, it has been decided that a Yugoslav national or a person permanently domiciled in Yugoslavia is personally responsible for paying these contributions while employed by a special mission. Experience shows that owing to the short duration of its stay in the country, the special mission is, furthermore, not in a position to comply with the formalities connected with making the necessary reports for the social security record of such persons.

(4) Many countries, and especially the United Kingdom and nearly all the socialist countries, consider that the head, the members and the staff of a special mission are

automatically entitled (subject to reciprocity) to medical assistance during their stay in the territory of the foreign State, irrespective of any bilateral agreements on the matter which, in practice, are becoming more and more frequent. Yugoslavia, for example, has concluded fourteen such agreements. Some countries offer this protection to the entire special mission, if necessary, as a matter of courtesy. There are two categories of countries in this respect: those which defray the cost of such protection, and those which present a bill for the cost later unless it has been paid in the interval. Since this practice is becoming increasingly common, the question arises whether it should be made a rule of international law that the receiving State is required to offer this protection to the entire special mission. The Special Rapporteur considers that the granting of this protection is a humanitarian obligation and, since it is becoming increasingly the practice for the receiving State to defray the cost of medical assistance, he thinks that this should be included as a new rule. The Special Rapporteur requests the Commission to take a decision on this point.

Article 29.—Exemption from personal services and contributions

1. The head and members of the special mission and the members of its staff will be exempt from personal services and contributions of any kind, from any compulsory participation in public works and from all military obligations relating to requisitioning, military contributions or the billeting of troops on premises which are in their possession or which they use.
2. The receiving State may not require the personal services or contributions mentioned in the preceding paragraph even of its own nationals while they are taking part in the activities of the special mission.

Commentary

(1) Although this question was barely touched upon on that occasion, the International Law Commission took the view in 1960 that special missions should enjoy the same exemptions as members of permanent diplomatic missions. That is quite understandable, since special missions would be limited in their personal freedom if they rendered personal services and contributions.

(2) In drafting this article the Special Rapporteur started with the ideas underlying article 35 of the Vienna Convention on Diplomatic Relations, but he has expanded the article in the following way:

(a) He has extended these exemptions to the entire staff and not merely to the head and members of the special mission. In his view, it is not possible otherwise to ensure the special mission's smooth operation;

(b) It is also his view that exemption from personal services and contributions must also be accorded to locally recruited staff regardless of nationality and domicile. Otherwise the special mission would be placed in a difficult position and would not be able to carry out its task until it succeeded in finding other staff exempt from such services and contributions. Calling on special mission staff to render such services or contributions could be used as a powerful weapon by the receiving

State to harass the special mission. On the other hand, the receiving State would not be imperilled by these exemptions, since special missions generally are of very short duration and have very small staffs.

(3) In spite of the above rules, the question arises in practice whether the head, the members and the staff of the special mission have an obligation to furnish personal services and contributions dictated by humanitarian considerations. The Special Rapporteur is aware of a conflict of this kind in practice. Is the head of the special mission bound to take into his motor car a person who has been injured on the road if instructed to do so by the traffic police, refusal to comply with such an order generally being considered in all countries as an offence? The Special Rapporteur has not dealt with this question in the draft of this article, because he is not sure that a special mission should tolerate such a limitation of its freedom, although he is convinced that no one is exempt from obligations of a humanitarian nature, regardless of the legal penalty, which in this case would not apply. He considers, however, that in the case described, depending on its gravity, the receiving State is entitled to declare the individual concerned *persona non grata*.

*Article 30.—Exemption from customs duties
and inspection*

The receiving State shall grant exemption from the payment of all customs duties, all taxes and other duties—with the exception of loading, unloading and handling charges and charges for other special services—connected with the import and export and permit the free import and export of the following articles:

(a) Articles for the official use of the special mission;

(b) Articles for the personal use of the head and members of the special mission and of the members of its staff which constitute their personal baggage, as well as articles serving the needs of family members accompanying the head, the members and the staff of the special mission, unless restrictions have been specified or notified in advance on the entry of such persons into the territory of the receiving State.

Commentary

(1) The Special Rapporteur has taken as his starting point article 36 of the Vienna Convention on Diplomatic Relations, but he has been unable to incorporate the entire text of that article. He considers that that text would grant too much in the way of facilities and privileges to special missions.

(2) In this case, too, the International Law Commission took as its basis in 1960 the rule that all the privileges granted to permanent diplomatic missions and their members are applicable to the members of special missions. Actually, such privileges are less broad in the case of a special mission, according to the nature of the task. In general, the exemption amounts in normal practice to no more than an exemption from customs duties on articles used by the mission in the performance of its task and on the personal baggage of its members.

(3) Baggage is not usually inspected, except in cases where the baggage of members of permanent diplomatic missions

is also inspected. In a number of countries, however, the inspection of baggage in the case of the staff of special missions depends on the type of passport issued to the members and staff of the special mission. Persons who do not hold a diplomatic passport are not exempt from the ordinary inspection. For this reason, the Special Rapporteur has not included in the text the provision contained in article 36, paragraph 2, of the Vienna Convention on Diplomatic Relations. This is a matter for the Commission to decide.

(4) The question of applying to special missions the rules exempting permanent diplomatic missions and their members from the payment of customs duties on articles imported for the establishment of the mission, its members or its staff seldom arises, although it may do so (e.g., in the case of special receptions or special machine installations). In view of the rarity of such cases, the Special Rapporteur considers that a special provision on this point should not be included in the text but that this eventuality should be clearly brought out in the commentary, as a warning to Governments of the existence of such situations, which they ought to settle in favour of special missions by means of special decisions.

(5) While provision must be made for exemption from customs duties and other taxes on the importation, and for the free import and export, of articles for the official use of the special mission—as is often done in practice, particularly in the case of missions with technical tasks—the Special Rapporteur believes that no provision should be made for any facilities for the importation of household articles. As a general rule, the head of the special mission, its members and its staff are usually only temporarily resident at the place where the special mission performs its task. This should therefore be the general rule, any departures from it being specified either in agreements between the States concerned or through the diplomatic channel in each individual case; for the Special Rapporteur appreciates that such needs may exist.

(6) Customs facilities should also normally be granted to members of the families of the head of the special mission, its members and its staff, apart from the cases—admittedly rare—in which restrictions on the entry of the family members have been notified or specified in advance, as is done in practice in respect of certain delicate missions or because of difficult local conditions.

(7) The Special Rapporteur has not specified what articles may be exported from the country by the special mission or by its head, its members or its staff. Here again, in his view, the rule that the customs and police regulations of the receiving State must be observed applies, but no restrictions may be placed on the mission's right to import and export articles used for the performance of its tasks. In this case, the rule of international law which guarantees the right of the special mission to exercise its function fully and without impediment prevails over the rule of domestic law.

(8) The claims of certain special missions that they themselves, or their members, are exempt from the payment of customs duties on the importation of consumer goods, specially of beverages and foodstuffs for use in official

entertainment, and cigarettes, have been challenged in practice. There are differences of opinion on this subject, the special missions claiming that these are articles for the use of the mission itself and for the performance of its task. The Special Rapporteur has deliberately refrained from proposing a solution for this case.

(9) In most countries, the Ministry of Foreign Affairs and the central customs administration determine whether the importation of such articles is justified and impose restrictions on the amount to be imported, in the light of the size of the mission, the length of its stay in the country, and the type of official receptions it holds. Most receiving States do not allow the importation of articles for presentation as gifts to nationals of the receiving State or for use in advertising goods produced in the sending State. As a matter of courtesy, however, the category of articles enjoying exemption is permitted to include gifts which the special mission presents officially to certain specified persons, provided that the persons in question are known in advance.

(10) It has been noticed that the rules concerning customs privileges for special missions find little application in the actual practice of the customs administration of receiving States, because special missions generally channel their imports and exports through the permanent diplomatic missions, limiting their direct imports in most cases to their personal baggage. Practice does not prohibit the free movement of uncustomed goods between the permanent diplomatic mission and special missions of the same sending State in the territory of the receiving State. This procedure is therefore regarded as more advantageous to both parties and as removing causes of dispute.

Article 31.—Status of family members

1. The receiving State may restrict the entry of members of the families of the head, members and members of the staff of the special mission. If such restriction has not been agreed upon between the States concerned, it must be notified in due time to the sending State. The restriction may be general (applying to the entire mission) or individual (some members are exempt from restriction), or it may relate only to certain periods of the special mission's visit or to access to certain parts of the country.

2. If such restriction has not been agreed upon or notified, it shall be deemed to be non-existent.

3. If the special mission performs its task in military or prohibited zones, family members must be in possession of a special permit from the receiving State authorizing them to enter such zones.

4. If the entry of members of the families of the head, members or members of the staff of the special mission is not subject to restrictions, and in areas where restrictions on entry do not apply, family members accompanying the head, members or members of the staff of the special mission shall enjoy privileges and immunities as specified below:

(a) The members of the families of the head and members of the special mission and of those members of its staff who belong to the category of diplomatic staff (article 6, paragraph 2, of these articles) shall enjoy the

privileges and immunities which are guaranteed by these articles to the persons whom they are accompanying;

(b) Members of the families of the administrative and technical staff shall be entitled to the privileges and immunities which are guaranteed by these articles to the persons whom they are accompanying.

5. Family members shall enjoy the above-mentioned privileges and immunities only if the provisions of these articles do not limit their right of enjoyment and if they are not nationals of or permanently resident in the receiving State.

Commentary

(1) The Special Rapporteur has taken as the basis of this provision article 37 of the Vienna Convention on Diplomatic Relations, but he considers that that article cannot be applied in its entirety to special missions and that some major changes are called for.

(2) During its discussion in 1960, the International Law Commission took as its starting-point the idea that it was here dealing with a matter to which the rules applicable to permanent diplomatic missions could be applied as they stood. In practice, however, the question arises whether these privileges and immunities also attach to family members accompanying the head and members of the special mission or members of its staff. One school of thought maintains that there can be no grounds for limiting the enjoyment of privileges exclusively to the head and members of the special mission and members of its staff unless, owing to the nature of the work they will be doing (involving travel) or by prior arrangement, the presence of family members in the territory of the receiving State is ruled out in advance. Consequently, unless the restriction is agreed upon or notified in advance—and such cases are exceptional—the legal rule is that the head of the special mission, its members and its staff may be accompanied by members of their families.

(3) The Special Rapporteur has not undertaken the task of determining what persons are covered by the expression "members of the family". At both of the Vienna Conferences (in 1961 and 1963), attempts to enumerate these persons ended in failure. His personal view is that only the closest relatives should be counted among the members of the family, but in the case of temporary residence he does not consider it important that the relative concerned should be a regular member of the household of the person he or she is accompanying. A married daughter often accompanies her father to look after his health.

(4) Restrictions may be general (applying to all members and staff of the mission), individual (excepting certain persons who usually belong to the family of the head of the mission), or applicable to all but a specified number of family members (usually the wife or one member of the family); they may apply to certain periods of the special mission's visit (during its work in the field) or to access to certain parts of the territory (it is usually considered that a general permit has been given to members of the family, authorizing them to enter prohibited or military zones which the special mission visits in the performance of its task). Even if there are restrictions, family members may still be able to be present in the territory in question on

other grounds, but they cannot then claim *ex jure* any facilities, privileges or immunities.

(5) There has been some debate, in practice, about whether such restrictions are a breach of courtesy or even an infringement of the rights of the special mission, by analogy with the provisions of the Convention on the Privileges and Immunities of the United Nations,⁴⁶ which provides that family members enjoy the same privileges and immunities as the representatives of States whom they are accompanying. It is difficult, however, to base this right on an analogy, because of the circumstances which may arise in bilateral relations. In many cases, States cannot provide for family members accommodation, other facilities and means of transport when the special mission is travelling in the field, and so forth. Nevertheless, it would be discourteous to deny such persons entry into the territory of a country if the regulations generally applied in that country to aliens allow free entry. Where this is so, however, such persons, if there are restrictions, cannot claim more extensive rights than are accorded to all aliens under the general regulations.

Article 32.—Status of service staff and personal servants

1. Members of the service staff of the special mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and exemption from the social security provisions of the receiving State.

2. Personal servants of the head, members and members of the staff of the special mission may be received in that capacity in the territory of the receiving State, provided that they are not subject to any restrictions in this connexion as a result of decisions, prior notifications or measures by the receiving State.

3. If personal servants are admitted to the territory of the receiving State and are not nationals of that State or permanently domiciled in its territory, they shall be exempt from payment of dues and taxes on the emoluments they receive by reason of their employment.

4. The receiving State shall have the right to decide whether, and to what extent, personal servants shall enjoy privileges and immunities. However, the receiving State must exercise its jurisdiction over such persons in such a manner as not to interfere unduly with the performance of the functions of the special mission.

Commentary

(1) As regards the members of the service staff of the special mission, the Special Rapporteur has taken the view that these persons, in view of their status and the scope of their privileges and immunities, should be distinguished from family members, whose legal status is dealt with in the preceding article. In the first place, this course is necessary because the scope of the privileges and immunities

granted to the service staff of the special mission is very limited. They are granted only the minor functional immunity, exemption from dues and taxes on their emoluments and exemption from the compulsory application of the receiving State's social security provisions. Secondly, courtesy towards these persons demands that they should be dealt with separately and not at the end of the article governing the status of members of the families of the other (higher grade) staff of the special mission. This is all the more important from the standpoint of courtesy towards the members of the service staff as no privileges and immunities are granted to members of their families. For this reason, it is logical, in the Special Rapporteur's view, to abandon the fictitious association between the two classes which was created in the provisions of article 37 of the Vienna Convention on Diplomatic Relations. This question must be dealt with in a separate article.

(2) Notwithstanding the remarks in paragraph (1) of this commentary, paragraph 1 of the draft article merely reproduces in substance the text of article 37, paragraph 3, of the Vienna Convention on Diplomatic Relations. The Special Rapporteur is convinced that such a provision also meets the needs of special missions and reflects the opinion of the members of the Commission that proper bounds must be set to the extent of the immunities, in order that their scope should not make excessive inroads on the rights of the sovereign State in whose territory the special mission is performing its task.

(3) For paragraphs 2, 3 and 4 of the draft article the Special Rapporteur has taken as his starting-point the idea expressed in article 37, paragraph 4, of the Vienna Convention on Diplomatic Relations, but the formulation has been changed to conform with the basic idea that the receiving State is not required to admit such persons to its territory. The reasons mentioned in connexion with the article on "Status of family members" apply in this case also.

(4) In 1960 the International Law Commission took as its starting-point the idea that the head, members and members of the staff of the special mission should be allowed to bring with them persons of this kind, who in many cases might be essential to their personal comfort or health, or even to the regular performance of the special mission's functions. There is some logic in this reasoning, and more attention should perhaps be given to this notion than has been done by the Special Rapporteur in his proposed article. This is a point to be decided by the Commission.

(5) In practice, however, the question arises whether the special mission is entitled *de jure* to bring such persons with it. As mentioned above, the Special Rapporteur considers that a decision on this point is within the discretionary power of the receiving State, which may therefore impose restrictions. However where there are no such restrictions or where the receiving State grants permission, the question arises, in practice, whether the privileges and immunities extend also to personal servants. There are no special rules on this subject. In 1960 the International Law Commission favoured the notion that the rules relating to permanent diplomatic missions apply in this case also. Thus, such persons are entitled only to immunity from

⁴⁶ United Nations, *Treaty Series*, vol. 1, p. 15; text also in United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations* (ST/LEG/SER.B/10), United Nations publication, Sales No.: 60.V.2, p. 184.

taxation, and then solely in respect of the remuneration they receive for their services; in all other respects, they are in the hands of the receiving State.

(6) The Special Rapporteur is of the opinion that these persons should also be guaranteed minor immunity from criminal jurisdiction in respect of acts performed in the course of the duties they normally carry out on the orders of their employers, e.g., in ejecting an undesirable guest from a protected residence with the use of sufficient force to overcome whatever resistance may be offered.

(7) The Special Rapporteur has considered it unnecessary to retain article 37, paragraphs 2 and 3, of the Vienna Convention on Diplomatic Relations, since the subject matter is already covered by the fact that no distinction has been made between the diplomatic staff of the special mission and the administrative and technical staff, identical treatment being given to all staff members in every article where mention is made of the staff of the special mission. This applies also to the service staff of the special mission, which is often of exceptional importance to the functioning of the special mission (e.g., drivers, personnel handling equipment, etc.).

Article 33.—Privileges and immunities of nationals of the receiving State and of persons permanently resident in the territory of the receiving State

1. Nationals of the receiving State and persons permanently resident in its territory who are admitted by the receiving State as the head, as members or as members of the staff of the special mission shall enjoy in the receiving State only immunities from jurisdiction, and inviolability, in respect of official acts performed in the exercise of the functions of the special mission.

2. Certain other privileges and immunities may also be granted to such persons by mutual agreement or by a decision of the receiving State.

3. The receiving State shall itself determine the nature and extent of the privileges and immunities granted to any personal servants of the head, the members and the members of the staff of the special mission who are its own nationals or are permanently resident in its territory.

4. Jurisdiction over the persons mentioned in this article must in all cases be exercised by the receiving State in such a manner as not to interfere unduly with the performance of the functions of the special mission.

Commentary

(1) This article is based on article 38 of the Vienna Convention on Diplomatic Relations, but the texts are not identical. The Special Rapporteur has taken as his starting-point the idea that the receiving State is not obliged to admit, as head, member or member of the staff of the special mission, its own nationals or persons permanently domiciled in its own territory. This idea has been set forth in this draft in the article entitled "Nationality of the head and the members of the special mission and of members of its staff", adopted as article 14 at the Commission's sixteenth session.⁴⁷

(2) The International Law Commission, in taking a decision on this point in 1960, took the view that, in this case also, the rules relating to permanent diplomatic missions ought to apply in their entirety. In practice, however, there are other opinions on this question; it is maintained, in particular, that persons whose duties with the special mission do not place them in the category of senior (diplomatic, administrative and technical) staff should not, if they are nationals of the receiving State or are permanently domiciled in its territory, enjoy any privilege or immunity as of right, but only at the discretion of the receiving State. The Special Rapporteur believes that any person belonging, in whatever capacity, to the special mission should enjoy such immunities from the jurisdiction of the receiving State as relate to official acts performed in the exercise of the functions of the special mission, and also personal inviolability. Otherwise the very freedom of operation of the special mission would be placed in jeopardy.

(3) The difference between the article entitled "Nationality of the head and the members of the special mission and of members of its staff", adopted as article 14 at the Commission's sixteenth session, and the present article is that, in the latter, persons permanently domiciled in the territory of the receiving State are treated in precisely the same manner as nationals of the receiving State.

(4) During the discussion in the Commission and the preparation of article 14, the Commission did not adopt the Special Rapporteur's view that nationals of the receiving State and persons permanently domiciled in its territory should be treated in identical fashion. In taking that decision, the Commission based itself on the fact that article 8 of the Vienna Convention on Diplomatic Relations had not identified permanent residents of the receiving State with nationals of that State. However, in regard to the enjoyment of privileges and immunities, the Vienna Convention on Diplomatic Relations treats these two groups in identical fashion in article 38. On the strength of that fact, the Special Rapporteur considers that the same course should be adopted in the present article. He accepts the argument of the majority in the Commission that the rules on special missions should not worsen the status of the staff of special missions and should not limit it to any greater extent than was done in the provisions of the Vienna Convention on Diplomatic Relations. However, it was also argued in the Commission that in settling the status of special missions the Commission should take care not to establish any further limitations on the sovereignty of receiving States. The Special Rapporteur considers that it would not be logical for certain members of special missions or of their staffs to be favoured to the detriment of the interests of the receiving State. One such detriment undoubtedly consists in granting privileges and immunities to persons permanently resident in the receiving State by reason of the fact that they temporarily form part of the special mission of a foreign State. In the discussions at the two Vienna Conferences (1961 and 1963) it was pointed out that foreign nationals permanently resident in national territory were generally a source of serious embarrassment. The Special Rapporteur considers that this is one of those cases where expression should be given to the idea, voiced during the general debate at the

⁴⁷ *Yearbook of the International Law Commission, 1964*, vol. II, p. 224.

Commission's sixteenth session, that consideration ought to be shown for the susceptibilities of receiving States and that the guarantee of facilities, privileges and immunities to persons belonging to special missions should be subject to reasonable limitations.

(5) In the light of constant practice, the Special Rapporteur has made it clear that the privileges and immunities of the persons mentioned in this article may be expanded, not only by a decision of the receiving State, but also by a mutual international agreement between the States concerned. Such agreements frequently provide guarantees of this kind, according to the nature of the special mission's task.

(6) The Special Rapporteur lays particular stress on his view that it is better that this question should be settled by mutual agreements rather than that general international rules should be laid down on the subject. He is convinced that States would be more affected if general rules were proposed for expanding the privileges and immunities of the persons mentioned in this article. It is also much better from the practical point of view that this question should be settled by mutual agreements, for in that case the States are able to judge for themselves how far it is possible to make concessions in the light of the specific circumstances. These agreements need not even be formal ones, but might be made *ad hoc* without formality, as happens in practice.

Article 34.—Duration of privileges and immunities

1. The head and members of the special mission, and the members of its staff and members of their families, shall enjoy facilities, privileges and immunities in the territory of the receiving State from the moment when they enter the territory of the receiving State for the purpose of performing the tasks of the special mission or, if they are already in its territory, from the moment when their appointment as members of the special mission is notified to the Ministry of Foreign Affairs.

2. The enjoyment of facilities, privileges and immunities shall cease at the moment when they leave the territory of the receiving State, upon the cessation of their functions with the special mission or upon the cessation of the activities of the special mission (article 12 of these rules).

Commentary]

This article merely reproduces in substance the language of article 39, paragraphs 1 and 2, of the Vienna Convention on Diplomatic Relations. In the present draft the subject matter of the other two paragraphs (3 and 4) of the said article 39 is dealt with in a separate article entitled "Death of the head or of a member of the special mission or of a member of its staff", which follows immediately after the present article. The Special Rapporteur therefore considers that no further commentary on the present article is necessary, since the Commission must base itself on the same reasons as determined the drafting and adoption of article 39 of the Vienna Convention on Diplomatic Relations.

Article 35.—Death of the head or of a member of the special mission or of a member of its staff

1. In the event of the death of the head or of a member of the special mission or of a member of its staff who is not a national of or permanently resident in the receiving State, the receiving State shall be obliged to permit the removal of his remains to the sending State or decent burial in its own territory, at the option of the family or of the representative of the sending State. It shall also facilitate the collection of the movable effects of the deceased, and shall deliver them to the representative of the family or of the sending State, permitting them to be exported without hindrance.

2. This provision shall apply also in the event of the death of a member of the family of the head of the special mission, of one of its members, or of a member of its staff, who has been allowed to accompany the person in question to the territory of the receiving State.

Commentary

This article merely reproduces the ideas expressed in paragraphs 3 and 4 of article 39 of the Vienna Convention on Diplomatic Relations and contains no more than is needed in the case of special missions, which are not of the same nature as permanent diplomatic missions.

Article 36.—Enjoyment of facilities, privileges and immunities while in transit through the territory of a third State

1. If the head or a member of the special mission or a member of its staff passes through or is in transit in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to the place where he is to perform the functions assigned to the special mission or when returning from such place to his own country, the third State shall accord him such inviolability and immunities as may be required for his unhindered transit through its territory. The same shall apply in the case of family members who accompany the head or a member of the special mission, or a member of its staff.

2. During such transit, such persons shall enjoy the right to inviolability of official correspondence and of other communications in transit.

3. The third State shall be bound to comply with these obligations only if it has been informed in advance, either in the visa application or by notification, of the purpose of the special mission, and has raised no objection to such transit.

4. Subject to the provisions of the preceding paragraph, the State shall also accord the necessary guarantees and immunities to the courier of the special mission and to the bag of the special mission in which correspondence and other official communications in transit are carried, in either direction, for the purpose of maintaining contact between the special mission and the Government of the sending State.

5. All the provisions set forth above shall also apply to the persons mentioned in paragraph 1 of this article, to the courier of the special mission and to the bag of the special

mission if their presence in the territory of the third State is due to *force majeure*.

Commentary

(1) The above text corresponds to that of article 40 of the Vienna Convention on Diplomatic Relations. The difference is that whereas facilities, privileges and immunities must be granted to the head and the staff of the permanent diplomatic mission in all circumstances, in the case of special missions the duty of the third State is restricted entirely to cases where it does not object to the transit through its own territory of the entire special mission.

(2) One point in dispute is whether the third State has the right to request information concerning the task of the special mission to which it grants free transit through its territory. It is noted that the sending State often gives no information concerning the true purpose of the task and that the third State should not interfere in the relations between other States, as it might be doing if it considered itself entitled to evaluate the special mission's task.

Article 37.—Professional activity

The head and members of the special mission and the members of its staff shall not, during the term of the special mission, practice for personal profit any professional or commercial activity in the receiving State, and they may not do so for the profit of the sending State unless the receiving State has given its prior consent.

Commentary

(1) This provision corresponds to the rule laid down in article 42 of the Vienna Convention on Diplomatic Relations. It differs from that rule in requiring the prior consent of the receiving State even in the case of professional or commercial activity practised for the profit of the sending State; for special missions very often take advantage of their presence in the territory of the other State to transact certain business for the profit of their own State, without the receiving State's having been informed in advance.

(2) There is no merit in the argument that permanent diplomatic missions do not ask for prior consent and that therefore special missions do not need prior consent either. Permanent diplomatic missions and their staffs operate within more or less established limits, and the institution of *persona non grata* is available as a sanction against them. Special missions are in the territory of the receiving State only temporarily and, consequently, this sanction (although a provision permitting the receiving State to declare someone *persona non grata* was adopted by the Commission at its sixteenth session—see article 4 of the rules adopted)⁴⁸ is quite ineffectual in their case, since the head and members of the special mission and the members of its staff are ready at any moment to leave the receiving State. It is known, furthermore, that certain States attach to special missions persons who have a special task unconnected with that of the special mission; such persons must realize beforehand that they are liable

to removal from the territory of the receiving State if that State objects to this practice, which is in fact an abuse of their position with the special mission.

Article 38.—Obligation to respect the laws and regulations of the receiving State

1. Without prejudice to their privileges and immunities, it is the duty of all persons belonging to special missions and enjoying these privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of the receiving State.

2. The special missions of the sending State shall be requested to conduct all the official business entrusted to them by the sending State with the organ, delegation or representative of the receiving State which has been designated in the mutual agreement on the acceptance of the special mission or to which they have been referred by the Ministry of Foreign Affairs of the receiving State.

3. Special missions may not, as a general rule, communicate with organs of the receiving State other than those specified in the preceding paragraph, but it is the duty of the receiving State to designate the liaison organ or officer through whom the special mission may, if necessary, make contact with other organs of the receiving State.

4. The premises used by the special mission must not be used for purposes other than those which are necessary for the exercise of the functions and for the performance of the task of the special mission.

Commentary

(1) This article corresponds in substance to the provisions of article 41 of the Vienna Convention on Diplomatic Relations. Some small changes have been made in the light of practice and of the nature of special missions.

(2) The provision proposed as paragraph 1 of this article corresponds entirely to the provisions of paragraph 1 of article 41 of the Vienna Convention on Diplomatic Relations and of article 55 of the Vienna Convention on Consular Relations. It is at present a standard rule of international law. The Special Rapporteur considers, furthermore, that this rule should be amplified by a proviso stating that the internal laws and regulations of the receiving State are not mandatory for the organs of the sending State if they are contrary to international law or at variance with the contractual rules which exist between the States. Such a proviso was discussed at both the Vienna Conferences (1961 and 1963) but was not inserted in the relevant articles, for it was presumed that as a general rule the receiving State would observe its general international obligations and the duties arising out of international agreements. In addition, it was pointed out that it would be undesirable to refer the diplomatic or consular organs to the standard provision and that in each specific case they had the right to enter into discussions with the Government of the receiving State about the conformity of its internal law with the rules of international law. Such discussions and differences are not out of the question but represent disputes which should be handled at a higher level. In keeping with this principle, the Special Rapporteur has adopted

⁴⁸ Yearbook of the International Law Commission, 1964, vol. II, p. 213.

this rule for special missions as well, but has omitted the proviso mentioned above.

(3) The provision in paragraph 2 of the present draft article is based on paragraph 2 of article 41 of the Vienna Convention on Diplomatic Relations. No such provision appears in article 55 of the Vienna Convention on Consular Relations for the simple reason that consuls are allowed in principle to communicate direct with all the organs of the receiving State, as is required by the actual nature of their business. Consuls are not confined solely to communication with the central authorities of the receiving State. They may, without the intervention of the central organs, communicate with all the organs with which they have dealings in the performance of their tasks. Special missions are in a special position. As a general rule, they communicate with the Ministry of Foreign Affairs of the receiving State, but frequently the nature of their tasks makes it necessary for them to communicate direct with the competent special organs of the receiving State in regard to the business entrusted to them. These organs are often but not always local technical organs. It is also the practice for the receiving State to designate a special delegation or representative who establishes contact with the special mission of the sending State. This is generally provided for in the mutual agreement between the States concerned, or else the Ministry of Foreign Affairs of the receiving State informs the organs of the sending State with which organ or organs the special mission should get in touch. A partial solution to this question has already been provided in the commentary on article 11 of these rules.⁴⁹ Consequently, the text proposed for paragraph 2 is merely an adaptation of article 41, paragraph 2, of the Vienna Convention on Diplomatic Relations.

(4) Although the range of organs of the receiving State with which the special mission may establish contact in the conduct of its business has been widened in paragraph 2 of the proposed text, the resulting conditions are not those which apply to consuls. Consuls are allowed in principle to communicate, within the limits of their competence, with all organs of the receiving State. Special missions, on the other hand, may communicate only with the organs which have been specified in the agreement or to which they are referred by the Ministry of Foreign Affairs of the receiving State. For this reason, it was necessary to include the provision of paragraph 3 in the draft and to stress, firstly, that in all probability special missions need to communicate also with other organs in performing their task and, secondly, that they are not allowed to make contact with these other organs of the receiving State direct and of their own accord but must for this purpose either approach the Ministry of Foreign Affairs of the receiving State or communicate with those organs through the particular organ to which the receiving State refers them. In most cases the receiving State appoints one of these organs as liaison officer through whom such communication is conducted. In practice this liaison officer is a very important link in such communication, and his action in establishing contact is regarded as expressing the consent of the Government of the receiving State to the special mission's approach-

ing the other organs. But it is also considered that the liaison officer is placed at the special mission's disposal and has the duty to establish such contact between the special mission and the other organs of the receiving State whenever the performance of the special mission's task so requires. The current view is that the liaison officer is not the compulsory intermediary for routine contacts and that it is not obligatory to use his services in such cases (though some States still insist on this even today).

(5) The provision proposed for paragraph 4 of this article corresponds to the provisions of paragraph 3 of article 41 of the Vienna Convention on Diplomatic Relations and paragraphs 2 and 3 of article 55 of the Vienna Convention on Consular Relations. The Special Rapporteur was convinced that it was sufficient to draft this provision in very succinct terms, so long as it satisfied the needs of the circumstances in which the functions of special missions are exercised. The role purpose of this provision in the proposed text is to remind special missions of their duty to ensure that what has been given to them for the performance of their tasks is not used for purposes other than those for which they have obtained, with or without the receiving State's assistance, the use of the premises. The lending, letting or sub-letting of these premises for use for other purposes, or their use for other purposes by the special mission itself, must be regarded as a malpractice.

Article 39.—Non-discrimination

1. In the application of the provisions of the present articles, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(a) Where the receiving State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its special mission in the sending State;

(b) Where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present articles.

Commentary

This provision corresponds entirely to article 47 of the Vienna Convention on Diplomatic Relations and to article 72 of the Vienna Convention on Consular Relations, which two articles are identical. In the Special Rapporteur's opinion, these rules now represent the standard provisions concerning the application of international law.

Article 40.—Relationship between the present articles and other international agreements

1. The provisions of the present articles shall not affect other international agreements in force as between States parties to those agreements.

2. Nothing in the present articles shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.

⁴⁹ *Ibid.*, p. 221.

Commentary

(1) This draft article is based on the terms of article 73 of the Vienna Convention on Consular Relations. There is no comparable provision in the Vienna Convention on Diplomatic Relations. At the Vienna Conference on Consular Relations (1963), article 73 was adopted to explain the Conference's opinion that the Vienna Convention on Consular Relations was a body of binding rules of law of general scope permitting States to conclude, within their framework, supplementary agreements, but that the provisions of that Convention were not rules of *jus dispositivum*.

(2) The Special Rapporteur is convinced that these articles, which should constitute the rules of law concerning the status of special missions, should likewise possess the quality and legal weight of a treaty of general interest. For this reason, he proceeds from the premise that the rules to be embodied in these articles should reflect the standard of public international law in this respect and that, hence, States acceding thereto cannot treat these rules as they see fit but rather than this instrument should be a law-making treaty.

(3) The Special Rapporteur shares the opinion of those of the Commission's members who consider that, except in so far as the provisions of the articles themselves allow for possible departures from these rules by mutual agreement among the States parties, these rules are not in principle rules of *jus dispositivum*. He considers that the States which accept these rules adopt them as general principles of international law and that in principle they cannot contract out of these rules.

(4) Nevertheless, even though they are general rules, fundamental rules of law, they should not debar States from elaborating, supplementing or adjusting them—in conformity with the terms of the rules—in the light of the demands of their international relations. States should be left free to supplement and adjust these rules, within and outside their framework, by international agreements, but not in a manner conflicting with the rules.

(5) On the basis of the foregoing, the Special Rapporteur proposes that the Commission should in principle adopt the view that the rules relating to the status of special missions contained in the future articles on this topic are, as a general rule, binding, subject to a certain elasticity as regards the limits laid down in article 73 of the Vienna Convention on Consular Relations. This means that these provisions, although general and binding, do not rule out the possibility of:

(a) Derogating therefrom, in cases where the rules themselves provide that they are applicable unless the States settle the particular question differently by treaty (e.g. article 3; article 6, paragraph 3; article 9; article 13, paragraph 1, of the articles on special missions as already adopted). In such a case, the rules in the articles are residual rules.

(b) Supplementing or adapting the provisions by bilateral or multilateral agreement. In such a case, although the rules in these articles are strict rules of law, they are not the only source for determining the relations between the States in the matter of the legal status of special

missions. States are free to supplement these rules by other rules, on the condition, however, that the other rules must be in conformity with these strict rules of law. This means that, if the present articles do not refer to the possibility of derogating from a residual rule by international treaty, all the rules contained in the articles on the legal status of special missions are elastic, in the sense that the States acceding to these articles should regard them as binding rules of international law but that they may supplement or adapt them without touching on their fundamental substance, in other words the essential provisions.

(6) Consequently, if the Special Rapporteur's view as outlined in paragraph (5) is adopted as reflecting the purport of the proposed text, the articles would consist of three kinds of provisions:

(a) Binding provisions—and, as a general rule, all are binding;

(b) Provisions replacing the rules in these articles in that the articles themselves permit them (supplemental rules), in cases where the parties are authorized by the terms of the articles to lay down different rules by mutual agreement; and

(c) Additional rules, in cases where the parties by supplementary agreements, extend, supplement or adapt the existing rules, within the framework of the existing general rules, without touching on their essence, with the consequence that in such cases there would be the general rules and additional rules not conflicting with the general rules.

Final provisions

The International Law Commission has established the practice of not inserting final provisions in the draft rules which it has prepared in the past. It has taken the view that these provisions are of a dual nature, partly technical and partly political.

So far as the political provisions are concerned, it has been the Commission's opinion that the States which adopt the proposed rules either at diplomatic conferences or within international organizations reserved their right to settle the political questions forming the subject of the final provisions, for these affect political relations among the States. The Special Rapporteur is not convinced that this practice is always correct or justified. Often, certain questions which are not political but are rather legal in nature are settled as though they were political questions, as happened at the two Vienna Conferences (1961 and 1963) with regard to the right of States to accede to the rules of law there drafted and adopted.

So far as the technical rules are concerned, it is held that these should be prepared and proposed to States by the Secretariat of the United Nations, with a view to uniformity. The Special Rapporteur recognizes that in principle this practice is correct and sound, even though some of the drafts proposed by the Commission may, by reason of their nature, call for specific final provisions inserted in the body of the rules actually proposed.

Nevertheless, in conformity with the practice prevailing hitherto, the Special Rapporteur has refrained from drafting any final provisions.

Draft provisions concerning so-called high-level special missions

At its sixteenth session the International Law Commission decided to ask its Special Rapporteur to submit at its succeeding session articles dealing with the legal status of so-called high-level special missions, in particular special missions led by Heads of States, Heads of Governments, Ministers for Foreign Affairs and Cabinet Ministers.

Despite all his efforts to establish what are the rules specially applicable to missions of this kind, the Special Rapporteur has not succeeded in discovering them either in the practice or in the literature. The only rules he has found are those relating to the treatment of these distinguished persons in their own State, not only as regards the courtesy accorded to them but also as regards the scope of the privileges and immunities. Accordingly, the Special Rapporteur is prepared to propose the following rules:

Rule 1

Except as otherwise provided hereinafter, the rules contained in the foregoing articles are likewise applicable to special missions led by Heads of State, Heads of Government, Ministers for Foreign Affairs and Cabinet Ministers.

Rule 2

A special mission which is led by a Head of State shall be governed by the provisions of the said articles, subject to the following exceptions:

(a) In giving its approval to the special mission being led by the Head of State, the receiving State admits in advance that such a mission may perform the tasks to be agreed upon by the two States concerned in the course of their contacts (exception to article 2 as adopted);

(b) The Head of State, as head of the special mission, cannot be declared *persona non grata* or not acceptable (exception to article 4);

(c) The members of the staff of a special mission which is led by a Head of State may also be members of his personal suite. Such persons shall be treated as diplomatic staff (supplement to article 6);

(d) In the case of the simultaneous presence of several special missions, Heads of State who lead special missions shall have precedence over the other heads of special missions who are not heads of State. Nevertheless, in the case of the simultaneous presence of several special missions led by Heads of State, precedence shall be determined according to the alphabetical order of the names of the States (supplement to article 9);

(e) In cases where a Head of State acts as head of a special mission, the function of the mission is deemed to commence at the time when he arrives in the territory of the receiving State (special rule replacing article 11);

(f) The function of a special mission which is led by a Head of State comes to an end at the time when he leaves the territory of the receiving State, but the special mission may, if the sending State and the receiving State so agree, continue in being after his departure; in this case, however, the level of the special mission changes, and its level shall be determined according to the rank of the person who becomes head of the special mission (supplement to article 12);

(g) A special mission which is led by a Head of State shall have the right to display, in addition to the flag and emblem of the sending State, the flag and emblem peculiar to the Head of State under the law of the sending State (supplement to article 15);

(h) The receiving State has the duty to provide a Head of State who leads a special mission with accommodation that is suitable and worthy of him;

(i) The freedom of movement of a Head of State who leads a special mission is limited in the territory of the receiving State in that an agreement on this matter is necessary with the receiving State (guarantee of the personal safety of the Head of State);

(j) A Head of State who leads a special mission enjoys complete inviolability as to his person, property and residence and full immunity from the jurisdiction of the receiving State;

(k) A Head of State who leads a special mission enjoys full Customs exemption and exemption from Customs inspection by an agency of the receiving State;

(l) A Head of State who leads a special mission has the right to bring with him members of his family and persons attached to his personal service, who shall, for so long as they form part of his suite, be entitled to the same immunities as the Head of State;

(m) On his arrival in the territory of the receiving State and on his departure, a Head of State who leads a special mission shall receive all the honours due to him as Head of State according to the rules of international law;

(n) If a Head of State who leads a special mission should die in the territory of the receiving State, then the receiving State has the duty to make arrangements in conformity with the rules of protocol for the transport of the body or for burial in its territory.

Rule 3

A special mission which is led by a Head of Government shall be governed by the provisions of the said articles, subject to the following exceptions:

(a) In giving its approval to the special mission being led by the Head of Government, the receiving State admits in advance that such a mission may perform the tasks to be agreed upon by the two States concerned in the course of their contacts (exception to article 2 as adopted);

(b) The Head of Government, as head of the special mission, cannot be declared *persona non grata* or not acceptable (exception to article 4);

(c) In cases where a Head of Government acts as head of a special mission, the function of the mission is

deemed to commence at the time when he arrives in the territory of the receiving State (special rule replacing article 11);

(d) The function of a special mission which is led by a Head of Government comes to an end at the time when he leaves the territory of the receiving State, but the mission may, if the sending State and the receiving State so agree, continue in being after his departure; in this case, however, the level of the special mission changes, and its level shall be determined according to the rank of the person who becomes head of the special mission (supplement to article 12);

(e) A Head of Government who leads a special mission enjoys complete inviolability as to his person, property and residence and full immunity from the jurisdiction of the receiving State;

(f) A Head of Government who leads a special mission enjoys full Customs exemption and exemption from Customs inspection by an agency of the receiving State;

(g) A Head of Government who leads a special mission has the right to bring with him members of his family and persons attached to his personal service, who shall, for so long as they form part of his suite, be entitled to the same immunities as the Head of Government.

Rule 4

A special mission which is led by a Minister for Foreign Affairs shall be governed by the provisions of the said articles, subject to the following exceptions:

(a) In giving its approval to the special mission being led by the Minister for Foreign Affairs, the receiving State admits in advance that such a mission may perform the tasks to be agreed upon by the two States concerned in the course of their contacts (exception to article 2 as adopted);

(b) The Minister for Foreign Affairs, as head of the special mission, cannot be declared *persona non grata* or not acceptable (exception to article 4);

(c) The members of the staff of a special mission which is led by a Minister for Foreign Affairs may also be members of his personal suite. Such persons shall be treated as diplomatic staff (supplement to article 6);

(d) In cases where a Minister for Foreign Affairs acts as head of a special mission, the function of the mission is deemed to commence at the time when he arrives in the territory of the receiving State (special rule replacing article 11);

(e) The function of a special mission which is led by a Minister for Foreign Affairs comes to an end at the time when he leaves the territory of the receiving State, but the mission may, if the sending State and the receiving State so agree, continue in being after his departure; in this case, however, the level of the mission changes, and its level shall be determined according to the rank of the person who becomes head of the special mission (supplement to article 12);

(f) A Minister for Foreign Affairs who leads a special mission enjoys complete inviolability as to his person,

property and residence and full immunity from the jurisdiction of the receiving State;

(g) A Minister for Foreign Affairs who leads a special mission enjoys full Customs exemption and exemption from Customs inspection by an agency of the receiving State;

(h) A Minister for Foreign Affairs who leads a special mission has the right to bring with him members of his family and persons attached to his personal service, who shall, for so long as they form part of his suite, be entitled to the same immunities as the Minister for Foreign Affairs.

Rule 5

A special mission which is led by a Cabinet Minister other than the Minister for Foreign Affairs shall be governed by the provisions of the said articles, subject to the following exceptions:

(a) The members of the staff of a special mission which is led by a Cabinet Minister may also be members of his personal suite. Such persons shall be treated as diplomatic staff (supplement to article 6);

(b) In cases where a Cabinet Minister acts as head of a special mission, the function of the mission is deemed to commence at the time when he arrives in the territory of the receiving State (special rule replacing article 11);

(c) The function of a special mission which is led by a Cabinet Minister comes to an end at the time when he leaves the territory of the receiving State, but the special mission may, if the sending State and the receiving State so agree, continue in being after his departure; in this case, however, the level of the special mission changes and its level shall be determined according to the rank of the person who becomes head of the special mission (supplement to article 12);

(d) A Cabinet Minister who leads a special mission enjoys complete inviolability as to his person, property and residence and full immunity from the jurisdiction of the receiving State;

(e) A Cabinet Minister who leads a special mission enjoys full Customs exemption and exemption from Customs inspection by an agency of the receiving State;

(f) A Cabinet Minister who leads a special mission has the right to bring with him members of his family and persons attached to his personal service, who shall, for so long as they form part of his suite, be entitled to the same immunities as the Cabinet Minister.

Rule 6

The sending State and the receiving State may, by mutual agreement, determine more particularly the status of the special missions referred to in rule 1 and, especially, may make provision for more favourable treatment for special missions at this level.

The Special Rapporteur is putting forward the foregoing rules as a suggestion only, in order that the Commission may express its opinion on the exceptions enumerated above. In the light of the Commission's decision he will submit a final proposal; he thinks he will be able to do so during the Commission's seventeenth session.

CO-OPERATION WITH OTHER BODIES

[Agenda item 7]

DOCUMENT A/CN.4/176

Report on the fifth meeting of the Inter-American Council of Jurists (San Salvador, 25 January - 5 February 1965) by Eduardo Jiménez de Aréchaga, Observer for the Commission

[Original text: English]
[16 March 1965]

1. The fifth meeting of the Inter-American Council of Jurists took place in the City of San Salvador, El Salvador, from 25 January to 5 February 1965, and was attended by the representatives from Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, United States of America, Uruguay and Venezuela and from the Organization of American States and the Inter-American Juridical Committee; and by observers from the Inter-American Development Bank, the Asian-African Legal Consultative Committee, the Inter-American Committee on the Alliance for Progress (CIAP), the Inter-American Bar Association, the Central American Institute of Comparative Law, the Institute of Hispanic Culture and the International Law Commission.

2. Mr. Miguel Urquía, representative of El Salvador, and Mr. Albano Provenzali Heredia, representative of Venezuela, were elected as Chairman and Vice-Chairman of the Council.

Agenda

3. The agenda comprised the following items:

I. LEGAL MATTERS

1. Draft Convention on industrial and agricultural use of international rivers and lakes
2. Programming of studies on the international aspect of legal and institutional problems of the economic and social development of Latin America
3. Contribution of the Americas to the principles of international law that govern the responsibility of the State
4. International sale of personal property
5. Possibility of revision of the Bustamante Code
6. Collision
7. Assistance and salvage
8. International co-operation in juridical procedures

II. MATTERS OF ORGANIZATION AND FUNCTIONING

1. Functioning and activities of the Inter-American Juridical Committee

2. Determination of the matters that should be entrusted to the Permanent Committee for study at its next meeting
3. Co-operation with the International Law Commission of the United Nations and with other agencies and institutions
4. Selection of the place of the Sixth Meeting of the Inter-American Council of Jurists.

Industrial and agricultural use of international rivers and lakes

4. The Council took as a basis of discussion a draft convention on this topic prepared by the Inter-American Juridical Committee. Several representatives presented observations and comments on the draft, and the delegations of Uruguay, Costa Rica, Honduras, Guatemala and El Salvador submitted formal amendments.

5. The Council decided to transmit to the Committee the minutes of the meetings, the draft amendments and additional observations which may be made by member States, requesting it to revise the draft convention in the light of this new material and of the principles indicated below. It also supported the proposal made by the Government of Brazil to convoke an Inter-American Specialized Conference on the utilization of waters of international rivers and lakes.

6. The Council agreed that in the preparation of the revised text of the draft convention, the Inter-American Juridical Committee should consider, among others, the following basic points:

(a) The draft convention shall contain exclusively the general standards concerning the utilization of the waters of international rivers and lakes for industrial and agricultural purposes.

(b) The specific rules relating to the use of international rivers and lakes shall be the subject of bilateral or regional agreements between the riparian States.

(c) The provisions of the Convention shall not affect bilateral or regional agreements between the contracting States.

(d) The utilization of the waters of an international river or lake for industrial or agricultural purposes must not prejudice the free navigation thereof in accordance with the applicable legal rules, or cause substantial injury, according to international law, to the riparian States, or alterations in their boundaries.

(e) It is advisable to establish an adequate procedure that will guarantee notification and consultation between riparian States in the event that one of them wishes to build works for the agricultural and industrial use of international rivers and lakes.

(f) For the case of a lack of agreement between the riparian States procedures must be provided for that will facilitate an understanding, guarantee the exercise of the rights of the parties, and further a solution of the dispute, within the spirit of equity and co-operation that inter-American good neighbourliness and solidarity require.

(g) The contracting States shall co-operate, in so far as possible, in carrying out studies concerning the industrial and agricultural use of international rivers and lakes.

(h) The contracting States shall adopt pertinent measures to prevent the contamination of the waters of international rivers and lakes.

Studies on the international aspect of legal and institutional problems of the economic and social development of Latin America

7. The Council decided to undertake a study on the international aspect of the legal and institutional questions that may obstruct or delay the process of Latin American integration, particularly in the light of the experience gained in the process of organization of the Central American Common Market and of the Latin American Free Trade Association.

8. To this end a special working group was established in order to undertake a comparative study of the legal system in effect in Latin America on matters connected with economic and social development, especially with respect to the legal and institutional problems that, in the fields of economic integration, of financing and of trade in and prices of basic products, may be retarding Latin American economic development. This working group was asked to suggest concrete legal measures to harmonize Latin American legal systems, in so far as possible, and to solve these problems on the international level.

9. The working group is to be composed of seven members: two members of the Inter-American Juridical Committee and one representative of each of the following entities: the Inter-American Committee on the Alliance for Progress (CIAP); the Inter-American Development Bank (IDB); the Legal Department of the Pan American Union; the Organization for Central American Economic Integration and the Latin American Free Trade Association.

10. It was further recommended to convoke a meeting of the Council for the primary purpose of considering the report of this working group, the date of that meeting to be co-ordinated with that of the Inter-American Eco-

nomical and Social Council in such a way that a joint meeting of the two Councils may be held.

Contribution of the Americas to the principles of international law that govern the responsibility of the State

11. The Inter-American Juridical Committee presented a report on the Latin American contribution to the principles of international law which govern the responsibility of the State, pointing out the standards that in its view reflect its general orientation. Such standards were summarized in the following terms:

"I. Intervention in the internal or external affairs of a State is not admissible to enforce the responsibility of said State.

On the contrary, intervention establishes the responsibility of the intervening State.

"II. The State is not responsible for acts or omissions with respect to foreigners except in those same cases and conditions where, according to its own laws, it has such responsibility towards its own nationals.

"III. The responsibility of the State for contractual debts claimed by the government of another State to be due to it or its nationals cannot be enforced by recourse to armed force.

This principle applies even where the debtor State fails to reply to a proposal for arbitration or fails to comply with an arbitral award.

"IV. A State is relieved of all international responsibility if the alien has, by contract, renounced the diplomatic protection of his government, or if domestic legislation subjects the contracting alien to the jurisdiction of the local courts, or if it places him in a similar status with nationals for all purposes of the contract.

"V. Damages suffered by aliens as a consequence of disturbances or commotion of a political or social nature and injuries caused to aliens by acts of private parties create no responsibility of the State, except in the case of the fault of duly constituted authorities.

"VI. The theory of risk as the basis for international responsibility is not admissible.

"VII. The State responsible for an aggressive war is responsible for damages that may arise therefrom.

"VIII. The obligation of the State regarding judicial protection shall be considered as having been fulfilled when it places at the disposal of foreigners the national courts and the legal remedies essential to implement their rights. A State cannot initiate diplomatic claims for the protection of its nationals nor bring an action before an international tribunal for this purpose when the means of resorting to the competent courts of the respective State have been made available to the aforementioned nationals.

Therefore:

a. There is no denial of justice when aliens have had available the means to place their

case before competent domestic courts of the respective States.

- b. The State has fulfilled its international obligations when the judicial authority pronounces its decision, even if it disallows the claim, action or appeal brought by the foreigner.
- c. The State is not internationally responsible for a judicial decision that is not satisfactory to the claimant.

“IX. The State is responsible if it provides, within its territory or abroad, assistance to persons who conspire or encourage hostile movements against a foreign State, or when it fails to take the available legal measures to prevent such situations from arising.

“X. The definition and enumeration of the basic rights and duties of the States, contained in American international declarations and treaties, also represent a contribution to the development and codification of the international law regarding the responsibility of the State.”

12. Since this report and summary statement of the Latin American contribution to the principles of State responsibility is intended to assist the International Law Commission in the codification of this topic, I felt obliged to make a statement in the capacity of observer of the International Law Commission in order to express the appreciation of the Commission for such a study, pointing out that it would undoubtedly be taken into consideration, as an illustrative document, by the International Law Commission, since it condenses the opinion of a distinguished group of American jurists about what has been, in their opinion, the American contribution to the topic. The reasoned dissenting votes of several members of the Juridical Committee would also contribute to the usefulness of the report.

13. In the observer's statement the question was raised, however, of whether a formal approval of this document by the Council would be advisable or would add something to the intrinsic doctrinal value of the report and statement.

14. It was pointed out in this connexion that there is now a lack of adjustment between this report, approved by the Inter-American Juridical Committee in August 1961, and the method according to which the International Law Commission decided in 1963 to codify this subject. Thus, many of the rules presented by the Juridical Committee could not be included in the codification of the general principles of State responsibility since they refer to substantive duties of States and not to the responsibility arising from their violation.

15. This applies, for instance, to rules I, III, VII, IX and X. Also, in view of the decision of the International Law Commission to divorce the subject of State responsibility, properly so called, from that of treatment of foreigners, rules II and part of VII might also be devoid of interest for the International Law Commission codification as organized at present. It was also pointed out that the summarized statement did not contain other topics directly relevant to State responsibility, strictly so called, and where the American contribution is of great interest,

such as the lack of specific reference to the local remedies rule; the requirement of nationality of claims; and that of continuity of nationality from the inception of the claim until the date of the award.

16. After a discussion, the Council passed a resolution which, without approving formally the statement, reproduces it in the preamble and decides:

1. To express to the Inter-American Juridical Committee its strong appreciation for the praiseworthy work it has done up to the present on such a delicate subject.

2. To recommend to the Inter-American Juridical Committee that it expand its valuable work by incorporating the contribution of all the American States.

3. To instruct the Inter-American Juridical Committee, when this task has been completed and it has the opinions issued by the Governments of the American States in the subject, to forward the results of its labours to the International Law Commission of the United Nations.

International sale of personal property

17. On this item the Council had before it a draft Convention on a Uniform Law on the International Sale of Tangible Personal Property, prepared by the Inter-American Juridical Committee.

18. It was decided to return to the Committee the draft convention in order that it may make a revision thereof, taking into account a draft submitted by the delegation of El Salvador and the Hague Conventions of 1964 on the subject.

Possibility of revision of the Bustamante Code

19. The Council recommended the convocation of a specialized conference on private international law, to meet in 1967, to undertake a revision of parts (a) General Rules, (b) International Civil Law, and (c) International Commercial Law of the Bustamante Code, taking into account the advances in legal science and the Montevideo treaties of 1889 and 1940.

Collision and assistance and salvage

20. The Council, acting on the report of its Committee, declared that there is no reason to create a regional or separate system of the treaty law set forth in the Brussels Conventions of 23 September 1910, concerning the unification of certain rules on the subject of collision, and respecting assistance and salvage.

International co-operation in juridical procedures

21. On this item the Council, approving a report of the Inter-American Juridical Committee, recommended to the Council of the Organization of American States the inclusion of the topic on the agenda of the Eleventh Inter-American Conference. It was also recommended to the member States that they study the 1964 Hague Convention on the service abroad of judicial and extra-judicial documents, with a view of adhering thereto.

Matters of organization and functioning

22. The Inter-American Juridical Committee was asked to study the following topics: subjects of international law; territorial sea; differences between intervention and collective action; preliminary studies on space law; protection of industrial property; and a comparative study of the organization of the public ministry in the American States.

23. To this end it was recommended that members of the Committee should devote themselves exclusively to this work during the period of meetings.

24. It was decided that the sixth meeting of the Council should take place in Caracas, Venezuela.

Co-operation with the International Law Commission

25. The Council expressed, in a formal resolution, its pleasure at the presence of an observer from the International Law Commission and recommended that measures be taken to make possible attendance by a member of the Inter-American Juridical Committee at the sessions of the International Law Commission.

26. In thanking the Council for this resolution I took occasion to reiterate the deep interest of the International Law Commission in maintaining the closest relationship with both inter-American juridical bodies and, through them, with the successful work of codification of international law which they carry on at the regional level.

DOCUMENT A/CN.4/180

Report on the seventh session of the Asian-African Legal Consultative Committee (Baghdad, 22 March - 1 April 1965) by Roberto Ago, Observer for the Commission

[Original text: English]
[11 May 1965]

1. The seventh session of the Asian-African Legal Consultative Committee took place at Baghdad (Iraq) from 22 March to 1 April 1965. The session was attended by the delegations of Ceylon, Ghana, India, Iraq, Japan, Pakistan and the United Arab Republic. Burma, Indonesia and Thailand were not represented. On the other hand, observers were sent by Cameroon, Malaysia and the United Republic of Tanzania. The Arab League, the International Law Commission, the United Nations and the Office of the United Nations High Commissioner for Refugees were also represented by observers. Mr. Hafez Sabeq, President of the sixth session of the Committee, ex-President of the Court of Cassation of the United Arab Republic, legal adviser to the Ministry of Justice of Iraq, was specially invited to attend the Committee's session.

2. The Prime Minister of the Republic of Iraq, H. E. Tahir Yehya, in his capacity as the personal representative of the President of the Republic, made an address to the Committee at the inaugural meeting. Referring to the Committee's earlier resolutions and recommendations concerning nuclear tests, the Prime Minister suggested that it would be advisable for the Committee to study and make recommendations also on the harmful effects resulting from underground nuclear tests. Referring to the agenda of the session, he mentioned, particularly, the United Nations Charter, the law of treaties and refugees.

3. The leader of the delegation of Iraq (Mr. Shaker Al Ani) was elected President of the Committee. The leader of the delegation of Ceylon (Hon. T. S. Fernando) was elected Vice-President.

4. The agenda of the session comprised the following items:

I. ADMINISTRATIVE AND ORGANIZATIONAL MATTERS

1. Adoption of the agenda
2. Election of the President and Vice-President of the session.

3. Admission of observers to the session.
4. Consideration of the Secretary's report.
5. Consideration of the Committee's programme of work for 1965-1966.
6. Question of extending the term of the Committee after November 1966.
7. Date and place of the eighth session.

II. MATTERS ARISING OUT OF THE WORK DONE BY THE INTERNATIONAL LAW COMMISSION UNDER ARTICLE 3 (a) OF THE STATUTES

1. Consideration of the report on the work done by the International Law Commission at its sixteenth session.
2. Law of treaties.

III. MATTERS REFERRED TO THE COMMITTEE BY THE GOVERNMENTS OF THE PARTICIPATING COUNTRIES UNDER ARTICLE 3 (b) OF THE STATUTES

1. Status of aliens (referred by the Government of Japan)
 - (a) Diplomatic protection of aliens by their home States; and
 - (b) Responsibility of States arising out of maltreatment of aliens.
2. The rights of refugees (referred by the Government of the United Arab Republic)
3. United Nations Charter from the view of Asian-African countries (referred by the Government of the United Arab Republic)
4. Law of the territorial sea (referred by the Governments of Ceylon and the United Arab Republic)
5. Enforcement of judgments, the service of process and recording of evidence among States both in civil and criminal cases (referred by the Government of Ceylon)
6. Law of outer space (referred by the Government of India)

7. Codification of the principles of peaceful co-existence (referred by the Government of India)

IV. MATTERS OF COMMON CONCERN TAKEN UP BY THE COMMITTEE UNDER ARTICLE 3 (c) OF THE STATUTES

1. Relief against double taxation (referred by the Government of India).

5. The Committee agreed that items 4, 5, 6 and 7 of part I of the agenda be referred to a Sub-Committee consisting of one member for each delegation for consideration and report. It was also agreed to refer for consideration and report to two Sub-Committees item 1 (a) of part III and item 1 of part IV of the agenda. It was further decided that the order of discussions in the Committee should be as follows:

- (i) Part III, item 6—for preliminary discussion
- (ii) Part III, item 7—for preliminary discussion
- (iii) Part III, item 2
- (iv) Part III, item 5
- (v) Part III, item 3

It was agreed that the items in part II of the agenda (Matters arising out of the work done by the International Law Commission), would be taken up on 29 March after the arrival of Professor Roberto Ago, observer for the International Law Commission.

6. *Law of outer space (preliminary discussion)*

This item had been referred to the Committee by India. The delegates of Ceylon, Ghana, India and Japan made preliminary statements, and the observer for Malaysia made some observations. The Committee decided that the Secretariat should be directed to prepare a detailed study on the subject and to place the study before the next session of the Committee for its consideration. The Committee further decided to request the Governments of the participating States to send their views and observations on the subject to the Secretariat for inclusion in the brief of documents for the eighth session.

7. *Codification of the principles of peaceful co-existence*

The delegates of Ceylon, India, Japan, Iraq and the observer for Malaysia made general statements on the subject, referred to the Committee by India. The Committee decided that the Secretariat should be directed to collect the relevant material on the subject and to draw up a report for consideration of the Committee at its next session. The delegate of Ghana suggested that the report of the Special Committee of the General Assembly on Principles of International Law concerning Friendly Relations and Co-operation among States (A/5746), which met in Mexico, should be made available to the Committee.

8. *The rights of refugees*

This was the principle subject discussed by the Committee at its seventh session. It had been referred to the Committee by the Government of the United Arab Republic. Before opening the discussion the United Nations Deputy High Commissioner for Refugees, Prince Sadruddin Aga Khan, was invited to deliver a statement on the subject.

9. The members of the Committee had before them a set of draft articles on "General principles concerning the

status and treatment of refugees" which the Secretariat had prepared as "basis for discussion". After an introductory statement by the delegate of the United Arab Republic, the delegates of India, Ghana, Iraq, Pakistan, Ceylon, Japan and the observer for the United Republic of Tanzania took part in the general debate. The Deputy High Commissioner and Dr. E. Jahn, legal adviser to the High Commissioner, also took part in the discussion. As a conclusion of this debate the Chairman indicated that: (1) the Committee was not drafting a new convention; and (2) the Committee should formulate the general principles on the subject and, in the light of those principles, should examine the text of the 1951 Convention in order to consider whether it was necessary to suggest any amendment to that Convention, particularly as the situation had greatly changed since the year 1951 when the Convention was drawn up, and the Convention itself contemplated changes being made in its provisions.

10. The Committee next proceeded to discuss in detail the draft articles prepared by the Secretariat. A Drafting Committee was also appointed to undertake drafting of the Committee's conclusions on the subject. The draft articles prepared by the Secretariat dealt with the definition of a refugee (art. 1), the right of asylum (art. 2), the right of repatriation (art. 3), the right of indemnification (art. 4), personal and property rights (art. 5), and expulsion and deportation (art. 6). The Drafting Sub-Committee, for its part, presented ten Articles of Principles concerning the Treatment of Refugees. The discussion of these articles and of several amendments presented by various members of the Committee took four meetings of the session and gave rise at a certain moment to political difficulties. Finally, the text of eleven articles incorporating the principles concerning treatment of refugees was adopted. The articles are set out in annex B.

11. *Enforcement of judgments, the service of process and recording of evidence among States both in civil and criminal cases*

The Committee took up for consideration the report on this question, originally referred to the Committee by Ceylon, presented by the Sub-Committee appointed at the Cairo Session. Mr. H. L. de Silva (Ceylon), rapporteur of the Sub-Committee, introduced the report and presented to the Committee two draft agreements prepared by the Sub-Committee. After a general discussion it was agreed that the Committee would consider the provisions of the articles as being model rules on the subject. A Drafting Sub-Committee was appointed to redraft the articles in the light of the decisions taken in the Committee. After a detailed discussion of the various articles, the final text of the two drafts was adopted.

12. *Consideration of the report on the work done by the International Law Commission at its sixteenth session. Law of Treaties*

The Committee took up for consideration the report on the work done by the International Law Commission at its sixteenth session submitted by Mr. Hafez Sabeq, who attended the session as an observer on behalf of the Committee. In introducing his report, Mr. Sabeq drew attention to the subjects considered by the Commission,

namely, Special Missions, Relations between States and Inter-Governmental Organizations and the Law of Treaties. Mr. Sabeq also referred to his efforts for enlargement of membership of the Committee and suggested that French and Arabic be introduced as official languages of the Committee in order to attract more members. The delegates of Ceylon, Ghana, India, Iraq, Japan, Pakistan and the United Arab Republic expressed their thanks to Mr. Sabeq and their appreciation for his action.

13. At the request of the Chairman of the Committee, Professor Roberto Ago, Chairman of the International Law Commission and observer for the Commission, made a statement on the work of the International Law Commission during its sixteenth session. He said that the Commission had dealt principally with the item on the law of treaties. He explained to the Committee that the Commission's main efforts were now concentrated on codifying the law on the subjects of Treaties, State Succession and the International Responsibility of States. If the Commission succeeded in its task of codifying the law of the world society on these three essential subjects, it would go a long way in transforming customary international law into treaty law. He said that codification was a delicate matter, and the Commission would like to know the trend of thinking on the aforesaid questions, particularly in the newly independent countries, so that the drafts prepared by the Commission would be found acceptable to a great majority of States. Professor Ago felt that the Committee could be of considerable help to the Commission if it concentrated on the items which the Commission was studying and made constructive suggestions before the Commission finalised its drafts. When requested to give some instances of topics to which the Committee might give special attention, he mentioned, as an example, the question of reservations and of interpretation of treaties. In order to perform the important task already mentioned, Professor Ago felt that the Committee should encourage participation of more countries, as suggested by Mr. Sabeq. The statement of Professor Ago is attached as annex C.

14. The delegates of all the participating member States thanked Professor Ago for his statement elucidating the programme of work of the International Law Commission. They looked forward to continued co-operation between the Committee and the International Law Commission. Some delegates expressed particular satisfaction that the International Law Commission was prepared to take into account the views of the Asian and African countries; and suggested that the Committee should make efforts to make a constructive contribution to the work of the International Law Commission.

15. As to the specific subject of the law of treaties, on which the Secretariat had prepared a draft, the Committee, on the proposal of the delegates of Iraq and the United Arab Republic, decided that the discussion on the subject should be postponed until the next session. The subject was vast, and the Committee did not have sufficient time to give adequate consideration to the 73 articles drawn up by the International Law Commission. It was decided that the Committee should appoint Dr. Hassan Zakariya (Iraq) as Special Rapporteur to prepare a report in order to assist the Committee in its study of the matter.

It was decided that the Special Rapporteur of the Committee would take the draft articles prepared by the International Law Commission as the basis for his study, that he should prepare a report containing specific points arising out of the Commission's draft which required consideration by the Committee from the Asian-African viewpoint, and that he would make suggestions for amendment of the draft articles in that light if he found it necessary. It was further decided to request Governments to send their comments on the draft articles to the Rapporteur by the end of August 1965; and that the subject would be taken up at the next session of the Committee for consideration on the basis of the report of the Special Rapporteur, and would be given priority. The text of Resolution No. 9, concerning this item of the agenda of the Committee, is attached as annex D.

16. *Diplomatic protection of aliens by their home States —Responsibility of States arising out of maltreatment of aliens*

Considering that these two subjects, referred to the Committee by Japan, are closely related, the Committee decided that they should be studied together at some future session. The Committee had before it a set of draft articles prepared by the Secretariat before 1961, as well as the Harvard Draft Convention of 1961 on the International Responsibility of States for Injuries to Aliens. The Secretariat was asked to redraft some of the aforesaid articles, taking into account subsequent developments.

17. *Relief against double taxation*

The Committee decided to place this item, referred to the Committee by India, on the agenda of its next session.

18. *United Nations Charter from the view of Asian-African countries*

This was the last big item to be taken up by the Committee. The subject had been referred to the Committee by the United Arab Republic. The Secretariat had prepared a report, based on the considerations developed at the Cairo Session. The report analysed United Nations practices so far as regards: membership, size, composition, voting, power and functions of the Security Council in relation to the General Assembly, peace forces, permanent neutrality and the United Nations, and provisions concerning regional arrangements and enemy States. The United Arab Republic had presented a memorandum.

19. After a general debate, the Committee decided to postpone until a more propitious time—to be decided in consultation with Governments—any question concerning the revision of the Charter. In the meantime the Secretariat would continue its study. On the proposal of the United Arab Republic, a resolution was adopted in which the Committee, considering the present position of the United Nations and the present international situation, expressed its full confidence in the United Nations and appealed to all Members of the Organization to faithfully live up to their obligations under the Charter and to spare no effort in the maintenance of peace and justice in the world. The United Nations observer, Mr. Dik Lehmkühl, in a statement presented at the final meeting of the session, expressed appreciation by the United Nations for

the confidence in the Organization expressed by the Committee.

20. *Law of the territorial sea*

The Committee did not take up this subject, referred by Ceylon and the United Arab Republic, at its seventh session.

21. *Report on the Inter-American Council of Jurists*

The Committee took note of the report on the Fifth Session of the Inter-American Council of Jurists, presented by Dr. Sampong Sucharitkul (Thailand), observer of the Committee.

22. *Administrative decisions*

The Committee adopted certain resolutions and adopted certain administrative measures proposed in the report of the Sub-Committee created for the consideration of these matters. It was particularly recommended to the member Governments that the Committee, whose mandate is to expire in November 1966, be established on a permanent basis. The Committee decided to extend the term of the present Secretary, Mr. B. Sen, for a further period of two years. The Committee decided also to nominate Dr. Hassan Zakariya to represent it at the next session of the International Law Commission in the capacity of observer.

23. In concluding this report, the observer of the International Law Commission wishes to extend the expression of his deepest gratitude to the Chairman, the members and the Secretary of the Asian-African Legal Consultative Committee for the warm welcome they gave to him; to the authorities of the Government of Iraq and to Professor M. K. Yasseen for their many kindnesses during his stay in Baghdad; and to Mr. Dik Lehmkuhl, Director of the United Nations Information Centre, for his friendly and valuable assistance.

ANNEX A

List of delegates and observers at the seventh session of the Asian-African Legal Consultative Committee

[not reproduced]

ANNEX B

Principles concerning treatment of refugees

Article I—Definition of the term "refugee"

A refugee is a person who, owing to persecution or well-founded fear of persecution for reasons of race, colour, religion, political belief or membership of a particular social group:

(a) Leaves the State of which he is a national, or, if he has no nationality, the State of which he is a habitual resident; or,

(b) Being outside such State, is unable or unwilling to return to it or to avail himself of its protection.

Exceptions: (1) A person having more than one nationality shall not be a refugee if he is in a position to avail himself of the protection of any of the States of which he is a national.

(2) A person who has committed a crime against peace, a war crime, or a crime against humanity or a serious non-political crime or has committed acts contrary to the purposes and principles of the United Nations shall not be a refugee.

Explanation: The dependants of a refugee shall be deemed to be refugees.

Explanation: The expression "leaves" includes voluntary as well as involuntary leaving.

NOTES

(i) The Delegations of Iraq, Pakistan and the United Arab Republic expressed the view that, in their opinion, the definition of the term "refugee" includes a person who is obliged to leave the State of which he is a national under the pressure of an illegal act or as a result of invasion of such State, wholly or partially, by an alien with a view to occupying the State.

(ii) The Delegations of Ceylon and Japan expressed the view that in their opinion the expression "persecution" means something more than discrimination or unfair treatment but includes such conduct as shocks the conscience of civilized nations.

(iii) The Delegation of Japan expressed the view that the word "and" should be substituted for the word "or" in the last line of paragraph (a).

Article II—Loss of status as refugee

A refugee shall lose this status as refugee if—

(i) He voluntarily returns to the State of which he is a national or, if he has no nationality, to the State of which he is a habitual resident; or

(ii) He voluntarily acquires the nationality of another State and is entitled to the protection of that State.

NOTE: The Delegations of Iraq and the United Arab Republic reserve their position on paragraph (ii).

Article III—Asylum to a refugee

A State has the sovereign right to grant or refuse asylum to a refugee in its territory.

Article IV—Right of return

A refugee shall have the right to return, if he so chooses, to the State of which he is a national and in this event it shall be the duty of such State to receive him.

Article V—Right to compensation

1. A refugee shall have the right to receive compensation from the State which he left or to which he was unable to return.

2. The compensation referred to in paragraph 1 shall be for such loss as bodily injury, deprivation of personal liberty in denial of human rights, death of dependants of the refugee or of the person whose dependant the refugee was, and destruction of or damage to property and assets, caused by the authorities of the State, public officials or mob violence.

NOTES

(i) The Delegations of Pakistan and the United Arab Republic were of the view that the word "also" should be inserted before the words "such loss" in paragraph 2.

(ii) The Delegations of India and Japan expressed the view that the words "deprivation of personal liberty in denial of human rights" should be omitted.

(iii) The Delegations of Ceylon and Japan suggested that the words "in the circumstances in which the State would incur state responsibility for such treatment to aliens under international law" should be added at the end of paragraph 2.

(iv) The Delegations of Ceylon, Japan and Pakistan expressed the view that compensation should be payable also in respect of the denial of the refugee's right to return to the State of which he is a national.

Article VI—Right of movement and residence

1. Subject to the conditions imposed for the grant of asylum in the State and subject also to the local laws, regulations and orders, a refugee shall have the right—

- (i) To move freely throughout the territory of the State; and
- (ii) To reside in any part of the territory of the State.

2. The State may, however, require a refugee to comply with provisions as to registration or reporting or otherwise so as to regulate or restrict the right of movement and residence as it may consider appropriate in any special circumstances or in the national or public interest.

Article VII—Personal rights

Subject to local laws, regulations and orders, a refugee shall have the right—

- (i) To freedom from arbitrary arrest;
- (ii) To freedom to profess and practise his own religion;
- (iii) To have protection of the executive and police authorities of the State;
- (iv) To have access to the courts of law; and
- (v) To have legal assistance.

Article VIII—Right to property

Subject to local laws, regulations and orders, and subject also to the conditions imposed for the grant of asylum in the State, a refugee shall have the right to acquire, hold and dispose of property.

Article IX—Expulsion and deportation

1. Save in the national or public interest or on the ground of violation of the conditions of asylum, the State shall not ordinarily expel a refugee.

2. Before expelling a refugee, the State shall allow him a reasonable period within which to seek admission into another State. The State shall, however, have the right to apply during the period such internal measures as it may deem necessary.

3. A refugee shall not be deported to a State where his life or liberty would be threatened for reasons of race, colour, religion, political belief or membership of a particular social group.

Article X—Conflict with treaties or conventions

Where the provisions of a treaty or convention between two or more States conflict with the principles set forth herein, the provisions of such treaty or convention shall prevail as between those States.

Article XI

Nothing in these articles shall be deemed to impair any higher rights and benefits granted by a State to refugees.

NOTES

- (i) The Delegation of Ghana reserved its position on all the articles.
- (ii) The question whether any provision should be made for ensuring the implementation of the right to return and the right to compensation was left over for consideration at the next session.
- (iii) The question whether the State should endeavour to accord to the refugee treatment also in conformity with the principles contained in the U.N. Convention on Refugees, 1951, was left over for consideration at the next session after a study of that Convention.
- (iv) The consideration of the following draft article proposed by the Delegation of India was held over till the next session:

“A refugee shall lose his status as a refugee if he does not return to the State of which he is a national, or, if he has no nationality, to the State of which he was a habitual resident, or fails to avail himself of the protection of such State even after the circumstances in which he became a refugee cease to exist.”

ANNEX C

Statement by Professor Roberto Ago, Chairman of the International Law Commission, Observer, March 28, 1965

First of all I would like to thank His Excellency Judge Hafez Sabeq for the kind words which he addressed to me, and to thank you all, Gentlemen, for your expressions of appreciation for the work of the International Law Commission. I am sure that Mr. M. K. Yasseen is sharing with me this feeling of satisfaction and gratitude towards you. May I first of all tell you, Mr. Chairman, that you had a first class representative to the last session of the International Law Commission in the person of Judge Sabeq. His participation in the work of the International Law Commission last year can be cited as an excellent example of such participation and representation. And now, Gentlemen, allow me to take five minutes of your time to explain our activity, our goal and what we expect from you.

Judge Sabeq told you that this year the Commission was able to deal with only three items. May I add that, as a matter of fact, the Commission dealt primarily with one item—“Law of Treaties”. This was decided on as a matter of principle. The Commission has now decided to concentrate its attention on certain major items. You will have noticed probably that the Commission in previous years has sometimes dealt with marginal subjects. With the exception, of course, of the Law of the Sea and of Diplomatic and Consular Relations, the International Law Commission has frequently treated matters which were outside the central theme of general international law. Now, the decision has been taken to concentrate our efforts above all on two or three basic items of general international law: the law of treaties, State responsibility and State succession. Of course, we continue to deal with some other matters like special missions and relations between States and international organizations; these items are in some way complementary to what the Commission has already done in the diplomatic field. But really, the main work is concentrated on these three main items, which may of course take many, many years of work by the International Law Commission. Why have we taken this decision?

Well, many of us are convinced, Gentlemen, that codification is something which has become necessary in the present circumstances of international life. In municipal law the great codifications have always taken place in connexion with exceptional upheavals like social revolutions, unification of countries, etc. Now the international society at present is experiencing a revolution which is probably greater than any other revolution which has happened within any particular country. The membership of the international community is today practically three times larger than it was at the beginning of this century. The lapse of time in which this change has taken place is very brief indeed. Such an important expansion has inevitably had its consequences in the field of the law. Many of the new political entities have sometimes an attitude of distrust toward the general international law which they found in existence when they became members of the international community. They feel they have not participated directly in the formation of this general international law. This is just the moment when codification is needed—when it is necessary to try to transform the unwritten law of the international society into a written law. Thus the old traditional rules of the international legal order may find a new youth and all the new member States of the international community can contribute their legal concepts to the definition of these rules. This is an urgent matter because, Mr. Chairman, around this table we are all jurists, and we know what it means when a society has doubts about the existing law. Law is in a certain way like health; nobody cares about health when you are in good health, but when you are not, you know what a precious thing it is, and how necessary it is to re-establish it. So we know how important it is to reach the goal of certainty in the field of international law. Some people probably do not realize what it means when a society does not rest on a solid basis of law. This was the reason, Gentlemen, why we took the decision to leave aside for the moment marginal matters and assumed the main task of codifying the major

subjects of international law. If we succeed in the course of a certain number of years in codifying subjects like the Law of Treaties, State Responsibility and State Succession, we can say that the great bulk of international law will have been transformed from unwritten to written law—from custom to general conventions.

Now codification in itself is a delicate matter. We cannot achieve codification of matters like the law of treaties in one year. If you remember that the German codification took a century, you can imagine how long the codification of international law might take. At the same time, we know that we cannot wait a century; we need to codify international law much faster. So we have to concentrate all our efforts on this.

The work of committees like your own, Gentlemen, may be exceptionally useful in our task, because one of the elements we need in our work is to know the thinking of all countries, and particularly of the new ones, on the various problems we have before us. For this purpose, your Committee is probably more important than any other committee of this kind, because I think that the great majority of the new political entities represent the Asian-African region. For this reason I particularly welcome the idea of Dr. Sabeq to try to enlarge this Committee and to have this Committee as representative as possible of the two regions. I would really welcome the presence of the French-speaking African countries and of other nations in order to achieve the widest possible participation. The contribution of your studies to our work would be that much more helpful if the Commission could benefit from your work before, rather than after, our drafts have reached their final stage. Similarly, the more concrete your work, the more helpful it would be to the Commission. We have not enough time for philosophical discussions; it would be better to tackle concrete problems: here we suggest a change, here we would like to have another conception adopted. Please let us have your observations, if possible, before our final draft has been prepared, and above all, before the United Nations General Assembly has convoked a diplomatic conference to deal with the Law of Treaties. If we want the goal of codification to be reached, it is necessary that the result of the Conference be accepted by the greatest possible majority of States.

Please excuse me, Gentlemen, if I have taken too much of your time to tell you, on behalf of the Commission, how deeply we appreciate the co-operation of a body like yours, and how we look forward to your continued co-operation.

Our task is probably ambitious, but if all of us around the world join in these efforts, we can finally succeed and achieve the important goal of codifying the main subjects of international law. This will bring into existence the modern universal law which is demanded by the present international society.

ANNEX D

Asian-African Legal Consultative Committee
Seventh Session
Baghdad, 1965

RESOLUTION No. 9 (VII)

Considering that the Report on the work done by the International Law Commission at its Sixteenth Session has been placed before the Committee under Clause (5) of Rule (6) of the Statutory Rules, together with the Report of Mr. Hafez Sabeq, Observer on behalf of this Committee,

And considering the views expressed by the Delegations present at this session for a postponement of consideration of the subject of the Law of Treaties and the appointment of a Special Rapporteur to prepare a Report on the subject,

Taking note of the observations made by the Chairman of the International Law Commission on the functions and scope of the work of the Commission and his suggestions regarding the field of co-operation between the Commission and this Committee,

The Committee decides to take up the subject of the Law of Treaties for consideration at its next session with a view to formulating proposals and suggestions from the Asian-African viewpoint for consideration of the Commission;

The Committee further decides to appoint Dr. Hassan Zakariya, Alternate Member for Iraq, as Special Rapporteur on the subject of the Law of Treaties, with the request that he may prepare a report on the specific points arising out of the International Law Commission's draft on the subject which require consideration from the Asian-African viewpoint, together with his suggestions for any amendment to the Draft Articles that may be considered necessary;

The Committee decides to request the Governments of the participating countries to send their comments on the Draft Articles to the Rapporteur through the Secretariat of the Committee before the end of August 1965;

The Committee requests the Rapporteur to complete this report by the end of October 1965 and to transmit the same to the Secretariat of the Committee;

The Committee directs the Secretariat to send the report of the Rapporteur to the Governments of the participating countries for their views and to place the same before the Committee at its next session together with the comments and observations that may be received from the Governments of the participating countries;

And the Committee further decides to give priority to this subject at its eighth session.

REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/6009*

Report of the International Law Commission on the work of the first part of its seventeenth session, 3 May - 9 July 1965

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CHAPTER I

Organization of the session

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, and in accordance with its Statute annexed thereto, as subsequently amended, held the first part of its seventeenth session at the European Office of the United Nations from 3 May to 9 July 1965. The work of the Commission during this part of the seventeenth session is described in this report. Chapter II of the report contains a description of the Commission's work on the law of treaties and twenty-five articles, consisting of general provisions and provisions on the conclusion of treaties, reservations, entry into force and registration, correction of errors and the functions of depositaries. Chapter II contains a description of the Commission's work on special missions and forty-four articles, with commentaries on the topic of special missions; sixteen of these articles

were provisionally adopted by the Commission at its sixteenth session in 1964, and twenty-eight articles at the present session. Chapter IV relates to the programme of work and organization of future sessions of the Commission. Chapter V deals with a number of administrative and other questions.

A. MEMBERSHIP AND ATTENDANCE

2. The Commission consists of the following members:

Mr. Roberto AGO (Italy)
Mr. Gilberto AMADO (Brazil)
Mr. Milan BARTOŠ (Yugoslavia)
Mr. Mohammed BEDJAOUI (Algeria)
Mr. Herbert W. BRIGGS (United States of America)
Mr. Marcel CADIEUX (Canada)
Mr. Erik CASTRÉN (Finland)
Mr. Abdullah EL-ERIAN (United Arab Republic)
Mr. Taslim O. ELIAS (Nigeria)

Mr. Eduardo JIMÉNEZ DE ARÉCHAGA (Uruguay)
 Mr. Manfred LACHS (Poland)
 Mr. LIU Chieh (China)
 Mr. Antonio de LUNA (Spain)
 Mr. Radhabinod PAL (India)
 Mr. Angel M. PAREDES (Ecuador)
 Mr. Obed PESSOU (Senegal)
 Mr. Paul REUTER (France)
 Mr. Shabtai ROSENNE (Israel)
 Mr. José María RUDA (Argentina)
 Mr. Abdul Hakim TABIBI (Afghanistan)
 Mr. Senjin TSURUOKA (Japan)
 Mr. Grigory I. TUNKIN (Union of Soviet Socialist Republics)
 Mr. Alfred VERDROSS (Austria)
 Sir Humphrey WALDOCK (United Kingdom of Great Britain and Northern Ireland)
 Mr. Mustafa Kamil YASSEEN (Iraq).

3. On 18 May 1965, the Commission elected Mr. Mohammed Bedjaoui (Algeria) to fill the vacancy which had arisen in consequence of the resignation of Mr. Victor Kanga (Cameroon).

4. All the members, with the exception of Mr. Liu Chieh, attended the session of the Commission.

B. OFFICERS

5. At its 775th meeting, held on 3 May 1965, the Commission elected the following officers:

Chairman: Mr. Milan Bartoš

First Vice-Chairman: Mr. Eduardo Jiménez de Aréchaga

Second Vice-Chairman: Mr. Paul Reuter

Rapporteur: Mr. Taslim O. Elias

6. At its 777th meeting, held on 5 May 1965, the Commission appointed a Drafting Committee composed as follows:

Chairman: Mr. Eduardo Jiménez de Aréchaga

Members: Mr. Roberto Ago; Mr. Herbert W. Briggs; Mr. Taslim O. Elias; Mr. Manfred Lachs; Mr. Paul Reuter; Mr. Grigory I. Tunkin; Sir Humphrey Waldock and Mr. Mustafa Kamil Yasseen. Mr. Milan Bartoš took part in the Committee's work as Special Rapporteur on special missions when the articles relating to that topic were considered. In addition, the Commission at its 797th meeting held on 8 June 1965, appointed Mr. José María Ruda as a member of the Committee, and at its 811th meeting, on 25 June 1965, appointed Mr. Shabtai Rosenne as a member. The Committee was responsible for the preparation of the English, French and Spanish texts of the draft articles.

7. Also at its 777th meeting, the Commission appointed a Committee to study the exchange and distribution of its documents. The Committee was composed of Mr. Roberto Ago, Mr. Manfred Lachs, Mr. Obed Pessou, Mr. Shabtai Rosenne and Mr. José María Ruda. The Committee submitted a report¹ to the Commission.

8. Mr. Constantin A. Stavropoulos, Legal Counsel, attended the 793rd and 794th meetings, held on 1 and 2 June 1965 respectively, and represented the Secretary-General at those meetings. Mr. Constantin A. Baguinian, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General at the other meetings of the session, and acted as Secretary to the Commission.

C. AGENDA

9. The Commission adopted an agenda for the seventeenth session, consisting of the following items:

1. Filling of a casual vacancy in the Commission (article 11 of the Statute).
2. Law of Treaties.
3. Special missions.
4. Relations between States and inter-governmental organizations.
5. Question of the organization of future sessions.
6. Dates and places of the meetings in winter and summer 1966.
7. Co-operation with other bodies.
8. Other business.

10. In the course of the session, the Commission held forty-seven public meetings and four private meetings. In addition, the Drafting Committee held thirteen meetings. The Commission considered all the items on its agenda, except that on relations between States and inter-governmental organizations.

CHAPTER II

Law of Treaties

A. INTRODUCTION

Summary of the Commission's proceedings

11. At its fourteenth, fifteenth and sixteenth sessions the Commission provisionally adopted parts I, II and III of its draft articles on the law of treaties, consisting respectively of twenty-nine articles on the conclusion, entry into force and registration of treaties, twenty-five articles on the invalidity and termination of treaties and nineteen articles on the application, effects, modification and interpretation of treaties. In adopting each part the Commission decided, in accordance with articles 16 and 21 of its Statute, to submit it, through the Secretary-General, to Governments for their observations.

12. At its sixteenth session, the Commission decided that in 1965 it would, after considering the comments received from Governments, conclude the second reading of part I, and as many further articles as possible of part II, of the draft on the law of treaties, in accordance with suggestions of the Special Rapporteur. It also asked the Secretariat to request Governments to submit their comments on part II by January 1965 at the latest, so that the Commission could consider them at its seventeenth session. Moreover, while recalling its decision of 1958² that it should prepare its

¹ A/CN.4/L.110.

² *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859), paras. 60-61.*

final draft only at the second session following that in which its first draft had been prepared, the Commission expressed the hope that the comments of Governments on part III of the law of treaties would be available to it before the commencement of its eighteenth session in 1966.

13. At the present session the Commission had before it a document, submitted by the Secretariat and dated 23 February 1965, which set out in volume I the written comments of Governments and in volume II the comments of delegates in the Sixth Committee on parts I and II of the Commission's draft articles on the law of treaties (A/CN.4/175). It also had before it four documents setting out the written comments of four further Governments received after the above-mentioned date (A/CN.4/175/Add.1-4).³ The comments of Governments and delegations in these documents contained detailed criticisms and proposals regarding the substance or wording of the draft articles. Eight other Governments, the Commission was informed, had replied stating that they did not have any observations to make at the present stage of the work on the law of treaties.

14. The Commission also had before it: (1) a report (A/5687) on "Depositary Practice in Relation to Reservations", dated 29 January 1964 and submitted by the Secretary-General to the General Assembly in accordance with resolution 1452 B (XIV) and (2) certain further information and material concerning the practice of depositaries and of the Secretary-General as registering authority under Article 102 of the Charter supplied by the Secretariat in response to the request of certain members of the Commission.⁴

15. In addition, the Special Rapporteur submitted a report (A/CN.4/177 and Add.1-2) containing: (1) a summary, article by article, of the comments of Governments and delegations on the twenty-nine articles of part I and the first three articles of part II provisionally adopted by the Commission in 1962 and 1963; and (2) proposals for the revision of the articles in the light of those comments. The Commission considered that report at its 776th-803rd, 810th-816th, 819th and 820th meetings, and re-examined the twenty-nine articles of part I. Owing to lack of time it decided to adjourn its examination of addendum II of the Special Rapporteur's report dealing with articles 30-32 of part II until the second part of the session.

16. *Form of the draft articles.* The Commission noted that certain Governments had commented on the question of the form ultimately to be given to the draft articles and that two Governments had expressed the view that the form should be that of a "code" rather than of a "convention" on the law of treaties. This question was discussed by the Commission in 1961 and 1962 at its thirteenth and fourteenth sessions. In its report for 1962 it explained the considerations which had led it in the previous year to

decide to change the scheme of its work on the law of treaties from that of a "code" to that of draft articles capable of serving as a basis for a multilateral convention:

"First, an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and the consolidation of the law of treaties is of particular importance at the present time when so many new States have recently become members of the international community. Secondly, the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished; and their participation in the work of codification appears to the Commission to be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations."

The Commission, in re-examining the question at the present session, saw no reason to modify the views which it had expressed in 1962. On the contrary, it recalled that at the seventeenth session of the General Assembly the Sixth Committee had stated in its report that the great majority of representatives had approved the Commission's decision to give the codification of the law of treaties the form of a convention. The Commission, moreover, felt it to be its duty to aim at achieving the maximum results from the prolonged work done by it on the codification of the law of treaties. Accordingly, it reaffirmed its decision of 1961 to prepare draft articles "intended to serve as the basis for a convention". At the same time it noted that the appropriate moment for it to exercise its competence under article 23, paragraph 1, of its Statute to make recommendations to the General Assembly regarding the action to be taken concerning its draft would be when it had completed its work on the revision of the articles and submitted its final report to the General Assembly.

17. In reaffirming its decision to prepare draft articles intended to serve as a basis for a convention the Commission observed that the draft articles provisionally adopted and submitted to Governments still contained some elements of a "code"; and that, in conformity with its decision, these elements must, so far as possible, be eliminated in the course of the revision of the articles. This observation it considered to apply particularly to the articles in part I on the conclusion, entry into force and registration of treaties, the revision of which was its principal task at the present session.

18. *A single draft convention.* When provisionally adopting parts I (Conclusion, Entry into Force and Registration), II (Invalidity and Termination) and III (Application, Effects, Modification and Interpretation), the Commission left open at its fourteenth, fifteenth and sixteenth sessions the question whether the articles should be cast in the form of a single draft convention or of a series of related conventions. At the present session, in addressing itself to the revision of the draft articles as a whole, the Commission concluded that the legal rules set out in the different parts are so far interrelated that it is desirable that they should be codified in a single convention. It considered that, while certain topics in the law of treaties may be

³ The Governments which submitted written comments were: Afghanistan, Australia, Austria, Burma, Canada, Czechoslovakia, Denmark, Finland, Israel, Jamaica, Japan, Luxembourg, Malaysia, Netherlands, Pakistan, Poland, Portugal, Sweden, Turkey, Uganda, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America.

⁴ See A/CN.4/SR.791, para. 61, and A/CN.4/SR.801, paras. 17-20.

susceptible of being dealt with separately, the proper co-ordination of the rules governing the several topics is likely to be achieved only by incorporating them in a single, closely integrated, set of articles. Accordingly, it decided that in the course of their revision the draft articles should be rearranged in the form of a single convention.

19. *Scope of the draft articles.* At its fourteenth session,⁵ the Commission reaffirmed decisions which it had previously taken in 1951 and 1959 to defer examination of treaties entered into by international organizations until it had made further progress with its draft on treaties concluded by States. At the same time, however, it recognized that international organizations may possess a certain capacity to enter into international agreements and that these agreements fall within the scope of the law of treaties. Moreover in article 1 (a) of part I it defined the term treaty, as used in the draft articles, to mean "any international agreement in written form... concluded between two or more States or other subjects of international law"; and in commenting upon this definition,⁶ it explained that the term "other subjects of international law" was "designed to provide for treaties concluded by (a) international organizations, (b) the Holy See which enters into treaties on the same basis as States, and (c) other international entities, such as insurgents, which may in some circumstances enter into treaties". Again, in formulating the rules regarding capacity to conclude treaties in article 3, it included as paragraph 3 of that article a provision concerning the treaty-making capacity of international organizations.

20. The Commission at the present session noted that many of its draft articles on the law of treaties, as provisionally adopted, were formulated in terms applicable only to treaties concluded between States; and that further special study of treaties concluded by international organizations would be needed before it could be in a position to codify satisfactorily the rules applicable to this category of treaties. It considered, moreover, that its primary task at the present stage of the codification of international law was to codify the fundamental principles of the law of the treaties and that it would conduce to a greater clarity and simplicity in the statement of these principles if the draft articles were explicitly confined to treaties concluded between States. If a codifying convention covering treaties concluded between States were concluded, it would always remain possible, if found desirable, to supplement it by a further convention dealing specially with treaties concluded by international organizations. Accordingly, both for the above reasons and to give greater consistency to the structure of the draft articles, the Commission decided explicitly to limit the scope of the articles to treaties concluded between States. This decision finds expression in a new article inserted at the beginning of the draft which reads: "The present articles relate to treaties concluded between States". It also finds expression in a consequential change made in the definition of the term "treaty" as used in the draft articles and in the deletion from article 3 of the

provision relating to the capacity of international organizations to conclude treaties.

21. At the same time, the Commission recognized that the principles set out in the draft articles are to a large extent relevant also in the case of treaties concluded between States and other subjects of international law and between two or more such other subjects of international law. The Commission also considered it essential to avoid any possibility that the limitation of the draft articles to treaties concluded between States might be construed as denying the legal force of such other forms of treaties or the application to them of principles set forth in the draft articles which would be applicable to them under general international law independently of the draft articles. Accordingly, it inserted in article 2 a new provision safeguarding the legal force of these forms of treaties and the application to them of relevant principles of general international law which find a place in the draft articles on treaties concluded between States.⁷

22. *Revision of the draft articles at the present session.* At the present session, as stated in paragraph 1, the Commission re-examined the twenty-nine articles of part I on the conclusion, entry into force and registration of treaties. In addition to the changes already mentioned in paragraph 19, the articles were extensively revised with the object of eliminating from them such purely descriptive elements as might be appropriate in a "code" but out of place in a convention; and, where necessary, the articles were redrafted so as to formulate them more explicitly as rules of law. As part of this process, the Commission provisionally decided to omit article 5 dealing with the negotiation and drawing up of a treaty which it considered to be descriptive rather than stating a legal rule.

23. In its 1962 report, the Commission employed the concept of "treaties in simplified form" as a basis for formulating certain rules in article 4 (authority to negotiate, draw up, authenticate, sign, ratify etc.) and in article 12 (ratification). It was, however, suggested by certain Governments in their comments that this concept does not have sufficient precision for it to be an adequate criterion in determining the application of legal rules. The use of simplified forms for the conclusion of many types of treaties is in the opinion of the Commission a development in treaty practice which is of great importance. Nevertheless, after re-examining the question the Commission concluded that there is substance in the view that the concept of a "treaty in simplified form" lacks the degree of precision necessary for it to provide a satisfactory criterion for distinguishing between different categories of treaties in formulating the rules in articles 4 and 12. Accordingly, it decided to reformulate those articles in terms which do not call for any precise distinction to be drawn between "formal treaties" and "treaties in simplified form". In conformity with this decision the Commission further decided to delete the definition of "treaty in simplified form" from article 1, paragraph 1 (b).

⁵ *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209)*, para. 21.

⁶ *Ibid.*, paragraph 8 of the commentary to article 1.

⁷ Article 2, as adopted in 1962, already contained an analogous provision safeguarding the legal force of international agreements not in written form; and this provision, in slightly expanded form, also appears in the new text of article 2.

24. The statement of the law regarding "ratification" contained in article 12, as drafted in 1962, depended entirely on the drawing of a distinction between "formal treaties" and "treaties in simplified form". Consequently, the Commission's decision not to employ that distinction would in any event have necessitated a reformulation of the article. In addition, the comments of governments disclosed differences of opinion, similar to those which had emerged in the Commission itself in 1962, as to whether or not there exists in the international law of today any basic residuary rule that ratification of a treaty is necessary unless a contrary intention appears. The Commission re-examined the whole question of the rules regarding signature and ratification as acts expressing consent to be bound by a treaty. Some members, as in 1962, favoured the statement of a residuary rule requiring ratification in the absence of a contrary intention. Others considered that such a rule would not reflect the actual position found in treaty practice today when so many treaties are concluded in simplified forms without ratification being required. The Commission concluded that the question whether signature does or does not express consent to be bound or whether it is subject to ratification is essentially one of intention; and that its appropriate course was simply to set out in one article the conditions under which signature would be considered as a definitive expression of consent to be bound and in another the conditions under which consent to be bound would be expressed through ratification, acceptance or approval without stating any residuary rule in international law either in favour or against the need for ratification. It accordingly redrafted articles 11 and 12 on these lines, at the same time incorporating in article 12 the rules regarding "acceptance" and "approval" which had formed the subject of a separate article—article 14—in its 1962 report. In addition, it re-arranged the several provisions of its 1962 draft dealing with signature, initialling and signature *ad referendum* in such a manner as to make it possible to dispense with the article. Thus, in revising the articles dealing with signature, ratification, acceptance and approval, the Commission found it possible to dispense with both articles 10 and 14 by transferring their substantive provisions to other articles.

25. A question which the Commission examined was that of participation in a treaty, which was dealt with in its 1962 report in article 8 (Participation in a treaty) and article 9 (Opening of a treaty to the participation of additional States). The comments of governments disclosed certain divergencies of view on these articles, more especially with regard to participation in general multilateral treaties. The Commission, as in 1962, was divided on this question and decided to adjourn the discussion of articles 8 and 9 together with the definition of "general multilateral treaty" in article 1 until the second part of its seventeenth session, in January 1966. Having regard to the close connexion of these articles with article 13 concerning accession to treaties, the Commission also decided to postpone its re-examination of the latter article until its January session.

26. Another question which the Commission examined was that of reservations to multilateral treaties. It noted that in their comments governments, although offering

detailed criticisms of the Commission's drafts, appeared in general to endorse its proposal for the solution of this difficult problem. Accordingly, the Commission retained the substance of the articles on reservations, namely, of articles 18-22, which it had provisionally adopted in 1962. At the same time it revised and re-arranged their provisions extensively in order to simplify their formulation and to take account of suggestions made by governments.

27. The Commission, in all, adopted revised texts of twenty-five articles. In doing so, it noted that there were certain points of terminology to which it might be necessary to return in the final stage of the Commission's work in order to ensure consistency in the use of terms throughout the draft articles. It also noted that some articles might require further examination in 1966 in order to harmonize their provisions with those of later articles; and that in any event it would be necessary in 1966, in re-arranging the draft articles as a single convention, to give further consideration to the order in which the various articles should be placed. The Commission concluded that the texts of articles adopted at the present session must still be treated as subject to review at the eighteenth session when its work on the draft articles on the law of treaties will be completed.

28. Having regard to the considerations mentioned in the preceding paragraphs, the Commission did not think that any useful purpose would be served by attaching detailed commentaries to the texts in the present report. While requesting the Special Rapporteur to prepare drafts of the commentaries to accompany these articles, it preferred to postpone its consideration of the commentaries until its eighteenth session when it would have before it the final texts of all the articles to be included in the draft convention.

29. The Commission accordingly decided to confine itself in this report to the foregoing explanations of the revision of part I of the draft articles undertaken by it at the present session and to set out in the report only the revised texts of the articles. These texts, as adopted by the Commission on the proposal of the Special Rapporteur, are reproduced below.

B. DRAFT ARTICLES ON THE LAW OF TREATIES

Part I.—Conclusion, entry into force and registration of treaties

Section I: General Provisions

Article 0. The scope of the present articles

The present articles relate to treaties concluded between States.

Article 1. Use of terms

1. For the purposes of the present articles:

(a) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

(b)
[Deleted by the Commission]

(c) "General multilateral treaty"...
[Decision postponed until the Commission resumes its examination of articles 8 and 9.]

(d) "Ratification", "Accession", "Acceptance" and "Approval" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.

[Reference to "signature" deleted by the Commission]

(e) "Full powers" means a document emanating from the competent authority of a State designating a person to represent the State for negotiating, adopting or authenticating the text of a treaty or for expressing the consent of the State to be bound by a treaty.

(f) "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that State.

(f) (bis) "Party" means a State which has consented to be bound by a treaty and for which the treaty has come into force.

(f) (ter) "Contracting State"...
[Consideration of the use of this term and of the problem of terminology to be used in regard to States having a right to be consulted or notified with respect to acts relating to a treaty has been deferred by the Commission until a later stage of its work.]

(f) (quater) "International organization" means an inter-governmental organization.

(g)
[Deleted by the Commission]

2.
[Decision concerning the inclusion of a provision regarding the characterization or classification of international agreements under internal law postponed]

Article 2. Treaties and other international agreements not within the scope of the present articles

The fact that the present articles do not relate

(a) To treaties concluded between States and other subjects of international law or between such other subjects of international law; or

(b) To international agreements not in written form shall not affect the legal force of such treaties or agreements or the application to them of any of the rules set forth in the present articles to which they would be subject independently of these articles.

Article 3. Capacity of States to conclude treaties

1. Every State possesses capacity to conclude treaties.
2. States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.

Article 3 bis. Treaties which are constituent instruments of international organizations or which have been drawn up within international organizations

The application of the present articles to treaties which are constituent instruments of an international organization or have been drawn up within an international organization shall be subject to the rules of the organization in question.

Section II: Conclusion of treaties by States

Article 4. Full powers to represent the State in the negotiation and conclusion of treaties

1. Except as provided in paragraph 2, a person is considered as representing a State for the purpose of negotiating, adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty only if:

(a) He produces an appropriate instrument of full powers; or

(b) It appears from the circumstances that the intention of the States concerned was to dispense with full powers.

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

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

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

(c) Representatives accredited by States to an international conference or to an organ of an international organization, for the purpose of negotiating and adopting the text of a treaty.

Article 5. Negotiation and drawing up of a treaty

[Deleted by the Commission]

Article 6. Adoption of the text

1. The adoption of the text of a treaty takes place by the unanimous agreement of the States participating in its drawing up except as provided in paragraphs 2 and 3.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States participating in the conference unless:

(a) By the same majority they shall decide to apply a different rule; or

(b) The established rules of an international organization apply to the proceedings of the conference and prescribe a different voting procedure.

3. The adoption of the text of a treaty by an organ of an international organization takes place in accordance with the voting procedure prescribed by the established rules of the organization in question.

Article 7. Authentication of the text

The text of a treaty is established as authentic and definitive by such procedure as may be provided for in the text or agreed upon by the States concerned and failing any such procedure by:

(a) The signature, signature *ad referendum* or initialling by the representatives of the States concerned of the text of the treaty or of the Final Act of a conference incorporating the text; or

(b) Such procedure as the established rules of an international organization may prescribe.

Article 8. Participation in a treaty

[Decision postponed by the Commission]

Article 9. The opening of a treaty to the participation of additional States

[Decision postponed by the Commission]

Article 10. Initialling and signature *ad referendum* as forms of signature

[Deleted by the Commission and substance incorporated in article 11]

Article 11. Consent to be bound expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(a) The treaty provides that signature shall have that effect;

(b) It appears from the circumstances of the conclusion of the treaty that the States concerned were agreed that signature should have that effect;

(c) The intention of the State in question to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiations.

2. For the purposes of paragraph 1:

(a) The initialling of a text constitutes a signature of the treaty when it appears from the circumstances that the contracting States so agreed;

(b) The signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

Article 12. Consent to be bound expressed by ratification, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(a) The treaty or an established rule of an international organization provides for such consent to be expressed by means of ratification;

(b) It appears from the circumstances of the conclusion of the treaty that the States concerned were agreed that ratification should be required;

(c) The representative of the State in question has signed the treaty subject to ratification; or

(d) The intention of the State in question to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiations.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Article 13. Accession

[Decision postponed by the Commission pending decisions on articles 8 and 9]

Article 14. Acceptance or approval

[Deleted by the Commission and substance incorporated in article 12]

Article 15. Exchange or deposit of instruments of ratification, accession, acceptance or approval

Unless the treaty otherwise provides, instruments of ratification, accession, acceptance or approval become operative:

(a) By their exchange between the contracting States;

(b) By their deposit with the depositary; or

(c) By notification to the contracting States or to the depositary, if so agreed.

Article 16. Consent relating to a part of a treaty and choice of differing provisions

1. Without prejudice to the provisions of articles 18 to 22, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made plain to which of the provisions the consent relates.

Article 17. Obligation of a State not to frustrate the object of a treaty prior to its entry into force

A State is obliged to refrain from acts calculated to frustrate the object of a proposed treaty when:

(a) It has agreed to enter into negotiations for the conclusion of the treaty, while the negotiations are in progress;

(b) It has signed the treaty to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;

(c) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Section III: Reservations to multilateral treaties**Article 18. Formulation of reservations**

A State may, when signing, ratifying, acceding to, accepting or approving a treaty, formulate a reservation unless:

(a) The reservation is prohibited by the treaty or by the established rules of an international organization;

(b) The treaty authorizes specified reservations which do not include the reservation in question; or

(c) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty.

Article 19. Acceptance of and objection to reservations

1. A reservation expressly or impliedly authorized by the treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the contracting States, the object and purpose of the treaty and the circumstances of its conclusion that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound, a reservation requires acceptance by all the States parties to the treaty.

3. When a treaty is a constituent instrument of an international organization, the reservation requires the acceptance of the competent organ of that organization, unless the treaty otherwise provides.

4. In cases not falling under the preceding paragraphs of this article:

(a) Acceptance by another contracting State of the reservation constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force;

(b) An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State;

(c) An act expressing the State's consent to be bound which is subject to a reservation is effective as soon as at least one other contracting State which has expressed its own consent to be bound by the treaty has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 20. Procedure regarding reservations

1. A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the other contracting States.

2. If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation. However, an objection to the reservation made

previously to its confirmation does not itself require confirmation.

Article 21. Legal effects of reservations

1. A reservation established with regard to another party in accordance with articles 18, 19 and 20:

(a) Modifies for the reserving State the provisions of the treaty to which the reservations relates to the extent of the reservation; and

(b) Modifies those provisions to the same extent for such other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation agrees to consider the treaty in force between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22. Withdrawal of reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative when notice of it has been received by the other contracting States.

Section IV: Entry into force and registration

Article 23. Entry into force of treaties

1. A treaty enters into force in such manner and upon such date as it may provide or as the States which adopted its text may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as all the States which adopted its text have consented to be bound by the treaty.

3. Where a State consents to be bound after a treaty has come into force, the treaty enters into force for that State on the date when its consent becomes operative, unless the treaty otherwise provides.

Article 24. Entry into force of a treaty provisionally

1. A treaty may enter into force provisionally if:

(a) The treaty itself prescribes that it shall enter into force provisionally pending ratification, accession, acceptance or approval by the contracting States; or

(b) The contracting States have in some other manner so agreed.

2. The same rule applies to the entry into force provisionally of part of a treaty.

Article 25. Registration and publication of treaties

Treaties entered into by parties to the present articles shall as soon as possible be registered with the Secretariat

of the United Nations. Their registration and publication shall be governed by the regulations adopted by the General Assembly of the United Nations.

Article 26. Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the contracting States are agreed that it contains an error, the error shall, unless they otherwise decide, be corrected:

(a) By having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) By executing or exchanging a separate instrument or instruments setting out the correction which it has been agreed to make; or

(c) By executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter:

(a) Shall notify the contracting States of the error and of the proposal to correct it if no objection is raised within a specified time-limit;

(b) If on the expiry of the time-limit no objection has been raised, shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text, and communicate a copy of it to the contracting States;

(c) If an objection has been raised to the proposed correction, shall communicate the objection to the other contracting States and, in the case of a treaty drawn up by an international organization, to the competent organ of the organization.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which it is agreed should be corrected.

4. (a) The corrected text replaces the defective text *ab initio*, unless the contracting States otherwise decide.

(b) The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

5. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy to the contracting States.

Article 27. The correction of errors in the texts of treaties for which there is a depositary

[Deleted by the Commission and substance incorporated in article 26]

Article 28. Depositaries of treaties

1. The depositary of a treaty, which may be a State or an international organization, shall be designated by the contracting States in the treaty or in some other manner.

2. The functions of a depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance.

Article 29. Functions of depositaries

1. The functions of a depositary, unless the treaty otherwise provides, comprise in particular:

(a) Keeping the custody of the original text of the treaty, if entrusted to it;

(b) Preparing certified copies of the original text and any further text in such additional languages as may be required by the treaty or by the established rules of an international organization, and transmitting them to the contracting States;

(c) Receiving any signatures to the treaty and any instruments and notifications relating to it;

(d) Examining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles and, if need be, bringing the matter to the attention of the State in question;

(e) Informing the contracting States of acts, communications and notifications relating to the treaty;

(f) Informing the contracting States when the number of signatures or of instruments of ratification, accession, acceptance or approval required for the entry into force of the treaty have been received or deposited.

(g) Performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the other contracting States or, where appropriate, of the competent organ of the organization concerned.

Article 29 bis. Communications and notifications to contracting States

Whenever it is provided by the present articles that a communication or notification shall be made to contracting States, such communication or notification shall be made:

(a) In cases where there is no depositary, directly to each of the States in question;

(b) In cases where there is a depositary, to the depositary for communication to the States in question.

CHAPTER III

Special missions

A. INTRODUCTION

Summary of the Commission's proceedings

30. At its tenth session, in 1958, the International Law Commission adopted a set of draft articles on diplomatic intercourse and immunities. The Commission observed, however, that the draft dealt only with permanent diplo-

matic missions. Diplomatic relations between States also assumed other forms that might be placed under the heading of "ad hoc diplomacy", covering itinerant envoys, diplomatic conferences and special missions sent to a State for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and requested the Special Rapporteur to make a study of the question and to submit his report at a future session.⁸ The Commission decided at its eleventh session (1959) to include the question of ad hoc diplomacy as a special topic on the agenda of its twelfth session (1960).

31. Mr. A. E. F. Sandström was appointed Special Rapporteur. He submitted his report to the twelfth session, and on the basis of this report the Commission took decisions and drew up recommendations for the rules concerning special missions.⁹ The Commission's draft was very brief. It was based on the idea that the rules on diplomatic intercourse and immunities in general prepared by the Commission should on the whole be applied to special missions by analogy. The Commission expressed the opinion that this brief draft should be referred to the Conference on Diplomatic Intercourse and Immunities convened at Vienna in the spring of 1961. But the Commission stressed that it had not been able to give this subject the thorough study it would normally have done. For that reason, the Commission regarded its draft as only a preliminary survey, carried out in order to put forward certain ideas and suggestions which should be taken into account at the Vienna Conference.¹⁰

32. At its 943rd plenary meeting on 12 December 1960, the General Assembly decided,¹¹ on the recommendation of the Sixth Committee, that these draft articles should be referred to the Vienna Conference with the recommendation that the Conference should consider them together with the draft articles on diplomatic intercourse and immunities. The Vienna Conference placed this question on its agenda and appointed a special Sub-Committee to study it.¹²

33. The Sub-Committee noted that these draft articles did little more than indicate which of the rules on permanent missions applied to special missions and which did not. The Sub-Committee took the view that the draft articles were unsuitable for inclusion in the final convention without long and detailed study which could take place only after a set of rules on permanent missions had been finally adopted. For this reason, the Sub-Committee recommended that the Conference should refer this question back to the General Assembly so that the Assembly could recommend to the International Law Commission further study of the topic, i.e., that it continue to study the topic in the light of the Vienna Convention on Diplomatic Relations which was then drawn up. At its fourth plenary

meeting, on 10 April 1961, the Conference adopted the Sub-Committee's recommendation.¹³

34. The matter was again submitted to the General Assembly. On 18 December 1961, the General Assembly, on the recommendation of the Sixth Committee, adopted resolution 1687 (XVI), in which it requested the International Law Commission to study the subject further and to report thereon to the General Assembly.

35. At its fourteenth session, the Commission decided to place the question of special missions on the agenda of its fifteenth session, and requested the Secretariat to prepare a working paper¹⁴ on the subject.¹⁵

36. During its fifteenth session, at the 712th meeting, the Commission appointed Mr. Milan Bartoš as Special Rapporteur for the topic of special missions.¹⁶

37. On that occasion, the Commission took the following decision:

"With regard to the approach to the codification of the topic, the Commission decided that the Special Rapporteur should prepare a draft of articles. These articles should be based on the provisions of the Vienna Convention on Diplomatic Relations, 1961, but the Special Rapporteur should keep in mind that special missions are, both by virtue of their functions and by their nature, an institution distinct from permanent missions. In addition, the Commission thought that the time was not yet ripe for deciding whether the draft articles on special missions should be in the form of an additional protocol to the Vienna Convention, 1961, or should be embodied in a separate convention or in any other appropriate form, and that the Commission should await the Special Rapporteur's recommendations on that subject."¹⁷

38. In addition, at the same session, the Commission considered again whether the study of special missions should also cover the status of government delegates to congresses and conferences, and it inserted the following paragraph in its annual report to the General Assembly:

"With regard to the scope of the topic, the members agreed that the topic of special missions should also cover itinerant envoys, in accordance with its decision at its 1960 session.¹⁸ At that session the Commission had also decided¹⁹ not to deal with the privileges and immunities of delegates to congresses and conferences as part of the study of special missions, because the topic of diplomatic conferences was connected with that of relations between States and inter-governmental organizations. At the present session, the question was raised again, with particular reference to conferences convened by States. Most of the members expressed the opinion,

⁸ *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859)*, para. 51.

⁹ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 179 and 180.

¹⁰ *Ibid.*, p. 179, para. 37.

¹¹ Resolution 1504 (XV).

¹² The Sub-Committee was composed of the representatives of Ecuador, Iraq, Italy, Japan, Senegal, the USSR, the United Kingdom, the United States of America and Yugoslavia.

¹³ *Yearbook of the International Law Commission, 1963*, vol. II, document A/CN.4/155, paras. 44-45.

¹⁴ A/CN.4/155 (see footnote 13 above).

¹⁵ *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209)*, para. 76.

¹⁶ *Ibid.*, Eighteenth Session, Supplement No. 9 (A/5509), para. 65.

¹⁷ *Ibid.*, para. 64.

¹⁸ *Yearbook of the International Law Commission, 1960*, vol. I, 565th meeting, para. 26.

¹⁹ *Ibid.*, para. 25.

however, that for the time being the terms of reference of the Special Rapporteur should not cover the question of delegates to congresses and conferences.”²⁰

39. The Special Rapporteur submitted his report²¹ and the Commission, at its sixteenth session, considered it twice. First, at the 723rd, 724th and 725th meetings, it engaged in a general discussion and gave the Special Rapporteur general instructions on continuing his study and submitting a second report at the following session. Secondly, at the 757th, 758th, 760th-763rd and 768th-770th meetings, it examined a number of draft articles and adopted sixteen articles which were included in its report to the General Assembly on the work of its sixteenth session, and were to be supplemented, if necessary, during its seventeenth session. It decided that these articles would be submitted to the General Assembly and to the Governments of Member States for information.

40. Owing to the circumstances prevailing at the time of its regular session in 1964, the General Assembly did not discuss the report and consequently did not express its opinion to the Commission. Accordingly, the Commission had to resume its work on the topic at the point it had reached at its sixteenth session in 1964.

41. The topic of special missions was placed on the agenda of the Commission’s seventeenth session, at which the Special Rapporteur submitted his second report on the subject.²² The Commission considered that report at its 804th-809th, 817th, 819th and 820th meetings.

42. The Commission considered all the articles proposed in the Special Rapporteur’s second report. It adopted 28 articles of the draft, which follow on from the sixteen articles adopted at the sixteenth session. The Commission requested that the General Assembly should consider all the articles adopted at the sixteenth and seventeenth sessions as a single draft.

43. In preparing the draft articles, the Commission has sought to codify the modern rules of international law concerning special missions, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law.

44. In conformity with articles 16 and 21 of its Statute, the Commission decided to communicate its draft articles on special missions to the Governments through the Secretary-General, inviting their comments. The Governments are asked to submit their comments by 1 May 1966. This short time-limit is regarded as essential if the Commission is to finish its preparation of the final draft on special missions with its present membership.

45. The Commission decided to submit to the General Assembly and to the Government of Member States, in addition to the draft articles in section B of this chapter, certain other decisions, suggestions and observations (set forth in section C) on which the Commission requests any comments likely to facilitate its subsequent work.

²⁰ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9 (A/5509)*, para. 63.

²¹ A/CN.4/166.

²² A/CN.4/179.

B. DRAFT ARTICLES ON SPECIAL MISSIONS²³

Part I

General rules²⁴

Article 1.²⁵ The sending of special missions

1. For the performance of specific tasks, States may send temporary special missions with the consent of the State to which they are to be sent.
2. The existence of diplomatic or consular relations between States is not necessary for the sending or reception of special missions.

Commentary

(1) Article 1 of the draft on special missions differs from the provisions of the Vienna Convention on Diplomatic Relations. The difference is due to the fact that the tasks and duration of special missions differ from those of regular missions.

(2) A special mission must possess the following characteristics:

(a) It must be sent by a State to another State. Special missions can not be considered to include missions sent by political movements to establish contact with a particular State, or missions sent by States to establish contact with a movement. In the case of insurrection or civil war, however, any such movements which have been recognized as belligerents and have become subjects of international law have the capacity to send and receive special missions. The same concept will be found in the Vienna Convention on Diplomatic Relations (article 3, paragraph 1 (a)).

(b) It must not be in the nature of a mission responsible for maintaining general diplomatic relations between the States; its task must be precisely defined. But the fact that a task is defined does not mean that its scope is severely limited; in practice, some special missions are given far-reaching tasks of a general nature, including the review of relations between the States concerned and even the formulation of the general policy to be followed in their relations. But the task of a special mission is in any case specified and it differs from the functions of a permanent diplomatic mission, which acts as a general representative of the sending State (article 3, paragraph 1 (a) of the Vienna Convention on Diplomatic Relations). In the Commission’s view, the specified task of a special mission should be to represent the sending State in political or technical matters.

²³ Articles 1-16 were adopted by the Commission at its sixteenth session (1964) on the basis of the Special Rapporteur’s first report (A/CN.4/166). Articles 16-36 of that report were not discussed by the Commission and were replaced by articles 17-40 of the Special Rapporteur’s second report (A/CN.4/179) which was discussed by the Commission at its seventeenth session and formed the basis of articles 17-44 of these draft articles.

²⁴ Title adopted at the 819th meeting.

²⁵ Introduced as article 1 of Special Rapporteur’s first report (A/CN.4/166). Discussed at the 757th and 758th meetings of the Commission. Drafting Committee’s text discussed and adopted at the 768th meeting. Commentary adopted at the 772nd meeting. The Commission decided that this article would be preceded by a definitions article.

(c) A State is not obliged to receive a special mission from another State unless it has undertaken in advance to do so. Here, the draft follows the principle set out in article 2 of the Vienna Convention, but the Commission points out that the way in which consent is expressed to the sending of a permanent diplomatic mission differs from that used in connexion with the sending of a special mission. In the case of a special mission, consent usually takes a more flexible form. In practice, such an undertaking is generally given only by informal agreement; less frequently, it is given by formal treaty providing that a specific task will be entrusted to the special mission; one characteristic of a special mission, therefore, is that consent for it must have been given in advance for a specific purpose.

(d) It is of a temporary nature. Its temporary nature may be established either by the term fixed for the duration of the mission or by its being given a specific task, the mission usually being terminated either on the expiry of its term or on the completion of its task.²⁶ Regular diplomatic missions are not of this temporary nature, since they are permanent (article 2 of the Vienna Convention on Diplomatic Relations). However, a permanent specialized mission which has a specific sphere of competence and may exist side by side with the regular permanent diplomatic mission is not a special mission and does not possess the characteristics of a special mission. Example of permanent specialized missions are the United States missions for economic co-operation and assistance to certain countries, the Australian immigration missions, the industrial co-operation missions of the socialist countries, and commercial missions or delegations which are of a diplomatic nature, etc.

(3) The sending and reception of special missions may—and most frequently does—occur between States which maintain regular diplomatic or consular relations with each other, but the existence of such relations is not an essential prerequisite. Where such relations do exist and the regular diplomatic mission is functioning, the special mission's particular task may be one which would have been within the competence of the ordinary mission if there had been no special mission. During the existence of the special mission, however, States are entitled to conduct through the special mission relations which are within the competence of the general mission. The Commission deemed it advisable to stress that the existence of diplomatic or consular relations between the States in question is not a prerequisite for the sending and reception of special missions. The Commission considered that special missions can be even more useful where such relations do not exist. The question whether special missions can be used between States or Governments which do not recognize each other was also raised. The Commission considered that, even in those cases, special missions could be helpful in improving relations between States, but it did not consider it necessary to add a clause to that effect to article 1.

(4) The manner in which the agreement for sending and receiving a special mission is concluded is a separate

question. In practice, there are a number of ways of doing so, namely:

(a) An informal diplomatic agreement providing that a special mission will be sent and received;

(b) A formal treaty providing that certain questions will be discussed and settled through a special mission;

(c) An offer by one State to send a special mission for a specific purpose, and the acceptance, even tacit, of such a mission by the other State;

(d) An invitation from one party to the other to send a special mission for a specific purpose, and the acceptance of the invitation by the other party.

(5) Where regular diplomatic relations are not in existence between the States concerned—whether because such relations have been broken off or because armed hostilities are in progress between the States—the sending and reception of special missions are subject to the same rules cited above. Experience shows that special missions are often used for the settlement of preliminary questions with a view to the establishment of regular diplomatic relations.

(6) The fact that a special mission is sent and received does not mean that both States must entrust the settlement of the problem in question to special missions appointed by the two parties. Negotiations with a delegation sent by a State for a specific purpose may also be conducted by the regular organs of the receiving State without a special mission being appointed. Both these practices are considered to be usual, and in the second case the special mission acts on the one side and the Ministry (or some other permanent organ) on the other. The Commission did not deem it necessary to refer to this concept in the text.

(7) Cases also arise in practice in which a specific delegation, composed of the head or of members of the regular permanent diplomatic mission accredited to the country in which the negotiations are taking place, appears in the capacity of a special mission. Practice provides no clear-cut answer to the question whether this is a special mission in the proper sense or an activity of the permanent mission.

Article 2.²⁷ The task of a special mission

The task of a special mission shall be specified by mutual consent of the sending State and of the receiving State.

Commentary

(1) The text of this article differs from the corresponding article (article 4) of the Vienna Convention on Diplomatic Relations.

(2) The scope and content of the task of a special mission are determined by mutual consent. Such consent may be expressed by any of the means indicated in paragraph 4 of the commentary on article 1. In practice, however, the agreement to the sending and reception of special missions is usually of an informal nature, often merely stating the purpose of the mission. In most cases, the exact scope of

²⁶ See article 12.

²⁷ Introduced as article 2 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 758th meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 772nd meeting.

the task becomes clear only during the negotiations, and it frequently depends on the full powers or the authority conferred on the representatives of the negotiating parties.

(3) Diplomatic history records a number of cases where special missions have exceeded the task for which they were sent and received. The customary comment is that this is done to take advantage of the opportunity, and that any good diplomat makes use of such opportunities. There are also a number of cases showing that special missions for ceremonial and formal purposes have taken advantage of propitious circumstances to conduct negotiations on other matters. The limits of the capacity of a special mission to transact business are normally determined by full powers, given in good and due form, but in practice the legal validity of acts by special missions which exceed the missions' powers often depends upon their acceptance by the respective governments. Though the Commission considered this question to be of importance to the stability of relations between States, it did not deem it necessary to propose an article dealing with it and considered that its solution was closely related to section II (Conclusion of treaties by States) of part I of the draft articles on the law of treaties.²⁸

(4) The tasks of a special mission are sometimes determined by a prior treaty. In this case, the special mission's task and the extent of its powers depend on the treaty. This is so, for instance, in the case of commissions appointed to draw up trading plans for a specific period under a trade treaty. However, these cases must be regarded as exceptional. In most cases, on the contrary, the task is determined by informal, *ad hoc* mutual agreement.

(5) In connexion with the task and the extent of the powers of a special mission, the question also arises whether its existence encroaches upon the competence of the regular diplomatic mission of the sending State accredited to the other party. It is generally agreed that the permanent mission retains its competence, even during the existence of the special mission, to transmit to the other contracting party, to which it is accredited, communications from its Government concerning, *inter alia*, the limit of the special mission's powers and, if need be, the complete or partial revocation of the full powers given to it or the decision to break off or suspend the negotiations; but all such actions can apply only to future acts of the special mission. The question of the parallel existence of permanent and special missions, and the problem of overlapping authority, are of considerable importance for the validity of acts performed by special missions. Some members of the Commission held that, during the existence of the special mission, its task is assumed to be excluded from the competence of the permanent diplomatic mission. The Commission decided to draw the attention of Governments to this point and to ask them to decide whether or not a rule on the matter should be included in the final text of the articles, and if so to what effect.

(6) If the special mission's activity or existence comes to an end, the full competence of the permanent diplomatic mission is usually restored, even with respect to matters relating to the special mission's task, except in cases where

special missions have been given exclusive competence, by treaty, to regulate relations in respect of certain matters between the States concerned.

Article 3.²⁹ Appointment of the head and members of the special mission or of members of its staff

Except as otherwise agreed, the sending State may freely appoint the head of the special mission and its members as well as its staff. Such appointments do not require the prior consent of the receiving State.

Commentary

(1) In regard to the head of the special mission, the text of article 3 differs from the rule in article 4 of the Vienna Convention on Diplomatic Relations. Whereas the head of a permanent diplomatic mission must receive the *agrément* of the receiving State, as a general rule no *agrément* is required for the appointment of the head of a special mission. In regard to the members and staff of the special mission, article 3 is based on the idea expressed in the first sentence of article 7 of the Vienna Convention on Diplomatic Relations: that the sending State may freely appoint them.

(2) The Commission notes that, in State practice, consent to the sending and receiving of a special mission does not ordinarily imply acceptance of its head, members or staff. The Commission does not share the view that the declaration of acceptance of the persons forming the special mission should be included in the actual agreement to receive the mission; it considered that consent to receive a special mission and consent to the persons forming it are two distinct matters.³⁰

(3) The proposition that no *agrément* or prior consent shall be required for the head, members or staff of a special mission in no way infringes the sovereign rights of the receiving State. Its sovereign rights and interests are safeguarded by article 4 (persons declared *non grata* or not acceptable).

(4) In practice, there are several ways in which, in the absence of prior agreement, the receiving State can limit the sending State's freedom of choice. The following instances may be quoted:

(a) Consent can be given in the form of a visa issued in response to a request from the sending State indicating the purpose of the journey, or in the form of acceptance of the notice of the arrival of a specific person on a special mission.

(b) The receiving State can express its wishes with regard to the level of the delegations.

(c) In practice the formal or informal agreement concerning the sending and reception of a special mission sometimes includes a clause specifically designating the person or persons who will form the special mission.

²⁹ Introduced as article 3 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 760th meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

³⁰ For the contrary view, see *Yearbook of the International Law Commission, 1960*, vol. II, pp. 112-117.

²⁸ See chapter II of this report.

In this case the sending State cannot make any changes in the composition of the special mission without the prior consent of the State to which it is being sent. In practice all that is done is to send notice of the change in good time, and in the absence of any reaction, the other party is presumed to have accepted the notice without any reservation.

(5) In some cases, although less frequently, it is stipulated in a prior agreement that the receiving State must give its consent. This occurs primarily where important and delicate subjects are to be dealt with through the special mission, and especially in cases where the head of the mission and its members must be eminent politicians.

(6) The question arises whether the receiving State is recognized as having the right to make acceptance of the person appointed conditional upon its own consent. In this case it sometimes happens that the State which raises the objection asks to be consulted on the selection of the person. Its refusal does not mean that it considers the person proposed *persona non grata*, being of an objective and procedural rather than a personal nature, although it is difficult to separate these two aspects in practice. The Commission considers that this is not the general practice and that provision for such a situation should be made in a special agreement.

(7) The head of the special mission and its members are not in practice designated by name in the prior agreement, but in certain cases an indication is given of the qualifications they should possess. This applies either to meetings at a specific level (e.g., meetings of Ministers for Foreign Affairs or of other eminent persons) or to missions which must be composed of specially qualified experts (e.g., meetings of hydraulic engineers or other experts). In such cases, the special mission is regularly composed if its head and its members possess certain qualifications or hold certain posts, and thus the sending State is subject to certain restrictions with respect to the selection and the composition of its special mission. Even though this is a widespread practice, the Commission considered that there was no need to include a rule to that effect in article 3, but that the situation was already covered by the proviso "except as otherwise agreed".

(8) The Commission also took into consideration the practice whereby certain States (by analogy with the provision contained in the last sentence of article 7 of the Vienna Convention on Diplomatic Relations) require prior consent in the case of members of the armed forces and persons of similar standing. The Commission considers that this rule is out of date and not universally applied.

Article 4.³¹ Persons declared *non grata* or not acceptable

1. The receiving State may, at any time and without having to explain its decision, notify the sending State that the head or any other member of the special mission or a member of its staff is *persona non grata* or not acceptable.

2. In any such case, the sending State shall either recall the person concerned or terminate his functions with the special mission. If the sending State refuses to carry out this obligation, the receiving State may refuse to recognize the person concerned as the head or a member of the special mission or as a member of its staff.

Commentary

(1) The text of article 4 follows article 9 of the Vienna Convention on Diplomatic Relations.

(2) Whether or not the receiving State has accepted the mission, it unquestionably has the right to declare the head or a member of a special mission or a member of the mission's staff *persona non grata* or not acceptable at any time. It is not obliged to state its reasons for this decision.³²

(3) It may be added that, in practice, a person is seldom declared *persona non grata* or not acceptable if the receiving State has already signified its acceptance of a particular person; but the majority of the Commission takes the view that even in that case the receiving State is entitled to make such a declaration. Nevertheless, the receiving State very rarely takes advantage of this prerogative; but in practice it may sometimes inform the sending State, through the regular diplomatic channel, that the head or a certain member of the special mission, even though consent has already been given to his appointment, represents an obstacle to the fulfilment of the mission's task.

(4) In practice, the right of the receiving State to declare the head or a member of the special mission *persona non grata* or not acceptable is not often exercised inasmuch as such missions are of short duration and have specific tasks. Nevertheless, instances do occur. In one case, the head of a special mission sent the minister of the receiving State a letter considered offensive by that State, which therefore announced that it would have no further relations with the writer. As a result, the activities of the special mission were virtually paralysed, and the sending State was obliged to recall the head of the special mission and to replace him.

(5) Where the meetings with the special mission are to be held at a specific level, or where the head or the members of the mission are required to possess certain specific qualifications and no other person in the sending State possesses such qualifications, it must be presumed that in practice the person concerned cannot be declared *persona non grata* or not acceptable, and that the only course is to break off the conversations, since the sending State is not in a position to choose among several persons with the necessary qualifications. The receiving State cannot, for instance, ask the sending State to change its Minister for Foreign Affairs because he is regarded as *persona non grata*, for that would constitute interference in the domestic affairs of the sending State. Nevertheless, it is under no obligation to enter into contact with an undesirable person, if it considers that refusal to do so is more advantageous to it than the actual contact with the other State. This, however, is not a juridical question, and the Commission therefore decided not to deal with this situation or to regulate it in the text of the article.

³¹ Introduced as article 4 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 760th meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

³² This was also the opinion of the International Law Commission in 1960. See *Yearbook of the International Law Commission, 1960*, vol. II, pp. 112-115 and p. 180.

Article 5.⁸³ Sending the same special mission to more than one State

A State may send the same special mission to more than one State. In that case the sending State shall give the States concerned prior notice of the sending of that mission. Each of those States may refuse to receive such a mission.

Commentary

(1) There is no corresponding provision in the Vienna Convention on Diplomatic Relations.

(2) The International Law Commission scarcely considered this question in 1960, and it has been given scant attention in the literature. At that time the majority of the Commission took the view that it was completely unnecessary to make provision for the matter, and the previous Special Rapporteur, Mr. Sandström, believed that the question did not arise at all.⁸⁴ Mr. Jiménez de Aréchaga, however, expressed the view on that occasion that the situation envisaged was by no means unusual. He pointed out that special missions were sent to a number of neighbouring States when changes of government took place in the sending States and on ceremonial occasions.⁸⁵ Subsequently studies have shown that cases of special missions being sent to more than one State occur in practice.

(3) Observations of practice indicate that there are two cases in which the problem of the appointment of a special mission to more than one State clearly arises. They are the following:

(a) Where the same special mission, with the same membership and the same task, is sent to several States, which are usually neighbours or situated in the same geographical region. In the case of political missions (e.g., goodwill missions), there have been instances of States refusing to enter into contact with a mission appointed to several other States with which they did not enjoy good relations. Thus the question is not simply one of relations between the sending and receiving States, but also of relations between the States to which the special mission is sent. Although this raises a political issue, it is tantamount, from the juridical standpoint, to a proviso that where special missions are sent to more than one State, simultaneously or successively, consent must be obtained from each of the States concerned.

(b) Although, according to the strict rule, a special mission is appointed individually, either simultaneously or successively, to each of the States with which contacts are desired, certain exceptions arise in practice. One custom is that known as circular appointment, which—rightly, in the view of the Commission—is considered discourteous by experts in diplomatic protocol. In this

case a special mission or an itinerant envoy is given full powers to visit more than one country, or a circular note is sent to more than one State informing them of the intention to send a special mission of this kind. If the special mission is an important one, the general practice is to lodge a protest against this breach of courtesy. If the special mission is sent to obtain information regarding future technical negotiations, the matter is usually overlooked, although it may be observed that such special missions are placed on the level of a commercial traveller with general powers of agency. A distinction must be made between this practice of so-called circular appointment and the case of a special mission authorized to conduct negotiations for the conclusion of a multilateral convention which is not of general concern. In this case its full powers may consist of a single document accrediting it to all the States with which the convention is to be concluded (e.g., the Bulgarian-Greek-Yugoslav negotiations for a settlement of certain questions connected with their common frontier).

(4) It should also be mentioned that, in practice, a special mission of the kind referred to in paragraph 3 (a) above, having been accepted in principle, sometimes finds itself in the position of being requested, because of the position it has adopted during its contacts with the representatives of the first State visited, to make no contact with another specific State to which it is being sent. This occurs particularly in cases where it is announced that the special mission has granted the first State certain advantages which are contrary to the interests of the second State. The latter may consider that the matter to be dealt with has been prejudged, and may announce that the special mission which it had already accepted has become pointless. This is not the same as declaring the head and members of the mission *persona non grata*, since in this case the refusal to accept them is based not on their subjective qualities but on the objective political situation created by the special mission's actions and the position taken by the sending State. It is, as it were, a restriction of diplomatic relations expressed solely in the revocation of the consent of the receiving State to accept the special mission. This clearly demonstrates the delicacy of the situation created by the practice of sending the same special mission to more than one State.

(5) The Commission found that in this case the sending State is required to give prior notice to the States concerned of its intention to send such a special mission to more than one State. This prior notice is needed in order to inform the States concerned in due time not only of the task of a special mission but also of its itinerary. This information is deemed necessary in order to enable the States concerned to decide in advance whether they will receive the proposed special mission. The Commission stressed that it was essential that the States so notified should be entitled only to state their position on the receivability of the special mission, and not to request that such a mission should not be sent to another State as well.

⁸³ Introduced as article 5 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 761st meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

⁸⁴ *Yearbook of the International Law Commission, 1960*, vol. II, p. 109 and p. 180.

⁸⁵ *Ibid.*, p. 116.

Article 6.³⁶ Composition of the special mission

1. The special mission may consist of a single representative or of a delegation composed of a head and other members.

2. The special mission may include diplomatic staff, administrative and technical staff and service staff.

3. In the absence of an express agreement as to the size of the staff of a special mission, the receiving State may require that the size of the staff be kept within limits considered by it to be reasonable and normal, having regard to circumstances, to the tasks and to the needs of the special mission.

Commentary

(1) The text of article 6, paragraphs 2 and 3, adopted by the Commission is based on article 1 (c) and article 11, paragraph 1, of the Vienna Convention on Diplomatic Relations. The text of paragraph 1 of article 6 reflects the special features of the institution of special missions.

(2) In practice, a special mission may be composed of only one member or of several members. If the special mission is entrusted to only one member, the latter is then a special delegate, described by the Commission in article 6 as a "representative". If it has two members, the sending State decides which of the two will be the head or first delegate. If the special mission consists of three or more members, the rule observed in practice is that a head of the mission (chairman of the delegation) should be designated.

(3) Precedence within the delegation is fixed, according to general practice, by the sending State, and is communicated to the receiving State or published in the manner normally adopted with respect to multilateral meetings. Neither the rank of the delegates according to the protocol of the sending State nor the title or function of the individual delegates authorizes *ex jure* any automatic change in the order of precedence established in the list communicated, without subsequent communication of an official rectification to the receiving State. However, according to international custom, a member of the Government takes precedence over other officials, and the head of delegation must not have lower diplomatic rank than the members of the delegation; but, as this custom is not observed in all cases and is not regarded as obligatory, it is not reflected in the text.

(4) In practice a special mission may include, in addition to the head, his deputy, the other titular members and their deputies. The Commission considered that the composition of the special mission and the titles of its members were a matter exclusively within the competence of the sending State and that in the absence of an agreement on it by the parties it was not governed by any international rule. Accordingly, the Commission did not think it necessary to include a rule on it in the article.

³⁶ Introduced as article 6, paragraphs 1 and 4 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 761st meeting of the Commission. Drafting Committee's text discussed and adopted at the 773rd meeting.

(5) Whether a special mission is composed of a single representative or of a delegation, it may be accompanied by the necessary staff. The Commission accepted the designation of the staff set out in article 1 (c) of the Vienna Convention on Diplomatic Relations, but pointed out that the staff of special missions often includes specific categories such as advisers and experts. The Commission considered that these were included in the category of diplomatic staff.

(6) In practice, even in special missions the problem of limiting the size of the mission arises. The rule relating to permanent missions is contained in article 11 of the Vienna Convention on Diplomatic Relations and the text of article 6, paragraph 3, proposed by the Commission is based on that rule.

(7) With regard to the limitation of the size of the special mission, attention should be drawn not only to the general rule, but also to certain particular cases which occur in practice. On this point:

(a) It is customary for the receiving State to notify the sending State that it wishes the size of the mission to be restricted because, for example, the housing, transport and other facilities it can offer are limited.

(b) Less frequently, in practice, the agreement on the establishment or reception of the special mission limits the size of the mission; in some cases the agreement specifies a minimum number of members (joint meetings) and even calls for a mission specifically composed of members having stated qualifications (generally according to the problems to be treated).

(c) With respect to the size of the mission- attention should also be drawn to the practice of "balancing rank". It is customary, during preliminary conversations and negotiations on the sending and receiving of a mission, to designate the rank and status of the head and members of the special mission, so that the other party may act accordingly and thus avoid any disparity, for if representatives were received by a person of lower rank than their own, it might be considered an affront to their country. This, however, is a question of protocol rather than of law.

Article 7.³⁷ Authority to act on behalf of the special mission

1. The head of the special mission is normally the only person authorized to act on behalf of the special mission and to send communications to the receiving State. Similarly, the receiving State shall normally address its communications to the head of the mission.

2. A member of the mission may be authorized either by the sending State or by the head of the special mission to replace the head of the mission if the latter is unable to perform his functions, and to perform particular acts on behalf of the mission.

³⁷ Introduced as article 6, paragraphs 2 and 3 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 761st meeting of the Commission. Drafting Committee's text, numbered 6A, discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

Commentary

(1) Article 7 is not derived directly from the Vienna Convention on Diplomatic Relations. Its text was drawn up on the basis of contemporary international practice.

(2) The main question from the legal point of view is to determine the rules concerning authority to act on behalf of the special mission. Only the head of a special mission is normally authorized to act on behalf of the special mission and to address communications to the receiving State. The Commission laid stress on the word "normally", as the parties may also make provision for other persons than its head to act on behalf of a special mission. These other possibilities are, however, exceptional.³⁸

(3) *Head of the special mission.* As explained in the commentary on the preceding article, if the mission is composed of three or more members, it must as a general rule have a head. If it is composed of only two members, the sending State decides whether one shall bear the title of first delegate or head of the special mission. Whether he is called first delegate or head of mission, he will be regarded as the head of the special mission by the receiving State, which will communicate with him and receive from him statements on behalf of the special mission. For this reason, the question of the existence of a head of mission is one of great importance, notwithstanding the fact that the International Law Commission did not deal with it in 1960. Mr. Jiménez de Aréchaga, on the other hand, considers that in practice a special mission has a head, but he does not go further into the question.³⁹ In the Commission's opinion, as expressed at its sixteenth session, the matter of the appointment of a head of the special mission is important from the legal standpoint.

(4) In article 7, paragraph 1, the Commission established a mere presumption that the head of the special mission is the person who gives any authorizations that may be required, but the sending State may in addition authorize the other members of the special mission to act on its behalf by giving them full powers. There are in practice instances of special missions whose members are delegates with equal rights under collective letters of credence for performing the tasks assigned to the special mission. Practice is not, however, uniform. Some States hold that the person mentioned first in the letters of credence issued to the special mission is its head. Others, particularly States which send delegations, claim equal rights for all members of such delegations. A common example is a mission composed of several members of a coalition government or of members of parliament representing various political groups. The advocates of the *in corpore* concept of equal rank argue that the composition of the delegation is a manifestation of the common outlook and the equal standing of the members of the delegation. The practice is not uniform.

(5) There are also instances in practice where the right to act on behalf of a special mission is held to vest only in some of its members who possess a collective authority (for the head and certain members of the mission to act

collectively on its behalf) or a subsidiary authority (for a member of a mission to act on its behalf if the head of the mission is unable to perform his functions or if he authorizes him to do so). The Commission considers that these are exceptional cases falling outside normal practice and are determined by the practice of the sending State. It considered that there was no need to include rules covering such cases in the body of the article.

(6) The Commission did not cover in article 7, paragraph 1, the problem of the limits of the authority given to special missions. That is a question governed by the general rules.

(7) *Deputy head of special mission.* In speaking of the composition of the special mission, it was said that sometimes a deputy head of mission was also appointed. The deputy's function is indicated by the fact that he is designated by the organ of the sending State which also appointed the head of the special mission, and that as a general rule the deputy head (who in practice is often called the vice-chairman of the delegation) acts without special appointment as head of the special mission whenever and wherever the head of mission is absent, unable to carry out his functions or recalled (in the last case, until the appointment of a new head has been notified to the other party). From the international standpoint, the rank of the deputy head in the special mission is considered to be next below that of the head of the mission. However, the deputy head does not take precedence of the members of the missions of other States with which his delegation enters into contact. His status as deputy head is effective only when he acts as head. The position of the deputy head of a special mission is referred to in article 7, paragraph 2.

(8) From the technical standpoint, a member of the special mission whom the head of the mission himself has designated as his deputy (i.e., the administrator of the mission) is not in practice regarded as the deputy head. The Commission did not, however, differentiate between these two classes of deputy head; it regarded them both as having the same status.

(9) *Chargé d'affaires ad interim of a special mission.* Very frequently the special mission arrives without its head or deputy head, that is to say, before them, since contact must be established and affairs conducted before their arrival. There may also be occasions when both its head and deputy head are absent during the course of its activities. In this case, a member of the mission provisionally assumes the duties of head of mission, acting on behalf of the head if the latter has so provided. The International Law Commission did not study this problem in 1960 and did not suggest that the rules of diplomatic law relating to *chargés d'affaires ad interim* should apply, in this connexion, to special missions.⁴⁰

(10) When a member of the mission is designated as *chargé d'affaires ad interim*, the rule in practice is for the appointment of the person to be entrusted with this function to be notified by the regular diplomatic mission

³⁸ See paragraphs 4-11 of this commentary.

³⁹ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 116 and 179-180.

⁴⁰ *Ibid.*, pp. 110 and 179-180. Mr. Sandström, the Special Rapporteur, was even of the opinion that this had no bearing on special missions.

of the sending State. This often occurs if the head of the mission is recalled "tacitly", if he leaves his post suddenly (as frequently happens when he returns to his country to get new instructions and remains there for some time) or if the mission arrives at its destination without its head and without his having given authorization in writing to the presumptive chargé d'affaires. The Commission regarded the position of such a person as comparable to that of an acting deputy and it provided that authority for him to carry out his duties could be given either by the sending State or by the head of the special mission.

(11) In the case of special missions dealing with a complex task, certain members of the special mission or of its staff are in practice given power to carry out specific acts on behalf of the special mission. The Commission considered this practice to be important from the legal point of view and it included a rule on the subject in the text (paragraph 2, *in fine*).

(12) The Commission takes the view that the rules applicable to the head of the special mission also apply to a single delegate, described in the text of article 6 as the "representative".

Article 8.⁴¹ Notification

1. The sending State shall notify the receiving State of:

(a) The composition of the special mission and of its staff, and any subsequent changes;

(b) The arrival and final departure of such persons and the termination of their functions with the mission;

(c) The arrival and final departure of any person accompanying the head or a member of the mission or a member of its staff;

(d) The engagement and discharge of persons residing in the receiving State as members of the mission or as private servants of the head or of a member of the mission or of a member of the mission's staff.

2. If the special mission has already commenced its functions, the notifications referred to in the preceding paragraph may be communicated by the head of the special mission or by a member of the mission or of its staff designated by the head of the special mission.

Commentary

(1) Article 8 is modelled on article 10, paragraph 1, of the Vienna Convention on Diplomatic Relations, with the changes required by the special features of the institution of special missions.

(2) In the case of special missions, too, the question arises to what extent the sending State is obliged to notify the composition of the special mission and the arrival and departure of its head, members and staff. As early as 1960, the International Law Commission adopted the position that in this respect the general rules on notification relating to permanent diplomatic missions are valid for special missions.⁴²

⁴¹ Introduced as article 7 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

⁴² *Yearbook of the International Law Commission, 1960*, vol. II, pp. 113 and 179-180.

(3) In practice, however, the notification is not identical with that effected in the case of permanent diplomatic missions. In the first place, notification of the composition of a special mission usually takes place in two stages. The first is the preliminary notice, i.e., an announcement of arrival. This preliminary notice of the composition of the special mission should contain brief information concerning the persons arriving in the special mission and should be remitted in good time, so that the competent authorities of the receiving State (and the persons who, on its behalf, will maintain contact) are kept informed. The preliminary notice may in practice be remitted to the Ministry of Foreign Affairs of the receiving State or to its permanent diplomatic mission in the sending State. The second stage is the regular notification given through the diplomatic channel, i.e., through the permanent mission in the receiving State (in practice, the special mission itself gives this notification directly only if the sending State has no permanent mission in the receiving State and there is no mission there of a third State to which the sending State has entrusted the protection of its interests). The Commission has not indicated these two stages of notification in the text, but has merely laid down the duty of the sending State to give the notification.

(4) Consequently, there are in practice certain special rules for notification of the composition and arrival of a special mission. They arise from the need to inform the receiving State in a manner different from that used for permanent missions. The International Law Commission did not refer to this fact in 1960.

(5) On the other hand, it is not customary to give separate notifications of the special mission's departure. It is presumed that the mission will leave the receiving State after its task has been fulfilled. However, it is customary for the head and members of the special mission to inform the representatives of the receiving State with whom they are in contact verbally, either during the course of their work or at the end of their mission, of the date and hour of their departure and the means of transport they propose to use. The Commission took the view that even in this case a regular notification should be given.

(6) A separate question is whether a head or member of a special mission who remains in the territory of the receiving State after his official mission has ended but while his visa is still valid should give notice of his extended stay. Opinion is divided on this question, and the answer depends on the receiving State's general laws governing aliens. If an extended stay of this kind does occur, however, it is an open question at what point of time the official stay becomes a private stay. Courtesy demands that the situation should be treated with some degree of tolerance. The Commission considers it unnecessary to include provisions governing this case in the text of the article.

(7) The right to recruit auxiliary staff for special missions locally is in practice limited to the recruitment of auxiliary staff without diplomatic rank or expert status, persons performing strictly technical functions (e.g., chauffeurs), and service staff. The rule observed in practice is that the receiving State should ensure the availability of such

services, for the performance of the functions of the special mission is often dependent on them. In 1960 the International Law Commission inclined to the view that the availability of these services to special missions should be regarded as part of their general privileges. However, the receiving State is entitled to information on any local recruitment by special missions and, in the Commission's view, the latter must see that the authorities of the receiving State are kept regularly informed concerning the engagement and discharge of such staff, although all engagements of this kind, like the special mission itself, are of limited duration.

(8) In order to make notification easy and flexible in practice, the special mission, as soon as it begins to discharge its functions, effects notification direct, and not necessarily through the permanent diplomatic mission. The Commission has found this a sensible custom and has included a rule to that effect in the text of article 8, paragraph 2.

Article 9.⁴³ General rules concerning precedence

1. Except as otherwise agreed, where two or more special missions meet in order to carry out a common task, precedence among the heads of the special missions shall be determined by alphabetical order of the names of the States.
2. The precedence of the members and the staff of the special mission shall be notified to the appropriate authority of the receiving State.

Commentary

(1) The question of precedence among the heads of special missions arises only when several special missions meet, or when two missions meet on the territory of a third State. In practice, the rules of precedence among the heads of permanent diplomatic missions are not applied. The Commission did not consider that precedence among the heads of special missions should be governed by the provisions of the Vienna Convention, which are based on the presentation of credentials or on the date of arrival and on classes of heads of permanent missions—institutions irrelevant to special missions.

(2) The question of rank does not arise when a special mission meets with a delegation or organ of the receiving State. In practice, the rules of courtesy apply. The organ or delegation of the receiving State pays its compliments to the foreign special mission and the mission pays its respects to its hosts, but there is no question of precedence, properly so-called. The Commission has not dealt with this situation in the text of the articles, since it considers the rules of courtesy sufficient.

(3) The Commission believes that it would be wrong to include a rule that the order of precedence of heads of special missions should be determined by the diplomatic rank to which their titles would assign them under the general rules on classes of heads of permanent missions.

(4) Of particular significance is the fact that many heads of special missions have no diplomatic rank, and that heads of special missions are often personalities standing above all diplomatic rank. Some States make provision for such cases in their domestic law and in their practice, and give precedence to ministers who are members of the cabinet and to certain other high officials.

(5) The Commission wishes to stress that the rules of article 9 are not valid with respect to special missions having ceremonial or formal functions. This question is dealt with in article 10.

(6) The Commission considers that the rank of heads of special missions should be determined on the basis of the following considerations. Although in the case of *ad hoc* ceremonial diplomacy the heads of special missions are still divided into diplomatic classes (e.g., special ambassador, special envoy), the current practice is not to assign them any special diplomatic title. All heads of special missions represent their States and are equal among themselves in accordance with the principle of the equality of States.

(7) The International Law Commission did not take up this question in 1960. During the Commission's debates in 1960, however, Mr. Jiménez de Aréchaga expressed the view that the rules on classes of heads of missions applied equally to special missions, and he did not restrict that conclusion to ceremonial missions.⁴⁴

(8) The practice developed in relations between States since the formation of the United Nations ignores the division of heads of special missions into classes according to their ranks, except in the case of ceremonial missions.

(9) There are two views concerning precedence among heads of special missions. According to the first, the question of rank does not arise with special missions. This follows from the legal rule laid down by article 3 of the Regulation of Vienna of 19 March 1815. This provides that diplomatic agents on special mission shall not by this fact be entitled to any superiority of rank. Genet⁴⁵ deduces from this rule that they have no special rank by virtue of their mission, although they do have diplomatic status. However, Satow⁴⁶ takes a different view. Although the heads of special missions are not ranked in the same order as the heads of the permanent diplomatic missions, there does exist an order by which their precedence can be established. This, says Satow, is an order *inter se*. It is based on their actual diplomatic rank; and where they perform identical functions, precedence among them is determined on the basis of the order of presentation of their credentials or full powers.

(10) In his 1960 proposal,⁴⁷ Mr. A. E. F. Sandström, Special Rapporteur of the International Law Commission, took the view that although, under the Regulation of Vienna, a special mission enjoys no superiority of rank,

⁴³ *Yearbook of the International Law Commission, 1960*, vol. II, p. 116.

⁴⁴ Raoul Genet, *Traité de diplomatie et de droit diplomatique*, Paris, 1931, vol. I, p. 86.

⁴⁵ Sir Ernest Satow, *A Guide to Diplomatic Practice*, 4th edition, London, 1957, p. 41.

⁴⁶ *Yearbook of the International Law Commission, 1960*, vol. II, p. 109.

⁴⁷ Introduced as article 8 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

the heads of special missions, at least ceremonial missions, nevertheless rank among themselves according to the order of the presentation of their credentials. Yet while advancing this opinion in the preliminary part of his report, he limited himself in his operative proposal (alternative I, article 10, and alternative II, article 3) to inserting the negative provision that the head of a special mission should not, by such position only, be entitled to any superiority of rank.

(11) Mr. Sandström took as his starting point the idea that rank was defined by membership in the diplomatic service or by diplomatic category. He therefore made a distinction between diplomatic missions, missions regarded as being diplomatic, and technical missions, which were not of a diplomatic character.

(12) In the first place, the Commission, at its sixteenth session, held that it is not true that the person heading a special diplomatic mission of a political character will necessarily be a member of the diplomatic service and have diplomatic rank. Such missions may be headed by other persons, so that diplomatic rank is a very unreliable criterion. Why should a high official of the State (for example, a member of the Government) necessarily be ranked lower than a person bearing the title of ambassador? This would be incompatible with the current functional conception of diplomacy. On the other hand, it is considered that it would be erroneous to classify heads of mission having diplomatic rank according to their titles (for example, ambassador and minister plenipotentiary). They are all heads of diplomatic missions and have the same authority to represent their sovereign States, which, under Article 2 of the United Nations Charter, enjoy the right to sovereign equality. It follows that precedence *inter se* cannot be determined on the basis of diplomatic rank, at least in so far as juridical treatment is concerned (this does not affect the matter of courtesy towards the head of the special mission).

(13) Secondly, the Commission discarded the idea that different principles apply to so-called technical missions. Such missions are today usually headed by a career diplomat, and the task of every technical mission includes some political and representative elements.

(14) Again, precedence can hardly be established according to the order of the presentation of credentials by the heads of special missions. At most meetings of special missions the presumption, consistent with the facts, is that they arrive simultaneously,⁴⁸ and the individual and ceremonial presentation of credentials is a distinct rarity. For this reason, the date of presentation is without significance in practice.

(15) Precedence among heads of special missions, limited as it is in its effect to their relations *inter se*, is important only in the case of a multilateral meeting or of contacts among two or three States, not counting the receiving State. In contacts between the special mission and the representatives of the receiving State alone, the question of precedence does not arise: as a matter of courtesy the

host treats its guest with high consideration, and the latter is obliged to act in the same manner towards its host.

(16) The Commission considers that as a result, first, of the change which has taken place in the conception of the character of diplomacy, especially the abandonment of the theory of the exclusively representative character of diplomacy and the adoption of the functional theory,⁴⁹ and secondly, of the acceptance of the principle of the sovereign equality of States, the legal rules relating to precedence among heads of special missions have undergone a complete transformation. The principles of the Regulation of Vienna (1815) are no longer applicable. No general principle can be inferred, on the basis of analogy, from the rules of precedence governing permanent missions. For this reason, more and more use is being made of an automatic method of determining the precedence of heads of special missions, namely, the classification of delegates and delegations according to the alphabetical order of the names of the participating States. In view of the linguistic differences in the names of States, the custom is also to state the language in which the classification will be made.⁵⁰ This is the only procedure which offers an order capable of replacing that based on rank, while at the same time ensuring the application of the rules on the sovereign equality of States.⁵¹

(17) The International Law Commission did not go into the question of precedence within a special mission. It believes that each State must itself determine the internal order of precedence among the members of the special mission and that this is a matter of protocol only, the order of precedence being sent to the receiving State by the head of the special mission either direct or through the permanent diplomatic mission. This rule forms the subject of article 9, paragraph 2.

(18) The Commission also believes that there are no universal legal rules determining the order of precedence as between members of different special missions, or as between them and members of permanent diplomatic missions, or as between them and the administrative officials of the receiving State.

(19) It frequently happens that special missions meet in the territory of a third State which is not involved in their work. In this case it is important to the receiving State that the precedence of the heads of the special missions, or rather of the missions themselves, should be fixed, so that it does not, as host, run the risk of favouring one of them or of being guided by subjective considerations in determining their precedence.

⁴⁸ This cumulation of the functional and the representative character is confirmed by the fourth paragraph of the Preamble and by article 3 of the Vienna Convention on Diplomatic Relations.

⁴⁹ Mr. Sandström too used this method in dealing with the question of the participation of *ad hoc* diplomats in congresses and conferences (chap. II, art. 6).

⁵¹ In order to bring the practice further into line with the principle of equality, it is now customary for lots to be drawn, the initial letter of the name of the State thus chosen indicating the beginning of the *ad hoc* alphabetical order. At United Nations meetings and meetings organized by the United Nations, lots are drawn at the opening of the session, to assign seats to the participating States for the duration of the session and whenever a roll-call vote is taken.

⁴⁸ Thus, Jiménez de Aréchaga; see *Yearbook of the International Law Commission, 1960*, vol. II, p. 116, para. 13.

(20) A brief comment must be made on the question of the use of the alphabetical order of names of States as a basis for determining the order of precedence of special missions. At the present time, the rule in the United Nations and in all the specialized agencies, in accordance with the principle of the sovereign equality of States, is to follow this method. While considering it to be the most correct one, the Commission concedes that the rule need not be strictly interpreted as requiring the use of the alphabetical order of the names of States in a specified language—English, for example. Some experts have drawn attention to the possibility of applying the same method but on the basis of the alphabetical order of names of States used in the official diplomatic list of the receiving State. The important thing is that the system applied should be objective and consistent with the principle of the sovereign equality of States. For this reason, the Commission adopted the principle of the alphabetical order of the names of States. The members of the Commission were divided on the question whether the order adopted should be that used by the United Nations or that used in the official diplomatic list of the receiving State.

(21) The Commission considers that everything stated in this article with regard to heads of special missions is also applicable to single representatives.

Article 10.⁵² Precedence among special ceremonial and formal missions

Precedence among two or more special missions which meet on a ceremonial or formal occasion shall be governed by the protocol in force in the receiving State.

Commentary

(1) The Vienna Convention on Diplomatic Relations confines itself to provisions concerning permanent diplomatic missions and does not take into account either special missions or diplomatic ceremonial and formal missions, which have continued to exist in practice even after the establishment of permanent resident diplomacy, and continue to exist to this day.

(2) The Commission observed that the rules governing special ceremonial and formal missions vary from State to State. The question arises whether a selection should be made among the different customs, or whether the rule universally observed in practice should be adopted, namely, that the receiving State is competent to settle the order of precedence among special missions meeting on its territory on the occasion of a ceremony or a formal manifestation. The Commission favoured the second proposal.

(3) The different customs practiced include the following:

(a) On such occasions the representatives of States customarily bear the title of special ambassadors extraordinary. Even a regularly accredited ambassador, when assigned to represent his country on a ceremonial occa-

sion, is given the title of *ad hoc* ambassador. This is regarded as a point of international courtesy.

(b) In accordance with the established interpretation of article 3 of the Regulation of Vienna of 1815, the *prior tempore* rule is held to apply even to these ambassadors, who should take precedence in the order of the time of presentation of the letters of credence issued for the *ad hoc* occasion. In practice, however, it has proved almost impossible to implement this rule. The funeral of King George VI of Great Britain was a case in point. A number of special missions were unable, for lack of time, to present their letters of credence, or even copies of them, to the new Queen before the funeral ceremony. Moreover, several missions arrived in London simultaneously, so that the rule providing for the determination of precedence according to the order of arrival was also inapplicable. For this reason, it was maintained that it would be preferable to select another criterion, more objective and closer to the principle of the sovereign equality of States, while retaining the division of heads of special missions into classes.

(c) It is becoming an increasingly frequent practice to send special delegates of higher rank than ambassador to be present on ceremonial occasions. Some countries consider that to give them the title of *ad hoc* ambassador would be to lower their status, for it is increasingly recognized that Heads of Government and ministers rank above all officials, including ambassadors. In practice, the domestic laws of a number of countries give such persons absolute precedence over diplomats.

(d) However, persons who do not belong to the groups mentioned in subparagraph (a) above are also sent as special *ad hoc* ambassadors, but are not given diplomatic titles because they do not want them. Very often these are distinguished persons in their own right. In practice there has been some uncertainty as to the rules applicable to their situation. One school of thought opposes the idea that such persons also take precedence over *ad hoc* ambassadors; and there are some who agree with the arguments in favour of this viewpoint, which are based on the fact that, if the State sending an emissary of this kind wishes to ensure that both the head of the special mission and itself are given preference, it should appoint him *ad hoc* ambassador. Any loss of precedence is the fault of the sending State.

(e) In such cases, the diplomatic status of the head of the special mission is determined *ad hoc*, irrespective of what is called (in the French texts) the *rang diplomatique réel*. The title of *ad hoc* ambassador is very often given, for a particular occasion, either to persons who do not belong to the diplomatic career service or to heads of permanent missions who belong to the second class. This fact should be explicitly mentioned in the special letters of credence for ceremonial or formal occasions.

(f) The issuance of special letters of credence covering a specific function of this kind is a customary practice. They should be in good and due form, like those of permanent ambassadors, but they differ from the latter in their terms, since the mission's task is strictly limited to a particular ceremonial or formal function.

⁵² Introduced as article 9 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

The issuance of such letters of credence is regarded as an international courtesy, and that is why heads of permanent diplomatic missions are expected to have such special letters of credence.

(g) Great difficulties are caused by the uncertainty of the rules of law concerning the relative rank of the head of a special mission for a ceremonial and formal function and the head of the mission regularly accredited to the Government of the country in which the ceremonial occasion takes place. Under the protocol instructions of the Court of St. James, the heads of special missions have precedence, the heads of regularly accredited diplomatic missions occupying the rank immediately below them, unless they are themselves acting in both capacities on the specific occasion in question. This solution is manifestly correct and is dictated by the very nature of the function, since otherwise it would be utterly pointless to send a special mission.

(h) The situation of the members of a special mission of a ceremonial or formal nature in cases where the members are designated as equals and are given collective letters of credence for the performance of the ceremonial or formal function in question is not precisely known. As stated in paragraph (4) of the commentary on article 7, practice in this matter is not uniform.

(4) Some members of the Commission requested that, despite the Commission's unanimous decision to accept the rule incorporated in article 10, the Special Rapporteur's original text should also be included in the present report for purposes of information.⁵³ This text is as follows:

"1. Where two or more special missions meet on a formal or ceremonial occasion (for example, a marriage, christening, coronation, installation of Head of State, funeral, etc.), precedence among the heads of missions shall be determined in accordance with the class to which each head of mission belongs by virtue of his diplomatic title, and within each class in accordance with the alphabetical order of the names of the States.

"2. Heads of State, members of ruling families, chairmen of councils and ministers who are members of the Government represent special classes having precedence over the class of ambassadors.

"3. Heads of special missions who do not possess the diplomatic rank of ambassador or minister plenipotentiary and who do not belong to the groups specified in paragraph 2 of this article shall constitute, irrespective of the functions they perform, a special group next following that of heads of special missions having the rank of minister plenipotentiary.

"4. The diplomatic title used in determining precedence for the purposes of this article, except in the case of persons mentioned in paragraph 2, shall be that indicated in the credentials issued for the performance of the ceremonial or protocol function.

"5. Heads of regular diplomatic missions shall not be considered to be heads of special missions for ceremonial or formal functions unless they have presented credentials issued specially for this particular purpose.

"6. The rank of the staff of special ceremonial and formal missions shall be determined in accordance with the rank of the heads of mission.

"7. When they appear at the ceremony to which their formal or ceremonial function relates, heads of special missions shall take precedence over the heads of regular diplomatic missions."

This text was communicated to the Commission, but the Commission did not consider it in detail because it had decided in principle to regulate the matter by reference rather than by substantive provisions.

Article 11.⁵⁴ Commencement of the functions of a special mission

The functions of a special mission shall commence as soon as that mission enters into official contact with the appropriate organs of the receiving State. The commencement of its functions shall not depend upon presentation by the regular diplomatic mission or upon the submission of letters of credence or full powers.

Commentary

(1) The Vienna Convention on Diplomatic Relations contains no express provisions on the commencement of the functions of permanent diplomatic missions.

(2) The International Law Commission takes the view that, where the commencement of the functions of a special mission is concerned, the rules applicable to permanent diplomatic missions do not apply.⁵⁵

(3) In practice, this matter is governed by a special usage. The functions of the special mission which have been the subject of prior notice and acknowledgement begin when the special mission arrives in the territory of the receiving State, unless it arrives prematurely—a situation which depends on the circumstances and on the notion of what constitutes a reasonable interval of time. If there has been no prior notice, the functions are deemed to begin when contact is made with the organs of the receiving State. A further point is that, in the case of special missions, the commencement of the function need not be deemed to take place only when copies of the letters of credence or full powers are presented, although this is taken into account in the case of *ad hoc* ambassadors. Heads of special missions in general, even in cases where they must have full powers, do not present either the original or a copy in advance, but only when the time comes to prove their authority to assume obligations on behalf of the sending State. Thus there is a legal difference with respect

⁵⁴ Introduced as article 10 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 774th meeting.

⁵⁵ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 116 and 180.

⁵³ A/CN.4/166, article 9.

to determining when the function commences, as compared with the case of the heads of permanent missions.

(4) Almost all the instructions by States concerning the exercise of functions related to diplomatic protocol are found to contain more rules on the procedure for welcoming a ceremonial *ad hoc* mission when it arrives and escorting it when it leaves than on its reception, which consists of an audience with the Minister for Foreign Affairs to introduce the mission, or the presentation of letters of introduction or copies of credentials. There are even fewer rules on audiences by Heads of State for the presentation of letters of credence. Even if the head of a special mission arrives with special letters of credence addressed to the Head of State, the practice is to present them more expeditiously—i.e., through the Chief of Protocol—and the functions of the mission commence immediately. An example of this custom is the case of an *ad hoc* mission sent to present the condolences of its own Head of State to the Head of State of another country upon the death of his predecessor or of a member of the royal family. In such a case, formal receptions are hardly in order; besides, there is usually little time. Nevertheless, missions of special importance are treated according to the general rules of protocol, both on arrival and when they leave.

(5) Contacts between special missions appointed to conduct political negotiations also generally take place immediately following the so-called protocol visit to the competent official with whom the negotiations are to be held.

(6) In the case of special missions appointed to conduct technical negotiations, it is not the practice to have either a ceremonial reception or a ceremonial presentation of credentials. It is customary, however, to make an introductory visit or, if the parties already know each other, a visit for the purpose of establishing contact. There is a growing tendency to abandon the custom whereby the head of the special mission is accompanied on his first visit by the head of the diplomatic mission permanently accredited to the receiving State, or by some member of that mission, if the head of the special mission or his opposite number who is to receive him is of lower rank than the head of the permanent mission. In practice, however, this formality of introduction is becoming obsolete, and the Commission does not deem it essential.

(7) It should be noted that there is an essential difference between the reception of the head of a special mission and the presentation of his letters of credence or full powers on the one hand and the reception of the heads of permanent mission and the presentation of their credentials on the other. This difference relates, first of all, to the person from whom the full powers emanate, in cases other than that of a special ambassador or an *ad hoc* ceremonial mission. A special ambassador and the head of an *ad hoc* ceremonial mission receive their letters of credence from the Head of State, as do the regular heads of diplomatic missions of the first and second classes, and they are addressed to the Head of the State to which the persons concerned are being sent. This procedure is not necessarily followed in the case of other special

missions. In accordance with a recently established custom, and by analogy to the rules concerning the regularity of credentials in the United Nations, full powers are issued either by the Head of State or of Government or by the Minister of Foreign Affairs, regardless of the rank of the delegate or of the head of the special mission.

(8) Again, this difference is seen in the fact that the letters of credence of the head of a permanent diplomatic mission are always in his name, while this is not so in the case of special missions, where even for a ceremonial mission, the letters of credence may be collective, in the sense that not only the head of the mission, but the other members also are appointed to exercise certain functions (a situation which could not occur in the case of regular missions, where there is no collective accreditation). Full powers may be either individual or collective, or possibly supplementary (granting authority only to the head of the mission, or stipulating that declarations on behalf of the State will be made by the head of the mission and by certain members or by one or more persons named in the full powers, irrespective of their position in the mission). It has recently become increasingly common to provide special missions with supplementary collective full powers for the head of the mission or a particular member. This is a practical solution (in case the head of the mission should be unable to be present throughout the negotiations).

(9) In practice, the members and staff of a special mission are deemed to commence their function at the same time as the head of the mission, provided that they arrived together when the mission began its activities. If they arrived later, their function is deemed to commence on the day of their arrival, duly notified to the receiving State.

(10) It is becoming increasingly rare to accord a formal welcome to special missions when they arrive at their destination, i.e., at the place where the negotiations are to be held. In the case of important political missions, however, the rules concerning reception are strictly observed but this is of significance only from the standpoint of formal courtesy and has no legal effect.

(11) Members of permanent diplomatic missions who become members of a special mission are considered, despite their work with the special mission, to retain their capacity as permanent diplomats; consequently, the question of the commencement of their functions in the special mission is of secondary importance.

(12) In practice States complain of discrimination by the receiving State in the reception of special missions and the way in which they are permitted to begin to function even among special missions of the same character. The Commission believes that any such discrimination is contrary to the general principles governing international relations. It believes that the principle of non-discrimination should operate in this case too; and it requests Governments to advise it whether an appropriate rule should be included in the article. The reason why the Commission has refrained from drafting a provision on this subject is that very often differences in treatment are due to the varying degree of cordiality of relations between States.

Article 12.⁵⁶ End of the functions of a special mission

The functions of a special mission shall come to an end, *inter alia*, upon:

- (a) The expiry of the duration assigned for the special mission;
- (b) The completion of the task of the special mission;
- (c) Notification of the recall of the special mission by the sending State;
- (d) Notification by the receiving State that it considers the mission terminated.

Commentary

(1) The Vienna Convention on Diplomatic Relations contains no rules dealing directly with the end of the functions of permanent diplomatic missions. Its treatment of the subject is limited to one provision on the end of the function of a diplomatic agent (article 43) and the provision concerning the case of the breaking off of diplomatic relations or the recall of the mission (article 45).

(2) In its deliberations in 1960,⁵⁷ the International Law Commission accepted the view that a special mission came to an end for the same reasons as those terminating the functions of diplomatic agents belonging to permanent missions. However, the accomplishment of a special mission's task was added, as a special reason for the termination of its functions.⁵⁸

(3) The Commission accepted the view of the majority of authors that the task of a special mission sent for a ceremony or for a formal occasion should be regarded as accomplished when the ceremony or occasion is over.

(4) In the first proposal he submitted in 1960 as the Commission's Special Rapporteur, Mr. Sandström expressed the opinion that it was desirable also to consider the functions of the special mission ended when the transactions which had been its aim were interrupted. A resumption of negotiations would then be regarded as the commencement of the functions of another special mission. Some authors adopt the same view and consider that in such cases it is unnecessary for the special mission to be formally recalled. The Commission regarded as well-founded the argument that the functions of a special mission are ended, to all practical purposes, by the interruption or suspension *sine die* of negotiations or other deliberations. It considered it preferable, however, to leave it to the sending and receiving States to decide whether they deemed it necessary in such cases to bring the mission to an end by application of the provisions of article 12 (c) and (d).

⁵⁶ Introduced as article 11 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 769th meeting. Commentary adopted at the 774th meeting.

⁵⁷ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 179-180.

⁵⁸ This addition was proposed by Mr. Jiménez de Aréchaga; see *ibid.*, p. 115.

Article 13.⁵⁹ Seat of the special mission

1. In the absence of prior agreement, a special mission shall have its seat at the place proposed by the receiving State and approved by the sending State.

2. If the special mission's tasks involve travel or are performed by different sections or groups, the special mission may have more than one seat.

Commentary

(1) The provision of article 13 is not identical to that contained in the Vienna Convention on Diplomatic Relations (article 12). In the first place, permanent missions must have their seats in the same locality as the seat of the Government. The permanent mission is attached to the capital of the State to which it is accredited, whereas the special mission is usually sent to the locality in which it is to carry out its task. Only in exceptional cases does a permanent mission set up offices in another locality, whereas it frequently occurs that, for the performance of its task, a special mission has to move from place to place and its functions have to be carried out simultaneously by a number of groups or sections. Each group or section must have its own seat.

(2) Very little has been written on this question, and in 1960 the Commission did not consider it necessary to deal with it at length. Its basic thought was that the rules applicable to permanent missions in this connexion were not relevant to special missions and that no special rules on the subject were needed. Some members of the Commission did not entirely agree, however, because the absence of rules on the subject might encourage special missions to claim the right to choose their seat at will and to "open offices in any part of the territory of the receiving State".⁶⁰

(3) In practice, special missions normally remain at the place designated by mutual agreement, which, in most cases, is not formally established by the sending State and the receiving State. Under that agreement the special mission generally establishes its offices near the locality where its functions are to be performed. If the place in question is the capital city of the receiving State and there are regular diplomatic relations between the two States, the official offices of the special mission are usually on the premises of the sending State's regular diplomatic mission, which (unless otherwise indicated) is its official address for communication purposes. Even in this case, however, the special mission may have a seat other than the embassy premises.

(4) It is very rare, in practice, for the seat of a special mission not to be chosen by prior agreement. In the exceptional case where the special mission's seat is not established in advance by agreement between the States concerned, the practice is that the receiving State proposes a suitable locality for the special mission's seat, chosen in the light of all the circumstances affecting the

⁵⁹ Introduced as article 12 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text discussed and adopted at the 770th meeting. Commentary adopted at the 774th meeting.

⁶⁰ *Yearbook of the International Law Commission, 1960*, vol. II, p. 116 and pp. 179-180.

mission's efficient functioning. Opinion is divided on whether the sending State is required to accept the place chosen by the receiving State. It has been held that such a requirement would conflict with the principle of the United Nations Charter concerning the sovereign equality of States if the receiving State were to impose the choice of the seat. The Commission has suggested a compromise, namely, that the receiving State should have the right to propose the locality, but that in order to become effective, that choice should be accepted by the sending State. That solution would have certain shortcomings in cases where the proposal was not accepted. The Commission has left the question open.

(5) The Commission did not go into the details of rules to determine the difference between the main seat and other seats where the special mission's task makes it necessary for it to have more than one seat. Usage varies in practice. One solution proposed to the Commission was that the main seat should be in the locality in which the seat of the Ministry of Foreign Affairs of the receiving State is situated, or in some other locality chosen by mutual agreement, and that the other seats should be established with a view to facilitating the work of the sections or teams. However, the Commission preferred to leave this question to be settled by agreement of the parties.

Article 14.⁶¹ **Nationality of the head and the members of the special mission and of members of its staff**

1. The head and members of a special mission and the members of its staff should in principle be of the nationality of the sending State.

2. Nationals of the receiving State may not be appointed to a special mission except with the consent of that State, which may be withdrawn at any time.

3. The receiving State may reserve the right provided for in paragraph 2 with regard to the nationals of a third State who are not also nationals of the sending State.

Commentary

(1) Article 14 corresponds to article 8 of the Vienna Convention on Diplomatic Relations.

(2) In 1960 the International Law Commission did not consider it necessary to express an opinion on the question whether the rules concerning the nationality of diplomatic agents of permanent missions should also apply to special missions. It even formulated the rule that the relevant article of its 1958 draft—article 7—did not apply directly to special missions.⁶²

(3) The relevant literature, on the other hand, does not consider it impossible for nationals of a country to be admitted by that country as members of special missions, but stresses that the problem has been dealt with differently by various countries at various times.⁶³

⁶¹ Introduced as article 13 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text discussed and adopted at the 770th meeting. Commentary adopted at the 774th meeting.

⁶² *Yearbook of the International Law Commission, 1960*, vol. II, pp. 179-180.

⁶³ Sir Ernest Satow, *A Guide to Diplomatic Practice*, 4th edition, London, 1957, pp. 138-141.

(4) In the Commission's view, there is no reason why nationals of the receiving State should not be employed as *ad hoc* diplomats of another State, but for that purpose, the consent of the receiving State has to be obtained.

(5) Apart from the question whether a national of the receiving State can perform the functions of *ad hoc* diplomat of another State, the problem arises whether an *ad hoc* diplomat must possess the nationality of the State on whose behalf he carries out his mission. Here again, the International Law Commission expressed no opinion in 1960. Recent practice shows that nationals of third States, and even stateless persons, may act as *ad hoc* diplomats of a State, although some members of the Commission held it to be undesirable that they should do so. Practical reasons sometimes make it necessary to adopt this expedient, and in practice it is for the receiving State alone to decide whether or not such persons should be recognized as *ad hoc* diplomats.

(6) The Commission has not specifically referred in the text to the possibility that the head of a special mission or one of its members or staff might have dual nationality. It believes that, in the case of a person who also possesses the nationality of the receiving State, that State has the right, in accordance with the existing rules on nationality in international law and with the practice of some countries, to consider such a person on the basis of the characterization theory, exclusively as one of its own nationals. In most States, the idea still prevails that nationality of the receiving State excludes any other nationality, and the argument that effective nationality excludes nominal nationality is not accepted in this case. The case of a person possessing more than one foreign nationality is juridically irrelevant, since it would be covered by paragraph 3 of this article.

(7) The Commission has also not considered whether persons possessing refugee status who are not natives of the receiving State can be employed, without the special approval of the receiving State, as heads or members of special missions or of their staffs.

(8) As regards nationals of the receiving State engaged locally by the special mission as auxiliary staff, and persons having a permanent domicile in its territory, the Special Rapporteur believes that they should not be subject to the provisions of this article, but rather to the régime applicable in this respect under the domestic law of the receiving State. The Commission did not deem it necessary to adopt a special rule on the subject.

(9) Nor did the Commission express any views on the question whether, in this respect, aliens and stateless persons having a permanent domicile in the territory of the receiving State should be treated in the same way as nationals of that State.

Article 15.⁶⁴ **Right of special missions to use the flag and emblem of the sending State**

A special mission shall have the right to display the flag and emblem of the sending State on the premises of the

⁶⁴ Introduced as article 15 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text, numbered 14, discussed and adopted at the 770th meeting. Commentary adopted at the 774th meeting.

mission, on the residence of the head of the mission and on the means of transport of the mission.

Commentary

(1) Article 15 is modelled on article 20 of the Vienna Convention on Diplomatic Relations.

(2) The Commission reserves the right to decide at a later stage whether article 15 should be placed in the section of the draft dealing with general matters or in the special section concerning facilities, privileges and immunities.

(3) In 1960, the International Law Commission recognized the right of special missions to use the national flag of the sending State upon the same conditions as permanent diplomatic missions.⁶⁵ In practice, the conditions are not identical, but nevertheless there are some instances where this is possible. The Commission's Special Rapporteur, Mr. Sandström, cited the case of the flying of the flag on the motor vehicle of the head of a ceremonial mission. During the discussion which took place in the Commission in 1960, Mr. Jiménez de Aréchaga expressed the view that all special missions (and not only ceremonial missions) have the right to use such flags on the ceremonial occasions where their use would be particularly appropriate.⁶⁶

(4) Current practice should be based on both a wider and a narrower approach: wider, because this right is not restricted to ceremonial missions but depends on the general circumstances (e.g., special missions of a technical nature moving in a frontier zone and all special missions on certain formal occasions); and narrower, because this usage is now limited in fact to the most formal occasions or to circumstances which warrant it, in the judgement of the mission. In practice, however, such cases are held within reasonable limits, and the tendency is towards restriction.

(5) All the rules applicable to the use of the national flag apply equally to the use of the national emblem, both in practice and in the opinion of the International Law Commission.

(6) In practice, some receiving States assert that they have the right to require that the flag of the sending State should be flown on all means of transport used by the special mission when it is travelling in a particular area. It is claimed in support of this requirement that measures to protect the special mission itself will be easier to carry out if the attention of the authorities of the receiving State is drawn by an external distinguishing mark, particularly in frontier security zones and military zones and in special circumstances. Some States, however, object to this practice on the grounds that it very often causes difficulties and exposes the special mission to discrimination. The Commission holds that this practice is not universally recognized and it has therefore not included a rule regarding it in the text of article 15.

Article 16.⁶⁷ Activities of special missions in the territory of a third State

1. Special missions may not perform their functions in the territory of a third State without its consent.

2. The third State may impose conditions which must be observed by the sending State.

Commentary

(1) There is no corresponding rule in the Vienna Convention on Diplomatic Relations, but article 7 of the Vienna Convention on Consular Relations of 1963 provides that a consular post established in a particular State may not exercise consular functions in another State if the latter objects.

(2) Very often, special missions from different States meet and carry on their activities in the territory of a third State. This is a very ancient practice, particularly in the case of meetings between *ad hoc* missions or diplomats belonging to States which are in armed conflict. The International Law Commission did not take note of this circumstance in 1960; nor have writers paid much attention to it, but some of them mention it, particularly where the contact takes place through the third State. Whether or not the third State engages in mediation or extends its good offices, courtesy undoubtedly requires that it should be informed, and it is entitled to object to such meetings in its territory.

(3) Thus, the States concerned are not entitled to make arbitrary use of the territory of a third State for meetings of their special missions, if this is contrary to the wishes of that State. However, if the third State has been duly informed and does not express any objection (its formal consent is not necessary), it has a duty to treat special missions sent in these circumstances with every consideration, to assure them the necessary conditions to carry on their activities, and to offer them every facility, while the parties concerned, for their part, must refrain from any action which might harm the interests of the third State in whose territory they carry on their activities.

(4) In practice, the prior approval of the third State is often simply a matter of taking note of the intention to send a special mission to its territory (such intention may even be notified orally). If the third State makes no objection to the notification and allows the special mission to arrive in its territory, approval is considered to have been given.

(5) The Commission regards as correct the practice of some States—for example, Switzerland during the war—in imposing certain conditions which must be observed by parties sending special missions. The duty to comply with these conditions is without prejudice to the question whether, objectively, the mission's activities are considered to be prejudicial to the interests of the third State in whose territory they are carried on.

(6) A question which arises in practice is whether the third State must not only behave correctly and impartially

⁶⁵ *Yearbook of the International Law Commission, 1960*, vol. II, p. 108, p. 180.

⁶⁶ *Ibid.*, p. 116.

⁶⁷ Introduced as article 14 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text, numbered 15, discussed and adopted at the 770th meeting. Commentary adopted at the 774th meeting.

towards the States whose missions meet in its territory by according them equal treatment, but must also respect any declarations it may itself have made in giving its prior approval. Since such approval can be given implicitly, it must be considered that a third State which goes even further by taking note, without objection, of a request for permission to use its territory is, in accordance with the theory of unilateral juridical acts in international law, bound by the request of the parties concerned, unless it has made certain reservations.

(7) Intercourse between a special mission of one State and the permanent diplomatic mission of another State accredited to the receiving State must be accorded the same treatment as the intercourse and activities of special missions in the territory of the third State. Such contacts are frequent, and they are referred to by legal writers as irregular means of diplomatic communication. They make direct intercourse possible between States which do not maintain mutual diplomatic relations, even when the States concerned are in armed conflict.

(8) The right of the third State, at any time and without being obliged to give any reason, to withdraw its hospitality from special missions in its territory and to prohibit them from engaging in any activity is recognized. In such cases, the sending States are obliged to recall their special missions immediately, and the missions themselves are required to cease their activities as soon as they learn that hospitality has been withdrawn. The exercise of this right by the third State does not mean that diplomatic relations with the States in question are broken off or that the head of the mission or its members are declared *persona non grata*. It merely means that the third State's consent to the activities of special missions in its territory has been revoked. The Commission held that article 16, paragraph 1, was sufficient and that the word "consent" means that the consent of the third State continues to be required throughout the period during which the activities of the special missions of the other States are taking place.

Part II

*Facilities, privileges and immunities*⁶⁸

Article 17.⁶⁹ General facilities

The receiving State shall accord to the special mission full facilities for the performance of its functions, having regard to the nature and task of the special mission.

Commentary

(1) This article is based on article 25 of the Vienna Convention on Diplomatic Relations.

(2) Proceeding from the fundamental idea that the facilities due to special missions depend on the nature, task and level of the special mission in question, the Commission considers that what must be ensured is the regular functioning of special missions with due regard

to their nature and task. The Commission has not adopted the view expressed in 1960 that, in this respect, all the provisions applicable to permanent diplomatic missions should be applied to special missions. It was inclined to follow the fundamental idea underlying the resolution adopted by the Vienna Conference on Diplomatic Intercourse and Immunities, namely, that the problem of the application of the rules governing permanent missions to special missions deserves detailed study. This means that the application of these rules cannot be uniform and that each case must be considered separately.

(3) It is undeniable that the receiving State has a legal obligation to provide a special mission with all facilities necessary for the performance of its functions. In the literature, this rule is generally criticized on the ground that it is vague. The Commission is convinced that its content changes according to the task of the mission in question, and that the facilities to be provided by the receiving State vary. Consequently, the assessment of the extent and content of the above-mentioned obligation is not a question of fact; the obligation is an *ex jure* obligation, whose extent must be determined in the light of the special mission's needs, which depend on the circumstances, nature, level and task of the specific special mission. There remains the legal question whether the extent is determined fairly by the receiving State and thus matches what is due.

(4) The Commission is of the opinion that the difficulties which arise in practice are due to the fact that some special missions consider the receiving State obliged to provide them with all the facilities normally accorded to permanent diplomatic missions. The right approach is that of the States which offer to special missions only such facilities as are necessary, or at least useful, according to some objective criterion, for the performance of their task, whether or not they correspond to the list of facilities granted to permanent diplomatic missions as set forth in the Vienna Convention on Diplomatic Relations. Special missions may, however, in some exceptional cases, enjoy more facilities than permanent diplomatic missions, when this is necessary for the performance of their particular tasks, for example in the case of high-level special missions or frontier-demarcation special missions. This approach is consistent with the resolution on special missions adopted by the Vienna Conference on Diplomatic Intercourse and Immunities.

Article 18.⁷⁰ Accommodation of the special mission and its members

The receiving State shall assist the special mission in obtaining appropriate premises and suitable accommodation for its members and staff and, if necessary, ensure that such premises and accommodation are at their disposal.

Commentary

(1) This article is based on article 21 of the Vienna Convention on Diplomatic Relations.

⁶⁸ Title adopted at 819th meeting.

⁶⁹ Introduced as article 17 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 804th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 820th meeting.

⁷⁰ Introduced as article 18 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 804th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 820th meeting.

(2) However, article 18 is not identical with the said article 21. The Commission is of the opinion that it is not necessary to provide that the State sending a special mission has in all cases the right to acquire land for the construction of accommodation for the special mission or to acquire the premises required for accommodating it, as is provided for by the corresponding provisions of the Vienna Convention in regard to regular, permanent diplomatic missions. The Commission considers that in this connexion it is sufficient to ensure the provision of accommodation for special missions, which are temporary in character.

(3) Special missions should, however, have their accommodation guaranteed, and the accommodation should be adequate for the special mission in question. On this point, the same rules should in principle apply as in the case of permanent diplomatic missions. But it is held that there is no obligation upon the receiving State to permit the acquisition of the necessary premises in its territory, a proposition which does not rule out the possibility—though this is an exceptional case—of some States purchasing or leasing the premises necessary for the accommodation of successive special missions which they send to the same country.

(4) The task of special missions may be such that they need more than one seat. This is clear from paragraph (5) of the commentary to article 13. In particular, cases occur in practice where either the special mission as a whole or a section or group of the mission has to travel frequently in the territory of the receiving State. Such travel often involves a swift change in the seat of the special mission or the arrival of groups of the special mission at specific places, and the mission's or group's stay in a particular locality is often very brief. These circumstances sometimes make it impossible for the sending State itself to arrange accommodation for its special mission or a section thereof. In this case, it is the authorities of the receiving State which arrange accommodation.

Article 19.⁷¹ Inviolability of the premises

1. The premises of a special mission shall be inviolable. The agents of the receiving State may not enter the premises of the special mission, except with the consent of the head of the permanent diplomatic mission of the sending State accredited to the receiving State.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the special 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 special mission, their furnishings, other property used in the operation of the special mission

⁷¹ Paragraphs 1 and 2 introduced as article 19 of the Special Rapporteur's second report (A/CN.4/179). Discussed at the 804th and 805th meetings of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Paragraph 3 introduced as article 24 of the Special Rapporteur's second report. Discussed at the 806th meeting of the Commission. Drafting Committee's text discussed and referred back to Drafting Committee at the 817th meeting. Re-submitted and adopted at the 820th meeting. Commentary adopted at the 820th meeting.

and its means of transport shall be immune from search, requisition, attachment or execution by the organs of the receiving State.

Commentary

(1) This article is based on article 22 of the Vienna Convention on Diplomatic Relations. However, the text has had to be adapted to the requirements imposed by the nature and practice of special missions.

(2) In 1960 the Commission considered that in this matter the rules applicable to permanent diplomatic missions should also apply to special missions. The previous Special Rapporteur, in his first draft, had held that "the official premises of... a special mission... shall enjoy... inviolability...".⁷²

(3) In 1965 the Commission took the view that the provisions of the Vienna Convention on Diplomatic Relations concerning accommodation should be applied to special missions, with due regard for the circumstances of such missions. It should also be noted that the premises of a special mission are often combined with the living quarters of the members and staff of the special mission.

(4) The offices of special missions are often located in premises which already enjoy the privilege of inviolability. That is so if they are located in the premises of the permanent diplomatic mission of the sending State, if there is one at the place. If, however, the special mission occupies private premises, it must equally enjoy the inviolability of its premises, in order that it may perform its functions without hindrance and in privacy.

(5) The Commission discussed the situation which may arise in certain exceptional cases where the head of a special mission refuses to allow representatives of the authorities of the receiving State to enter the premises of the special mission. It has provided that in such cases the Ministry of Foreign Affairs of the receiving State may appeal to the head of the permanent diplomatic mission of the sending State, asking for permission to enter the premises occupied by the special mission.

(6) As regards the property used by the special mission, the Commission considers that special protection should be accorded to such property, and accordingly it has drafted paragraph 3 of this article in terms granting such protection to all property, by whomsoever owned, which is used by the special mission.

Article 20.⁷³ Inviolability of archives and documents

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

Commentary

(1) This article reproduces *mutatis mutandis* article 24 of the Vienna Convention on Diplomatic Relations and article 33 of the Vienna Convention on Consular Relations.

⁷² *Yearbook of the International Law Commission, 1960*, vol. II, p. 112.

⁷³ Introduced as article 20 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 805th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

(2) Here, too, the Commission took the view in 1960 that the rules applicable to permanent diplomatic missions apply also to special missions, which otherwise would scarcely be able to function normally.

(3) Because of the controversies which arise in practice, the Commission considers it necessary to stress the point concerning documents in the possession of the members or of the staff of a special mission, especially in the case of a special mission which does not have premises of its own and in cases where the special mission or a section or group of the special mission is itinerant. In such cases, the documents transported from place to place in the performance of the special mission's task are mobile archives rather than part of the baggage of the persons concerned.

Article 21.⁷⁴ Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the special mission such freedom of movement and travel on its territory as is necessary for the performance of its functions, unless otherwise agreed.

Commentary

(1) This article is based on article 26 of the Vienna Convention on Diplomatic Relations and article 34 of the Vienna Convention on Consular Relations. However, changes have been made in the text to take account of the special circumstances in which the task of special missions is performed. The article thus includes certain provisions which apply neither to permanent diplomatic missions nor to consulates.

(2) Special missions have limited tasks. It follows that they should be guaranteed freedom of movement only to the extent necessary for the performance of these tasks (this does not mean that they cannot go also to other parts of the territory of the receiving State, subject to the normal conditions applicable to other aliens).

(3) Guaranteed freedom for special missions to proceed to the seat of the sending State's permanent diplomatic mission to the receiving State or to a consular post of the sending State and to return to the place where the special mission performs its task is in practice not only a daily occurrence but also a necessity.

(4) One of the peculiarities of special missions is that they may operate through persons or teams situated in different places or responsible for specific tasks in the field. Because of the need for constant liaison between the different sections of a special mission there should be wide freedom of movement.

Article 22.⁷⁵ Freedom of communication

1. The receiving State shall permit and protect free communication on the part of the special mission for all official

⁷⁴ Introduced as article 21 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 805th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

⁷⁵ Introduced as article 22 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 805th and 806th meetings of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the special mission may employ all appropriate means, including couriers and messages in code or cipher. However the special mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the special mission shall be inviolable. Official correspondence means all correspondence relating to the special mission and its functions.

3. The bag of the special mission shall not be opened or detained.

4. The packages constituting the bag of the special mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the special mission.

5. The courier of the special 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 receiving 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 special mission may designate couriers *ad hoc* of the special mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the special mission's bag in his charge.

7. The bag of the special 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 special mission. By arrangement with the appropriate authorities, the special 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) This article is based on article 27 of the Vienna Convention on Diplomatic Relations.

(2) In 1960 the Commission took the position that special missions enjoy the same rights as permanent diplomatic missions in this respect.

(3) It should be noted, however, that in practice special missions are not always granted the right to use messages in code or cipher. The Commission considered that special missions should be granted this right, since the use of messages in code or cipher is often necessary for the proper functioning of such missions.

(4) The Commission did not think that it should depart from the practice whereby special missions are not allowed to use wireless transmitters, unless there is a special agreement or a permit is given by the receiving State.

(5) The Vienna Convention on Diplomatic Relations (article 27, paragraph 3) lays down the principle of the absolute inviolability of the diplomatic bag. Under that provision, the diplomatic bag may not be opened or detained by the receiving State. The Vienna Convention on Consular Relations, on the other hand, confers limited protection on the consular bag (article 35, paragraph 3). It allows the consular bag to be detained if

there are serious reasons for doing so and provides for a procedure for the opening of the bag. The question arises whether absolute inviolability of the special mission's bag should be guaranteed for all categories of special missions. The Commission considered this question and decided to recognize the absolute inviolability of the special mission's bag.

(6) The Commission adopted the rule that the special mission's bag may be entrusted to the captain of a commercial aircraft (article 27, paragraph 7, of the Vienna Convention on Diplomatic Relations; article 35, paragraph 7, of the Vienna Convention on Consular Relations) or to the captain of a ship (article 35, paragraph 7, of the Vienna Convention on Consular Relations). It has been observed recently that in exceptional cases special missions use the services of such persons for the transport of the bag. The Commission considers that the captains of commercial inland waterway vessels may also be used for this purpose.

Article 23.⁷⁶ Exemption of the mission from taxation

1. The sending State and the head of the special mission and the members of its staff shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the special mission, 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 receiving State by persons contracting with the sending State or the head of the special mission.

Commentary

(1) This article reproduces *mutatis mutandis* article 23 of the Vienna Convention on Diplomatic Relations.

(2) In 1960 the Commission expressed the view that in this respect the legal rules applicable to permanent diplomatic missions should be applied to special missions. At its seventeenth session, the Commission reaffirmed that view.

(3) On the other hand, the Commission is of the opinion that article 28 of the Vienna Convention on Diplomatic Relations cannot be applied to special missions. It is the rule that special missions have no authority to levy any fees, dues or charges in foreign territory except in the cases specially provided for by international agreements. This does not, however, rule out the possibility that in certain exceptional cases provided for in international agreements special missions may be authorized to charge such dues. The Commission therefore decided not to include in the article any rule of law concerning the levying by special missions of fees, dues or charges in the territory of the receiving State, and to refer to the matter only in the commentary.

⁷⁶ Introduced as article 23 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 806th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

Article 24.⁷⁷ Personal inviolability

The person of the head and members of the special mission and of the members of its diplomatic staff shall be inviolable. They shall not be liable to any form of arrest or detention. The receiving State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.

Commentary

(1) This article reproduces *mutatis mutandis* article 29 of the Vienna Convention on Diplomatic Relations.

(2) The Commission discussed the advisability of a provision granting to the members of special missions only a personal inviolability limited to the performance of their functions. The majority of the Commission did not consider such a provision acceptable.

Article 25.⁷⁸ Inviolability of the private accommodation

1. The private accommodation of the head and members of the special mission and of the members of its diplomatic staff shall enjoy the same inviolability and protection as the premises of the special mission.

2. The papers, correspondence and property of the persons referred to in paragraph 1 shall likewise enjoy inviolability.

Commentary

(1) This article reproduces *mutatis mutandis* article 30 of the Vienna Convention on Diplomatic Relations.

(2) The word "residence" used in the Vienna Convention on Diplomatic Relations has been replaced by the word "accommodation" because of the temporary nature of special missions.

(3) The inviolability of the accommodation of the members of special missions should be guaranteed, regardless of whether they live in a separate building or in parts of another building, or even in a hotel. It was considered necessary to add this paragraph of the commentary because some States do not recognize this protection in cases where the mission is accommodated in a building accessible to the public.

Article 26.⁷⁹ Immunity from jurisdiction

1. The head and members of the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State.

2. Unless otherwise agreed, they shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State, except in the case of:

⁷⁷ Introduced as article 25 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 806th and 807th meetings of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

⁷⁸ Introduced as article 26 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 807th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

⁷⁹ Introduced as article 27 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 807th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless the head or member of the special mission or the member of its diplomatic staff holds it on behalf of the sending State for the purposes of the mission;

(b) An action relating to succession in which the person referred to in sub-paragraph (a) 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 referred to in sub-paragraph (a) in the receiving State outside his official functions.

3. The head and members of the special mission 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 the head or of a member of the special mission or of a member of its diplomatic staff except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 2 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

5. The immunity of the head and members of the special mission and of the members of its diplomatic staff from the jurisdiction of the receiving State does not exempt them from the jurisdiction of the sending State.

Commentary

(1) This article is based on article 31 of the Vienna Convention on Diplomatic Relations.

(2) The Commission discussed the question whether members of special missions should or should not be granted complete and unlimited immunity from criminal, civil and administrative jurisdiction. Some members of the Commission took the view that, in principle, only functional immunity should be granted to all special missions. There should be no deviation from this rule, except in the matter of immunity from criminal jurisdiction; for any limitation of the liberty of the person prevents the free accomplishment of the special mission's tasks. Disagreeing with that opinion, the majority of the Commission decided that full immunity from the jurisdiction of the receiving State in all matters (criminal, civil and administrative) should be granted to the members of special missions.

(3) However, the Commission added in paragraph 2 the phrase "Unless otherwise agreed" to indicate that it is open to the States concerned to limit the immunity from *civil and administrative* jurisdiction. In short, the ordinary rule proposed by the Commission is complete immunity from civil and administrative jurisdiction, the States concerned being at liberty to agree on a limited form of immunity in this respect.

Article 27.⁸⁰ Waiver of immunity

1. The immunity from jurisdiction of the head and members of the special mission, of the members of its staff and

⁸⁰ Introduced by the Drafting Committee as article 27 *bis*. Discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

of the members of their families, may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by one of the persons referred to in paragraph 1 of this article 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.

Commentary

(1) This article reproduces *mutatis mutandis* article 32 of the Vienna Convention on Diplomatic Relations.

(2) The Commission considers that the purpose of immunity is to protect the interests of the sending State, not those of the person enjoying the immunity.

Article 28.⁸¹ Exemption from social security legislation

1. The head and members of the special mission and the members of its staff shall be exempt, while in the territory of the receiving State for the purpose of carrying out the tasks of the special mission, from the social security provisions of that State.

2. The provisions of paragraph 1 of this article shall not apply:

(a) To nationals or permanent residents of the receiving State regardless of the position they may hold in the special mission;

(b) To locally recruited temporary staff of the special mission, irrespective of nationality.

3. The head and members of the special mission and the members of its staff who employ persons to whom the exemption provided for in paragraph 1 of this article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

Commentary

(1) This article is based on article 33 of the Vienna Convention on Diplomatic Relations.

(2) In practice, it is found necessary not to exempt from the social security system of the receiving State persons locally employed for the work of the special mission, for a number of reasons: the short duration of the special mission; the risk to life and health presented by the difficulty of the special mission's tasks in certain cases, especially in the case of special missions working in the field; and the still unsettled question of insurance after the termination of the special mission's task, if the employee was not engaged through and on the responsibility of the permanent diplomatic mission.

⁸¹ Introduced as article 28 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

Article 29.⁸² Exemption from dues and taxes

The head and members of the special mission and the members of its diplomatic staff shall be exempt from all dues and taxes, national, regional or municipal, in the receiving State on all income attaching to their functions with the special mission and in respect of all acts performed for the purposes of the special mission.

Commentary

(1) This article is based on article 34 of the Vienna Convention on Diplomatic Relations.

(2) The Commission was of the opinion that the exemption of the members of special missions from dues and taxes should apply only to income attaching to their functions with the mission and in respect of all acts performed for the purposes of the mission. Accordingly, the Commission decided to omit from article 29 all the exceptions enumerated in the said article 34.

Article 30.⁸³ Exemption from personal services and contributions

The receiving State shall exempt the head and members of the special mission and the members of its diplomatic staff 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

(1) This article reproduces *mutatis mutandis* article 35 of the Vienna Convention on Diplomatic Relations.

(2) In drafting article 30 the Special Rapporteur had started the ideas underlying the said article 35, but had expanded the article in the following way:

(a) He had extended these exemptions to the entire staff and not merely to the head and members of the special mission. In his view, it was not possible otherwise to ensure the special mission's smooth operation;

(b) It was also his view that exemption from personal services and contributions ought to be accorded to locally recruited staff regardless of nationality and domicile. Otherwise, the special mission would be placed in a difficult position and would not be able to carry out its task until it succeeded in finding other staff exempt from such services and contributions. Calling on such locally recruited staff to render such services or contributions could be used as a powerful weapon by the receiving State to harass the special mission. On the other hand, the receiving State would not be imperilled by these exemptions, special missions generally being of very short duration and their staff very small.

(3) The Commission considered that the rules of law corresponding to these needs of the special mission would

⁸² The proposal to introduce this article was made by the Special Rapporteur at the 808th meeting. Drafting Committee's text, numbered 28 *bis*, submitted and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

⁸³ Introduced as article 29 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

involve an excessive derogation from the sovereign rights of the receiving State, but it decided to mention in the commentary the arguments put forward by the Special Rapporteur.

Article 31.⁸⁴ Exemption from customs duties and inspection

1. The receiving 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 special mission;

(b) Articles for the personal use of the head and members of the special mission, of the members of its diplomatic staff, or of the members of their family who accompany them.

2. The personal baggage of the head and members of the special mission and of the members of its diplomatic staff shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the person concerned, of his authorized representative, or of a representative of the permanent diplomatic mission of the sending State.

Commentary

(1) This article is based on article 36 of the Vienna Convention on Diplomatic Relations.

(2) The question of applying to special missions the rules exempting permanent diplomatic missions and their members from the payment of customs duties on articles imported for the establishment of the mission, its members or its staff seldom arises, although it may do so. In view of the rarity of such cases, the Commission considers that a special provision on this point should not be included in the text but that this eventuality should be mentioned in the commentary, in order to inform Governments that such situations occur and that they ought to settle them by specific decisions in individual cases.

(3) The claims of certain special missions, for themselves or for their members, to exemption from the payment of customs duties on the importation of consumer goods, have been challenged in practice. The Commission has refrained from proposing a solution for this case.

Article 32.⁸⁵ Administrative and technical staff

Members of the administrative and technical staff of the special mission shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in articles 24 to 31, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 2 of article 26 shall

⁸⁴ Introduced as article 30 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

⁸⁵ Introduced as article 32 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 31, discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

not extend to acts performed outside the course of their duties.

Commentary

(1) This article is based on article 37, paragraph 2, of the Vienna Convention on Diplomatic Relations.

(2) The two texts differ in that article 32 omits two clauses which appear in the said article 37, paragraph 2:

(a) It omits any mention of members of the family, for these are dealt with in a separate article (article 35);

(b) It does not provide for customs exemption in respect of articles imported at the time of first installation, as the Commission considered that this privilege should not be granted to the members of special missions (see article 31, paragraph (2) of the commentary).

Article 33.⁸⁶ Members of the service staff

Members of the service staff of the special mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, and exemption from duties and taxes on the emoluments they receive by reason of their employment.

Commentary

(1) This article is based on article 37, paragraph 3, of the Vienna Convention on Diplomatic Relations.

(2) The Commission considers that the text adopted is sufficient to provide the guarantees necessary for the members of the service staff of special missions.

(3) The Special Rapporteur suggested that the Commission should provide for the grant of the following additional privileges to members of the service staff:

(a) Exemption from personal services and contributions, for he is convinced that, unless members of the service staff are guaranteed this exemption, the authorities of the receiving State could paralyse the proper functioning of the special mission;

(b) Full immunity from the criminal jurisdiction of the receiving State, for the exercise of that jurisdiction in respect of members of the service staff could paralyse the functioning of the special mission entirely—a possibility which does not arise in the case of permanent diplomatic missions.

(4) The Commission did not accept the Special Rapporteur's suggestions, and it decided not to go further than the Vienna Convention on Diplomatic Relations in the matter. It decided to draw attention in the commentary to the Special Rapporteur's suggestions set out in paragraph (3) above.

⁸⁶ Introduced as article 32 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 32, discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

Article 34.⁸⁷ Private staff

Private staff of the head and members of the special mission and of members of its staff who are authorized by the receiving State to accompany them in the territory of the receiving State shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In all other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving 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 special mission.

Commentary

(1) This article is based on article 37, paragraph 4, of the Vienna Convention on Diplomatic Relations.

(2) In 1960 the Commission took as the premise the proposition that the head, members and members of the staff of the special mission should be allowed to bring private staff with them, for such staff might be essential to their health or personal comfort.

(3) However, it is a moot point whether there is a right *de jure* to bring such staff. This matter is thought to lie within the discretionary power of the receiving State, which may therefore impose restrictions. However, where there are no restrictions or where the receiving State grants permission, the question arises in practice whether the privileges and immunities extend to private staff.

(4) The Special Rapporteur is of the opinion that this staff should be guaranteed functional immunity from criminal jurisdiction in respect of acts performed in the course of the duties they normally carry out on the orders of their employers. The Commission did not wish to go further than the Vienna Convention on this point.

Article 35.⁸⁸ Members of the family

1. The members of the families of the head and members of the special mission and of its diplomatic staff who are authorized by the receiving State to accompany them shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 24 to 31.

2. Members of the families of the administrative and technical staff of the special mission who are authorized by the receiving State to accompany them shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in article 32.

Commentary

(1) This article is based on article 37 of the Vienna Convention on Diplomatic Relations, but some major changes were necessary to make it applicable to special missions.

(2) In practice, the question arises whether privileges and immunities also attach to family members accompa-

⁸⁷ Introduced as article 32 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 33, discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

⁸⁸ Introduced as article 31 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 34, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

nying the head and members of the special mission or members of its staff. One school of thought maintains that there can be no grounds for limiting privileges exclusively to the head and members of the special mission and members of its staff unless, owing to the nature of the work to be performed or by prior arrangement, the presence of family members in the territory of the receiving State is ruled out in advance.

(3) The Commission realized that the attempt to specify what persons are covered by the expression "members of the family" had at both the Vienna Conferences (in 1961 and 1963) ended in failure, but it believes that in the case of special missions the number of such persons should be limited. However, in the case of temporary residence it is a matter of no great consequence whether the relative concerned is a regular member of the household of the person whom he or she is accompanying.

(4) In practice, restrictions are sometimes general, sometimes limited in the sense that they except a specified number of family members, or else they may apply to certain periods of the special mission's visit or to access to certain parts of the territory. The Commission merely recognized, without going into details, that it is within the receiving State's power to impose restrictions in this respect.

Article 36.⁸⁹ Nationals of the receiving State and persons permanently resident in the territory of the receiving State

1. Except in so far as additional privileges and immunities may be recognized by special agreement or by decision of the receiving State, the head and members of the special mission and the members of its diplomatic staff 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 special mission and private staff who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving 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 special mission.

Commentary

(1) This article is based on article 38 of the Vienna Convention on Diplomatic Relations, but the two texts are not identical. The starting-point is the idea that the receiving State is not obliged to admit, as head, member or member of the staff of the special mission, its own nationals or persons permanently resident in its own territory. This idea is set forth in article 14 concerning the nationality of the head and members of the special mission and of members of its staff.

(2) The difference between the aforesaid article 14 and the present article is that, in the latter, persons permanently resident in the territory of the receiving State are treated in the same manner as nationals of the receiving State.

⁸⁹ Introduced as article 23 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 35, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

(3) During the discussion of article 14, the Commission did not adopt the view that nationals of the receiving State and persons permanently resident in its territory should be treated in identical fashion. In adopting that decision, the Commission took account of the fact that article 8 of the Vienna Convention on Diplomatic Relations does not treat these persons in identical fashion. However, in regard to the enjoyment of privileges and immunities, the Vienna Convention on Diplomatic Relations accepts identical treatment of these two groups in article 38. The Commission considers that the same course should be adopted in the present article. It accepts the argument that the rules on special missions should not reduce the staff of special missions to a status lower than that resulting from the provisions of the Vienna Convention on Diplomatic Relations. However, it was also argued in the Commission that in settling the status of special missions the Commission should take care not to establish any further limitations on the sovereignty of receiving States. It is held that it would not be logical for certain members of special missions or of their staff to be favoured to the detriment of the interests of the receiving State.

(4) The Commission stresses that, in its view, it is better that this question should be settled by mutual agreements rather than that general international rules should be laid down on the subject.

Article 37.⁹⁰ 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 receiving State for the purpose of performing his functions in a special mission, or, if already in its territory, from the moment when his appointment is notified to the competent organ of that 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, but shall subsist until that time, even in the case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the special mission, immunity shall continue to subsist.

Commentary

(1) This article reproduces *mutatis mutandis* article 39, paragraphs 1 and 2, of the Vienna Convention on Diplomatic Relations. In the present draft the subject matter of the other two paragraphs (3 and 4) of the said article 39 is dealt with in a separate article (article 38).

(2) In adopting article 37 the Commission based itself on the same reasons as determined the adoption of article 39 of the Vienna Convention on Diplomatic Relations.

⁹⁰ Introduced as article 34 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 36, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

Article 38.⁹¹ Case of death

1. In the event of the death of the head or of a member of the special mission or of a member of its staff, 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.

2. In the event of the death of the head or of a member of the special mission or of a member of its staff, or of a member of their families, if those persons are not nationals of or permanently resident in the receiving State, the receiving State shall facilitate the collection and 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.

3. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as the head or member of the special mission or member of its staff, or as a member of their families.

Commentary

(1) This article is based on paragraphs 3 and 4 of article 39 of the Vienna Convention on Diplomatic Relations. It contains no more than is needed in the case of special missions, which are not of the same nature as permanent diplomatic missions.

(2) The Commission takes the view that in addition to the provisions applicable to permanent diplomatic missions an obligation should be placed on the receiving State to take whatever measures of protection are necessary with regard to the movable property of members of special missions. It may be that members of special missions and their families are far from the seat of the sending State's permanent mission when death occurs, and the assistance of the local authorities is then necessary for the purpose of collecting and protecting the deceased's movable property. This situation does not arise in the case of the staff of diplomatic and consular missions.

Article 39.⁹² Transit through the territory of a third State

1. Subject to the provisions of paragraph 4, if the head or a member of the special mission or a member of its diplomatic staff passes through or is in the territory of a third State, while proceeding to take up his functions in a special mission performing its task in a foreign State, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the person referred to in this paragraph, or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the transit of members of the administrative and technical or

⁹¹ Introduced as article 35 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 37, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

⁹² Introduced as article 36 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 38, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

service staff of the special mission, and of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. Subject to the provisions of paragraph 4, they shall accord to the couriers and bags of the special mission in transit the same inviolability and protection as the receiving State is bound to accord.

4. The third State shall be bound to comply with the obligations mentioned in the foregoing three paragraphs only if it has been informed in advance, either in the visa application or by notification, of the transit of the special mission, and has raised no objection to it.

5. The obligation of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in these paragraphs, and to the official communications and bags of the special mission, whose presence in the territory of the third State is due to *force majeure*.

Commentary

(1) This article is based on article 40 of the Vienna Convention on Diplomatic Relations. The difference is that, whereas facilities, privileges and immunities must be granted to the head and the staff of the permanent diplomatic mission in all circumstances, in the case of special missions the duty of the third State is restricted to cases where it does not object to the transit through its own territory of the special mission.

(2) The Commission considers that a third State is not bound to accord to its nationals who form part of a foreign special mission passing through its territory the privileges and immunities which the receiving State is not bound to guarantee to its nationals who are members of a foreign special mission (see article 36 of the draft).

Article 40.⁹³ Obligation to respect the laws and regulations of the receiving State

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

2. The premises of the special mission must not be used in any manner incompatible with the functions of the special mission as laid down in these articles or by other rules of general international law or by any special agreements in force between the sending and the receiving State.

Commentary

(1) Paragraph 1 of this article reproduces *mutatis mutandis* paragraph 1 of article 41 of the Vienna Convention on Diplomatic Relations and of article 55 of the Vienna Convention on Consular Relations. The rule in question is at present a general rule of international law. The Special Rapporteur considered, furthermore, that this rule should be amplified by a proviso stating that the

⁹³ Introduced as article 38, paragraphs (1) and (4) of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 39, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

laws and regulations of the receiving State are not mandatory for the organs of the sending State if they are contrary to the general rules of international law or to the contractual rules which exist between the States. Such a proviso was discussed at both the Vienna Conferences (1961 and 1963) but was not inserted in the relevant articles, for it was presumed that as a general rule the receiving State would observe its general international obligations and its duties arising out of international agreements. In addition, it was pointed out that it would be undesirable to refer the diplomatic or consular organs to the general rules of international law and that in each specific case they had the right to enter into discussions with the Government of the receiving State about the conformity of its internal law with the rules of international law. Accordingly, the Commission adopted the rule in question for special missions, but omitted the proviso mentioned above.

(2) Paragraph 2 of this article reproduces *mutatis mutandis* paragraph 3 of article 41 of the Vienna Convention on Diplomatic Relations.

Article 41.⁹⁴ Organ of the receiving State with which official business is conducted

All official business with the receiving State entrusted to the special mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other organ, delegation or representative as may be agreed.

Commentary

(1) This article is based on paragraph 2 of article 41 of the Vienna Convention on Diplomatic Relations. No such provision appears in the Vienna Convention on Consular Relations for the simple reason that consuls are allowed in principle to communicate direct with all the organs of the receiving State with which they have dealings in the performance of their tasks. Special missions are in a special position. As a general rule, they communicate with the Ministry of Foreign Affairs of the receiving State, but frequently the nature of their tasks makes it necessary for them to communicate direct with the competent special organs of the receiving State in regard to the business entrusted to them. These organs are often but not always local technical organs. It is also the practice for the receiving State to designate a special delegation or representative who establishes contact with the special mission of the sending State. The question is generally settled by mutual agreement between the States concerned, or else the Ministry of Foreign Affairs of the receiving State informs the organs of the sending State with which organ or organs the special mission should get in touch. A partial solution to this problem has already been provided in the commentary on article 11 of the draft. Consequently, the article as adopted is merely an adaptation of article 41, paragraph 2, of the Vienna Convention on Diplomatic Relations.

⁹⁴ Introduced as article 38, paragraphs (2) and (3) of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 40, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

(2) Although the range of organs of the receiving State with which the special mission may establish contact in the conduct of its business has been widened in the article as adopted, special missions are not being placed in a position analogous to that of consuls. The relations of special missions are confined to those with the organs which have been specified by agreement or to which they are referred by the Ministry of Foreign Affairs of the receiving State. It should be noted that the term "organ" also applies to liaison officers.

Article 42.⁹⁵ Professional activity

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

Commentary

(1) This article reproduces *mutatis mutandis* article 42 of the Vienna Convention on Diplomatic Relations.

(2) With regard to the possibility of including in the article a clause stating that the right of the persons concerned to carry on a professional or commercial activity in the receiving State on behalf of the sending State is subject to the prior consent of the receiving State, some members contested the validity of the argument that prior consent should not be required in the case of special missions because it is not required in the case of permanent diplomatic missions. The other members took the view that such activity was permitted if in conformity with the law of the receiving State and that the question was settled by article 40, paragraph 1, of the draft (Obligation to respect the laws and regulations of the receiving State). The Commission decided not to include a clause on this question in the text, but to mention this difference of opinion in the commentary.

Article 43.⁹⁶ Right to leave the territory of the receiving State

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Commentary

(1) This article reproduces *mutatis mutandis* article 44 of the Vienna Convention on Diplomatic Relations.

(2) The Commission considered that persons who had entered the receiving State's territory in order to form part of a special mission (other than nationals of the

⁹⁵ Introduced as article 37 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 41, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

⁹⁶ Text, numbered 42, submitted by Drafting Committee and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

receiving State) had the right to leave that territory. The receiving State would be contravening the principle of personal inviolability if it prevented them from leaving.

Article 44.⁹⁷ Cessation of the functions of the special mission

1. When a special mission ceases to function, the receiving State must respect and protect its property and archives, and must allow the permanent diplomatic mission or the competent consular post of the sending State to take possession thereof.

2. The severance of diplomatic relations between the sending State and the receiving State shall not automatically have the effect of terminating special missions existing at the time of the severance of relations, but each of the two States may terminate the special mission.

3. In case of absence or breach of diplomatic or consular relations between the sending State and the receiving State and if the special mission has ceased to function,

(a) The receiving State must, even in case of armed conflict, respect and protect the property and archives of the special mission;

(b) The sending State may entrust the custody of the property and archives of the mission to a third State acceptable to the receiving State.

Commentary:

(1) This article is based on article 45 of the Vienna Convention on Diplomatic Relations, but it was necessary to take into account the fact that the cessation of a special mission's functions does not always coincide with the severance of diplomatic or consular relations between the sending State and the receiving State.

(2) Paragraph 1 covers the case in which the functions of a special mission cease while diplomatic or consular relations exist between the States concerned. In this case, the diplomatic mission or consular posts of the sending State are authorized to take possession of the property and archives of the special mission; they are responsible for the protection of the property of the sending State, including that of the special mission.

(3) Paragraph 2 provides, first, that the severance of diplomatic relations between the sending State and the receiving State does not automatically have the effect of terminating special missions existing at the time of the severance. This is consequential on the rule in article 1, paragraph 2, of the draft that the existence of diplomatic or consular relations between the States is not necessary for the sending and reception of special missions (see also paragraph (5) of the commentary on article 1). If the existence of diplomatic or consular relations is not

necessary for the sending or reception of special missions, then, *a fortiori*, the severance of such relations does not automatically have the effect of terminating special missions.

(4) Secondly, in conformity with practice, the Commission has recognized in paragraph 2 the right of each of the States concerned to terminate by unilateral act special missions existing at the time when diplomatic relations are severed.

(5) Where diplomatic or consular relations between the two States concerned are non-existent or are severed, the property and archives of the special mission which has ceased its functions are governed, in conformity with practice, by the rules of diplomatic law relating to the severance of diplomatic relations (article 45 of the Vienna Convention on Diplomatic Relations).

C. OTHER DECISIONS, SUGGESTIONS AND OBSERVATIONS BY THE COMMISSION

46. The Commission instructed the Special Rapporteur to prepare and submit to the Commission an introductory article on the use of terms in the draft, in order that the text may be simplified and condensed.

47. The Commission decided that it would review the articles provisionally adopted during its sixteenth and seventeenth sessions after receiving the observations and comments of the Governments.

48. The Commission considered whether special rules of law should or should not be drafted for so-called "high-level" special missions, whose heads hold high office in their States. It would appreciate the opinion of Governments on this matter and hopes that their suggestions will be as specific as possible. The Special Rapporteur prepared a draft on such missions. This draft, which the Commission did not discuss, is reproduced as an annex to this chapter.

49. The Special Rapporteur suggested to the Commission that a provision on non-discrimination (article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations) should be included among the draft articles. The Commission did not accept that suggestion, on the ground that the nature and tasks of special missions are so diverse that in practice such missions have inevitably to be differentiated *inter se*.

50. Nor did the Commission accept for the time being the Special Rapporteur's proposal that the draft should contain a provision on the relationship between the articles on special missions and other international agreements (article 73 of the Vienna Convention on Consular Relations).

⁹⁷ Text, numbered 43, submitted by Drafting Committee and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

ANNEX

Draft provisions concerning so-called high-level special missions, prepared by the Special Rapporteur

(not discussed by the Commission)

[Original text: French]

At its sixteenth session the International Law Commission decided to ask its Special Rapporteur to submit at its succeeding session articles dealing with the legal status of so-called high-level special missions, in particular special missions led by Heads of States, Heads of Government, Ministers for Foreign Affairs and Cabinet Ministers.

Despite all his efforts to establish what are the rules specially applicable to missions of this kind, the Special Rapporteur has not succeeded in discovering them either in the practice or in the literature. The only rules he has found are those relating to the treatment of these distinguished persons in their own State, not only as regards the courtesy accorded to them but also as regards the scope of the privileges and immunities. Accordingly, the Special Rapporteur is prepared to propose the following rules:

Rule 1

Except as otherwise provided hereinafter, the rules contained in the foregoing articles are likewise applicable to special missions led by Heads of State, Heads of Government, Ministers for Foreign Affairs and Cabinet Ministers.

Rule 2

A special mission which is led by a Head of State shall be governed by the provisions of the said articles, subject to the following exceptions:

- (a) In giving its approval to the special mission being led by the Head of State, the receiving State admits in advance that such a mission may perform the tasks to be agreed upon by the two States concerned in the course of their contacts (exception to article 2 as adopted);
- (b) The Head of State, as head of the special mission, cannot be declared *persona non grata* or not acceptable (exception to article 4);
- (c) The members of the staff of a special mission which is led by a Head of State may also be members of his personal suite. Such persons shall be treated as diplomatic staff (supplement to article 6);
- (d) In the case of the simultaneous presence of several special missions, Heads of State who lead special missions shall have precedence over the other heads of special missions who are not Heads of State. Nevertheless, in the case of the simultaneous presence of several special missions led by Heads of State, precedence shall be determined according to the alphabetical order of the names of the States (supplement to article 9);
- (e) In cases where a Head of State acts as head of a special mission, the function of the mission is deemed to commence at the time when he arrives in the territory of the receiving State (special rule replacing article 11);
- (f) The function of a special mission which is led by a Head of State comes to an end at the time when he leaves the territory of the receiving State, but the special mission may, if the sending State and the receiving State so agree, continue in being after his departure; in this case, however, the level of the special mission changes, and its level shall be determined according to the rank of the person who becomes head of the special mission (supplement to article 12);
- (g) A special mission which is led by a Head of State shall have the right to display, in addition to the flag and emblem of the sending

State, the flag and emblem peculiar to the Head of State under the law of the sending State (supplement to article 15);

- (h) The receiving State has the duty to provide a Head of State who leads a special mission with accommodation that is suitable and worthy of him;
- (i) The freedom of movement of a Head of State who leads a special mission is limited in the territory of the receiving State in that an agreement on this matter is necessary with the receiving State (guarantee of the personal safety of the Head of State);
- (j) A Head of State who leads a special mission enjoys complete inviolability as to his person, property and residence and full immunity from the jurisdiction of the receiving State;
- (k) A Head of State who leads a special mission enjoys full Customs exemption and exemption from Customs inspection by an agency of the receiving State;
- (l) A Head of State who leads a special mission has the right to bring with him members of his family and persons attached to his personal service, who shall, for so long as they form part of his suite, be entitled to the same immunities as the Head of State;
- (m) On his arrival in the territory of the receiving State and on his departure, a Head of State who leads a special mission shall receive all the honours due to him as Head of State according to the rules of international law;
- (n) If a Head of State who leads a special mission should die in the territory of the receiving State, then the receiving State has the duty to make arrangements in conformity with the rules of protocol for the transport of the body or for burial in its territory.

Rule 3

A special mission which is led by a Head of Government shall be governed by the provisions of the said articles, subject to the following exceptions:

- (a) In giving its approval to the special mission being led by the Head of Government, the receiving State admits in advance that such a mission may perform the tasks to be agreed upon by the two States concerned in the course of their contacts (exception to article 2 as adopted);
- (b) The Head of Government, as head of the special mission, cannot be declared *persona non grata* or not acceptable (exception to article 4);
- (c) In cases where a Head of Government acts as head of a special mission, the function of the mission is deemed to commence at the time when he arrives in the territory of the receiving State (special rule replacing article 11);
- (d) The function of a special mission which is led by a Head of Government comes to an end at the time when he leaves the territory of the receiving State, but the mission may, if the sending State and the receiving State so agree, continue in being after his departure; in this case, however, the level of the special mission changes, and its level shall be determined according to the rank of the person who becomes head of the special mission (supplement to article 12);
- (e) A Head of Government who leads a special mission enjoys complete inviolability as to his person, property and residence and full immunity from the jurisdiction of the receiving State;
- (f) A Head of Government who leads a special mission enjoys full Customs exemption and exemption from Customs inspection by an agency of the receiving State;
- (g) A Head of Government who leads a special mission has the right to bring with him members of his family and persons attached to his personal service, who shall, for so long as they form part of his suite, be entitled to the same immunities as the Head of Government.

Rule 4

A special mission which is led by a Minister for Foreign Affairs shall be governed by the provisions of the said articles, subject to the following exceptions:

(a) In giving its approval to the special mission being led by the Minister for Foreign Affairs, the receiving State admits in advance that such a mission may perform the tasks to be agreed upon by the two States concerned in the course of their contacts (exception to article 2 as adopted);

(b) The Minister for Foreign Affairs, as head of the special mission, cannot be declared *persona non grata* or not acceptable (exception to article 4);

(c) The members of the staff of a special mission which is led by a Minister for Foreign Affairs may also be members of his personal suite. Such persons shall be treated as diplomatic staff (supplement to article 6);

(d) In cases where a Minister for Foreign Affairs acts as head of a special mission, the function of the mission is deemed to commence at the time when he arrives in the territory of the receiving State (special rule replacing article 11);

(e) The function of a special mission which is led by a Minister for Foreign Affairs comes to an end at the time when he leaves the territory of the receiving State, but the mission may, if the sending State and the receiving State so agree, continue in being after his departure; in this case, however, the level of the mission changes, and its level shall be determined according to the rank of the person who becomes head of the special mission (supplement to article 12);

(f) A Minister for Foreign Affairs who leads a special mission enjoys complete inviolability as to his person, property and residence and full immunity from the jurisdiction of the receiving State;

(g) A Minister for Foreign Affairs who leads a special mission enjoys full Customs exemption and exemption from Customs inspection by an agency of the receiving State;

(h) A Minister for Foreign Affairs who leads a special mission has the right to bring with him members of his family and persons attached to his personal service, who shall, for so long as they form part of his suite, be entitled to the same immunities as the Minister for Foreign Affairs.

Rule 5

A special mission which is led by a Cabinet Minister other than the Minister for Foreign Affairs shall be governed by the provisions of the said articles, subject to the following exceptions:

(a) The members of the staff of a special mission which is led by a Cabinet Minister may also be members of his personal suite. Such persons shall be treated as diplomatic staff (supplement to article 6);

(b) In cases where a Cabinet Minister acts as head of a special mission, the function of the mission is deemed to commence at the time when he arrives in the territory of the receiving State (special rule replacing article 11);

(c) The function of a special mission which is led by a Cabinet Minister comes to an end at the time when he leaves the territory of the receiving State, but the special mission may, if the sending State and the receiving State so agree, continue in being after his departure; in this case, however, the level of the special mission changes, and its level shall be determined according to the rank of the person who becomes head of the special mission (supplement to article 12);

(d) A Cabinet Minister who leads a special mission enjoys complete inviolability as to his person, property and residence and full immunity from the jurisdiction of the receiving State;

(e) A Cabinet Minister who leads a special mission enjoys full Customs exemption and exemption from Customs inspection by an agency of the receiving State;

(f) A Cabinet Minister who leads a special mission has the right to bring with him members of his family and persons attached to his personal service, who shall, for so long as they form part of his suite, be entitled to the same immunities as the Cabinet Minister.

Rule 6

The sending State and the receiving State may, by mutual agreement, determine more particularly the status of the special missions referred to in rule 1 and, especially, may make provision for more favourable treatment for special missions at this level.

The Special Rapporteur is putting forward the foregoing rules as a suggestion only, in order that the Commission may express its opinion on the exceptions enumerated above. In the light of the Commission's decision he will submit a final proposal; he thinks he will be able to do so during the Commission's seventeenth session.

CHAPTER IV**Programme of work and organization of future sessions**

51. The Commission considered questions relating to its programme of work and the organization of future sessions at four private meetings held on 18 and 31 May and 2 and 4 June 1965. These questions were also considered by the officers of the Commission and the Special Rapporteurs, whose proposals were adopted by the Commission at its 799th meeting on 10 June 1965.

52. At its sixteenth session in 1964, the Commission decided to complete the study of the law of treaties and of special missions before the end of 1966, that is, before the end of the term of office of the present members of the Commission. For the accomplishment of this aim, the Commission believed it essential to hold a four-week winter session in 1966.⁹⁸ At its present session the Commission was even more firmly convinced that a considerable number of additional meetings would be necessary to complete the work programme it had adopted, even if, as seemed necessary, all items but the law of treaties and special missions were for the present left aside. The Commission considered the question whether the proposed winter session could be replaced by extensions of the regular summer sessions of 1965 and 1966, but concluded that an extension in 1965 was not possible, and that an extension in 1966 would not by itself permit the completion of even the draft on the law of treaties.

53. The Commission, therefore, reaffirmed its recommendation of 1964 to the General Assembly that arrangements should be made for the Commission to meet for four weeks from 3-28 January 1966. These meetings would constitute the second part of the seventeenth session of the Commission.⁹⁹ The report on the work of the second part of the seventeenth session would be

⁹⁸ *Official Records of the General Assembly, Nineteenth Session, Supplement No. 9 (A/5809)*, chapter IV, paras. 36-38.

⁹⁹ The decision on this point was taken on an *ad hoc* basis, without prejudice to the question of the numbering of sessions if winter meetings are held in years after 1966.

submitted to the General Assembly at its twenty-first regular session in 1966. The records and documents of the January meetings would be published in the *Yearbook of the International Law Commission, 1966*.

54. The Commission cannot at the present stage of its work be certain that even the meetings of January 1966 would be sufficient to enable it to complete its programme, and hence wishes to reserve the possibility of a two-week extension of its 1966 summer session. In the course of the winter meetings the Commission would decide, in the light of the progress made up to that time, whether an extension of the summer session will be necessary or not.

55. The meetings of January 1966 will be entirely devoted to reviewing certain portions of the Commission's draft on the law of treaties in the light of the comments of Governments. The remainder of the draft will be completed at the regular summer session of 1966. Moreover, the Commission, pursuant to articles 16 and 21 of its Statute, has requested the Secretary-General to send its draft articles on special missions, completed at the present session, to Governments for their comments, and has requested that such comments be submitted by 1 May 1966. At the summer session, the draft will be reviewed and a text adopted in the light of those comments.

56. The Government of the Principality of Monaco has kindly invited the Commission to hold its meetings of January 1966 in Monaco. Article 12 of the Commission's Statute provides:

"The Commission shall sit at the European Office of the United Nations at Geneva. The Commission shall, however, have the right to hold meetings at other places after consultation with the Secretary-General."

In accordance with this provision, the Commission consulted the Secretary-General, who replied that, if the General Assembly at its twentieth session provided funds for a winter session in Geneva and if the Government of Monaco undertook to pay all expenses over and above such appropriation, there would be no objection to holding the meetings in Monaco. On these understandings, the Commission decided in principle to accept the invitation of the Government of Monaco, and requested the Secretary-General to make the necessary arrangements in accordance with General Assembly resolution 1202 (XII) of 13 December 1957, which provides in operative paragraph 2 (e):

"Meetings may be held away from the established headquarters of any body in other cases where a Government issuing an invitation for a meeting to be held within its territory has agreed to defray, after consultation with the Secretary-General as to their nature and possible extent, the additional costs involved."

CHAPTER V

Other decisions and conclusions of the Commission

A. CO-OPERATION WITH OTHER BODIES

57. At its 801st and 819th meetings on 14 June and 7 July 1965, the Commission considered the item concern-

ing co-operation with other bodies. In this connexion, it desired to stress the importance which it attaches to consultation with the bodies with which it co-operates under article 26 of its Statute.

Inter-American Council of Jurists

58. The Commission took note of the report by Mr. Eduardo Jiménez de Aréchaga (A/CN.4/176) on the work of the fifth meeting of the Inter-American Council of Jurists, held at San Salvador from 25 January to 5 February 1965, which he had attended as an observer on behalf of the Commission.

59. The Inter-American Juridical Committee, the standing organ of the Inter-American Council of Jurists, was represented by Mr. Elbano Provenzali Heredia, who addressed the Commission.

60. A standing invitation has been extended to the Commission to send an observer to the Inter-American Council of Jurists. The Commission took note that the next meeting of the Council would be held in Caracas, Venezuela, but that the date had not yet been set. If the meeting is held before the next session of the Commission, the Commission requested its Chairman, Mr. Milan Bartoš, to attend it, or, if he were unable to do so, to appoint another member of the Commission or its Secretary to represent the Commission.

Asian-African Legal Consultative Committee

61. The Commission took note of the report by Mr. Roberto Ago (A/CN.4/180) on the work of the seventh session of the Asian-African Legal Consultative Committee held at Baghdad from 22 March to 1 April 1965, which he had attended as an observer on behalf of the Commission.

62. The Asian-African Legal Consultative Committee was represented by Mr. Hasan Zakariya, who addressed the Commission.

63. The Commission considered the standing invitation addressed to it to attend the sessions of the Asian-African Legal Consultative Committee. The Commission considered it useful to send an observer to the eighth session of the Committee in 1966, at which comments on the Commission's draft articles on the law of treaties will be prepared. It therefore requested its Chairman, Mr. Milan Bartoš, to attend that session, or, if he were unable to do so, to appoint another member of the Commission or its Secretary to represent the Commission.

B. EXCHANGE AND DISTRIBUTION OF DOCUMENTS OF THE COMMISSION

64. At its 819th meeting on 7 July 1965, the Commission approved the report (A/CN.4/L.110) of a committee which it had established¹⁰⁰ to study the exchange and distribution of the documents of the Commission. The conclusions of the report were as follows:

(a) All the mimeographed and printed documents and records of the Commission should be distributed

¹⁰⁰ See chapter I, para. 7 of the present report.

to all members of the Commission, and to all of the former members of the Commission and members and former members of the International Court of Justice who so request. The Commission desired to stress the need of its members to receive volume II, as well as volume I, of the printed *Yearbooks of the International Law Commission*, for the purposes of study and research in connexion with their functions.

(b) Apart from the above-mentioned persons, the *Yearbooks* and documents should not normally be sent to individuals by name, but should rather be confined to organizations, institutes and libraries, in particular, law school libraries, which should be placed on the mailing list at the request of members of the Commission or of permanent missions to the United Nations; the Secretariat should review the present list in the light of these principles.

(c) When scientific institutions such as the *Institut de Droit international* and the International Law Association are studying questions related to those before the International Law Commission, a limited number of the relevant documents and records of the Commission should be placed at their disposal if their Secretariats so request; they should be asked in exchange to supply a limited number of their documents and records for the use of the Commission.

(d) While it was recognized that the sending of review copies of the Commission's publications is the responsibility of the Secretariat in connexion with the promotion of sales, nevertheless it is desirable that the number of review copies sent out should be increased to a minimum of 100, so as to allow one copy for each of the principal legal periodicals of the world, and thus, by making the work of the Commission better known, to serve the basic objectives of General Assembly resolution 1968 (XVIII) on technical assistance to promote the teaching, study, dissemination and wider appreciation of international law.

(e) When bodies with which the Commission cooperates in pursuance of article 26 of its Statute are working on topics related to those before the Commission, it is desirable in principle that sufficient copies of the documents and reports of the Commission and of the other body should be exchanged to permit distribution of one copy to each member of the Commission and to each member of the other body; the Secretariat was requested to explore the possibility of making such arrangements with those bodies.

C. DATES AND PLACES OF NEXT MEETINGS

65. As stated in the preceding chapter of this report, the Commission finds it necessary to hold a four-week series of meetings from 3 to 28 January 1966, and has decided in principle to accept the invitation of the Government of the Principality of Monaco to hold those meetings in Monaco.

66. The Commission further decided to hold its next regular session at the European Office of the United

Nations from 4 May to 8 July 1966, but wishes, for the reasons explained in the preceding chapter, to reserve the possibility of a two-week extension of the session until 22 July 1966, the question of extension to be decided during the January meetings.

D. REPRESENTATION AT THE TWENTIETH SESSION OF THE GENERAL ASSEMBLY

67. The report of the Commission on the work of its sixteenth session recorded its decision¹⁰¹ that it would be represented at the nineteenth session of the General Assembly by Mr. Roberto Ago, Chairman of the Commission at the sixteenth session. The 1964 report of the Commission was not discussed at the nineteenth session of the General Assembly but will presumably be discussed at the twentieth session. At its present session the Commission continued to consider it important that it be represented, at the discussion by the General Assembly of its work in 1964, by Mr. Ago.

68. The Commission further decided that it would be represented, in respect of the work of its seventeenth session, by Mr. Milan Bartoš, its Chairman, at the twentieth session of the General Assembly.

E. YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

69. The Commission examined certain suggestions concerning the presentation of its records in the *Yearbooks of the International Law Commission*, made for the purpose of facilitating the use of the *Yearbooks*. A number of suggestions were adopted and will be reflected in the volumes for 1965.

F. SEMINAR ON INTERNATIONAL LAW

70. The European Office of the United Nations organized a Seminar on International Law for advanced students of the subject and young government officials responsible in their respective countries for dealing with questions of international law, to take place during the present session of the Commission. The general subject of the discussions was the law of treaties. The Seminar, which held ten meetings between 10 and 21 May 1965, was attended by sixteen students from thirteen different countries. They heard lectures by seven members of the Commission, two members of the Secretariat and one professor from Geneva University, held discussions with the lecturers, and attended meetings of the Commission. The Seminar was held without cost to the United Nations, which undertook no responsibility for the travel or living expenses of the participants.

71. The Commission considers that the Seminar was well organized and well administered. The excellent qualifications of the participants made it possible to maintain a high level of discussion. The course turned out to be a useful experience for those who attended it. The Commission recommends that further Seminars

¹⁰¹ *Official Records of the General Assembly, Nineteenth Session, Supplement No. 9 (A/5809), para. 51.*

should be organized in conjunction with its future sessions. In setting the dates for future Seminars, the work programme of the Commission is the primary consideration; but so far as possible, the dates should be co-ordinated with those of other international law activities in Europe, so that participants coming from distant countries can profit by those activities as well.

72. Several members of the Commission stressed the desirability of including among the participants in the

Seminar a reasonable proportion of nationals of the developing countries. To achieve this, the General Assembly may wish to consider the possibility of granting fellowships, which might cover travel and subsistence expenses, to enable nationals of such countries to attend. Such a measure would be in accord with the aims of General Assembly resolution 1968 (XVIII) on technical assistance to promote the teaching, study, dissemination and wider appreciation of international law.

CHECK LIST OF DOCUMENTS REFERRED TO IN THIS VOLUME

<i>Document</i>	<i>Title</i>	<i>Observation and references</i>
A/3859 and Corr.1	Report of the International Law Commission covering the work of its tenth session, 28 April-4 July 1958	<i>Official Records of the General Assembly, Thirteenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1958, vol. II.</i>
A/4169	Report of the International Law Commission covering the work of its eleventh session, 20 April-26 June 1959	<i>Official Records of the General Assembly, Fourteenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1959, vol. II.</i>
A/4425	Report of the International Law Commission covering the work of its twelfth session, 25 April-1 July 1960	<i>Official Records of the General Assembly, Fifteenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1960, vol. II.</i>
A/4843	Report of the International Law Commission covering the work of its thirteenth session, 1 May-7 July 1961	<i>Official Records of the General Assembly, Sixteenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1961, vol. II.</i>
A/5209 and Corr.1	Report of the International Law Commission covering the work of its fourteenth session, 24 April-29 June 1962	<i>Official Records of the General Assembly, Seventeenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1962, vol. II.</i>
A/5509	Report of the International Law Commission on the work of its fifteenth session, 6 May-12 July 1963	<i>Official Records of the General Assembly, Eighteenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1963, vol. II.</i>
A/5687	Depositary practice in relation to reservations: report of the Secretary-General	Printed in this volume, p. 74.
A/5809	Report of the International Law Commission on the work of its sixteenth session, 11 May-24 July 1964	<i>Official Records of the General Assembly, Nineteenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1964, vol. II.</i>
A/CN.4/63	Law of treaties: report by H. Lauterpacht, Special Rapporteur	<i>Yearbook of the International Law Commission, 1953, vol. II.</i>
A/CN.4/101	Law of treaties: report by Sir Gerald Fitzmaurice, Special Rapporteur	<i>Yearbook of the International Law Commission, 1956, vol. II.</i>
A/CN.4/107	Law of treaties: second report by Sir Gerald Fitzmaurice, Special Rapporteur	<i>Yearbook of the International Law Commission, 1957, vol. II</i>
A/CN.4/129	<i>Ad hoc</i> diplomacy: report by A.E.F. Sandström, Special Rapporteur	<i>Yearbook of the International Law Commission, 1960, vol. II.</i>
A/CN.4/144 and Add.1	Law of treaties: first report by Sir Humphrey Waldock, Special Rapporteur	<i>Yearbook of the International Law Commission, 1962, vol. II.</i>
A/CN.4/155	Special Missions: working paper prepared by the Secretariat	<i>Yearbook of the International Law Commission, 1963, vol. II.</i>
A/CN.4/156 and Add.1-3	Law of treaties: second report by Sir Humphrey Waldock, Special Rapporteur	<i>Ibid.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/166	Special Missions: report by Milan Bartoš, Special Rapporteur	<i>Yearbook of the International Law Commission, 1964, vol. II.</i>
A/CN.4/167 and Add.1-3	Law of treaties: third report by Sir Humphrey Waldock, Special Rapporteur	<i>Ibid.</i>
A/CN.4/176	Report on the fifth meeting of the Inter-American Council of Jurists (San Salvador, 25 January-5 February 1965), by Eduardo Jiménez de Aréchaga, observer for the Commission	Printed in this volume, p. 145.
A/CN.4/177 and Add.1 and 2	Law of treaties: fourth report by Sir Humphrey Waldock, Special Rapporteur	Printed in this volume, p. 3.
A/CN.4/179	Special Missions: second report by Milan Bartoš, Special Rapporteur	Printed in this volume, p. 109.
A/CN.4/180	Report on the seventh session of the Asian-African Legal Consultative Committee (Baghdad, 22 March-1 April 1965), by Roberto Ago, observer for the Commission	Printed in this volume, p. 148.
A/CN.4/L.87	Provisions proposed by Mr. Jiménez de Aréchaga for insertion in the draft articles on diplomatic intercourse and immunities prepared by the International Law Commission at its tenth session	<i>Yearbook of the International Law Commission, 1960, vol. II.</i>
A/CN.4/L.88	Memorandum by Mr. Jiménez de Aréchaga in explanation of his proposal concerning <i>ad hoc</i> diplomacy	<i>Ibid.</i>

**CHECK LIST OF DOCUMENTS OF THE FIRST PART
OF THE SEVENTEENTH SESSION NOT REPRODUCED IN THIS VOLUME**

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/174 and Rev.1	Provisional agenda	Mimeographed
A/CN.4/175 and Add.1-4	Law of treaties: comments by Governments on parts I and II of the draft articles on the law of treaties drawn up by the Commission at its fourteenth and fifteenth sessions	Mimeographed
A/CN.4/178	Filling of a casual vacancy in the Commission: note by the Secretariat	Mimeographed
A/CN.4/178/Add.1	Filling of a casual vacancy in the Commission: list and curriculum vitae of candidates	Mimeographed
A/CN.4/181	Report of the International Law Commission covering the work of its seventeenth session	Same as document A/6009 printed in this volume, p. 155.
A/CN.4/L.107	Law of treaties: draft articles adopted by the Commission	Mimeographed
A/CN.4/L.109	Resolution adopted by the Commission at its 786th meeting on 19 May 1965 (place of meeting in Geneva)	Mimeographed*
A/CN.4/L.110	Co-operation with other bodies: report of the Committee on exchange and distribution of the documents of the Commission	Mimeographed
A/CN.4/L.111 and Add.1-5	Draft report of the International Law Commission covering the work of its seventeenth session	Mimeographed

* For the text of this resolution, see vol. I, summary record of the 786th meeting, para. 3.

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