

# YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1971

*Volume II*  
*Part One*

*Documents of the twenty-third session:  
Reports of the Special Rapporteurs  
and report of the Commission  
to the General Assembly*

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UNITED NATIONS





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## PREFATORY NOTE

Volume II of the 1971 *Yearbook* consists of two separately published parts containing the following documents:

### PART ONE (*the present volume*)

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|------------------------|--|
| A/CN.4/217/Add.2       | First report on State responsibility, by Mr. Roberto Ago, Special Rapporteur—Review of previous work on codification of the topic of the international responsibility of States: <i>Addendum</i> —annex XXIV (Restatement of the law, by the American Law Institute) |
| A/CN.4/241 and Add.1-6 | Sixth report on relations between States and international organizations, by Mr. Abdullah El-Erian, Special Rapporteur   |
| A/CN.4/246 and Add.1-3 | Third report on State responsibility, by Mr. Roberto Ago, Special Rapporteur—The internationally wrongful act of the State, source of international responsibility   |
| A/CN.4/247 and Add.1   | Fourth report on succession in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur—Draft articles with commentaries on succession to public property  |
| A/CN.4/249             | Fourth report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur  |
| A/8410/Rev.1           | Report of the International Law Commission on the work of its twenty-third session (26 April-30 July 1971)   |

### PART TWO (*United Nations publications, Sales No. E.72.V.6 (Part II)*)

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|----------------------|---|
| A/CN.4/243 and Add.1 | Succession of States in respect of bilateral treaties: second and third studies prepared by the Secretariat [air transport agreements and trade agreements]   |
| A/CN.4/244/Rev.1     | General Assembly resolution 2669 (XXV) (Progressive development and codification of the rules of international law relating to international watercourses): note by the Secretariat   |
| A/CN.4/245           | Survey of international law: Working paper prepared by the Secretary-General  |
| A/CN.4/248           | Report on the twelfth session of the Asian-African Legal Consultative Committee, by Taslim O. Elias, Observer for the Commission  |
| A/CN.4/250           | Report of the Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations   |
| A/CN.4/L.166         | Relations between States and international organizations—Consideration by the Commission of the question of the possible effects of exceptional situations such as absence of recognition, absence or severance of diplomatic and consular relations, or armed conflict on the representation of States in international organizations: working paper prepared by Mr. Abdullah El-Erian, Special Rapporteur |

- A/CN.4/L.171      Relations between States and international organizations—Question of the inclusion in article 50 of a provision on the settlement of disputes: working paper prepared by Mr. Abdullah El-Erian, Special Rapporteur
- A/CN.4/L.173      Draft articles on representatives of States to international organizations—Draft articles on observer delegations of States to organs and to conferences: working paper prepared by Mr. Abdullah El-Erian, Special Rapporteur
- A/CN.4/L.174 and Add.1-6      Working group on relations between States and international organizations: first to fifth reports



# RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

[Agenda item 1]

## DOCUMENT A/CN.4/241 AND ADD.1-6

Sixth report on relations between States and international organizations, by Mr. Abdullah El-Erian,  
Special Rapporteur

[Original text : English]  
[2 March, 29 March, 5 April, 9 April,  
26 April, 12 May, 14 May 1971]

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#### ABBREVIATIONS

<p>“ CCI ”    General abbreviation used by ITU to designate both the CCIR (International Radio Consultative Committee) and the CCITT (International Telegraph and Telephone Consultative Committee)</p> <p>ECA        Economic Commission for Africa</p> <p>FAO        Food and Agriculture Organization of the United Nations</p> <p>IAEA        International Atomic Energy Agency</p> <p>ICSID      International Centre for Settlement of Investment Disputes</p> <p>IBRD        International Bank for Reconstruction and Development</p> <p>IDA        International Development Association</p>	<p>IFC        International Finance Corporation</p> <p>ILO        International Labour Organisation</p> <p>IMF        International Monetary Fund</p> <p>ITU        International Telecommunication Union</p> <p>OAS        Organization of American States</p> <p>UNESCO    United Nations Educational, Scientific and Cultural Organization</p> <p>UNIDO     United Nations Industrial Development Organization</p> <p>UPU        Universal Postal Union</p> <p>WHO        World Health Organization</p> <p>WMO        World Meteorological Organization</p>
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## DOCUMENT A/CN.4/241 AND ADD.1 AND 2

## I. Introduction

1. At its twentieth, twenty-first and twenty-second sessions, the International Law Commission provisionally adopted parts I, II, III and IV of its draft articles on representatives of States to international organizations, consisting of a first group of twenty-one articles on general provisions (part I) and permanent missions to international organizations in general (part II, section 1),<sup>1</sup> of a second group of twenty-nine articles on facilities, privileges and immunities of permanent missions to international organizations; conduct of the permanent mission and its members; and end of functions (part II, sections 2, 3 and 4)<sup>2</sup> and of a third group of sixty-six articles on permanent observer missions to international organizations (part III) and delegations of States to organs and to conferences (part IV).<sup>3</sup> The Commission decided, in accordance with articles 16 and 21 of its Statute, to submit the first, second and third groups of articles, through the Secretary-General, to Governments for their observations. It also decided to transmit them to the secretariats of the United Nations, the specialized agencies and IAEA (hereinafter referred to as "international organizations"), for their observations. Bearing in mind the position of Switzerland as the host State in relation to the Office of the United Nations at Geneva and to a number of specialized agencies, as well as the wish expressed by the Government of that country, the Commission deemed it useful to transmit also the three groups of draft articles to that Government for its observations.<sup>4</sup>

2. At its twenty-second session in 1970, the Commission expressed its intention to conclude at its twenty-third session in 1971 the second reading of the draft articles on relations between States and international organizations.<sup>5</sup> Consequently, the Commission has instructed the Secretariat to request the Governments and the international organizations to which the third group of draft articles was to be transmitted to submit their observations not later than 15 January 1971,<sup>6</sup> in order that the Commission might be in a position to consider them at its twenty-third session. Also in 1970, the General Assembly at its twenty-fifth session adopted resolution 2634 (XXV) which, *inter alia*, recommended that the Commission

continue its work on relations between States and international organizations, taking into account the views expressed at the twenty-third, twenty-fourth and twenty-fifth sessions of the General Assembly and the comments which may be submitted by Governments, with the object of presenting in 1971 a final draft on the topic.

3. In its report on the work of its twenty-first session, the Commission stated that article 50 (consultations between

the sending State, the host State and the Organization) had been put provisionally at the end of part II (permanent missions to international organizations), its place in the draft as a whole to be determined by the Commission at a later stage.<sup>7</sup> In its report on the work of its twenty-second session, the Commission stated that it

intends article 50 to apply also to the articles on permanent observer missions and on delegations to organs and to conferences, and during the second reading will decide on a suitable place for the article.<sup>8</sup>

Mention should also be made, in this connexion, of the statement made by the Commission in that same report to the effect that it

intends, during the second reading of the whole draft, to determine whether it would be possible to reduce the number of articles by combining provisions which are susceptible of uniform treatment.<sup>9</sup>

4. In connexion with its examination at its twenty-first session of the second group of articles, the Commission briefly considered the desirability of dealing, in separate articles, with the possible effects of exceptional situations—such as absence of recognition, absence or severance of diplomatic relations or armed conflict—on the representation of States in international organizations. The Commission decided "to resume examination [of those questions] at a future session and to postpone any decision on them for the time being".<sup>10</sup> The Commission also briefly considered at its twenty-second session in 1970 the desirability of dealing, in separate articles, with the possible effects of those exceptional situations on permanent observer missions and on delegations to organs and conferences. The Commission decided, in view of the decision taken at its twenty-first session,

to examine at its second reading the question of the possible effects of exceptional situations on the representation of States in international organizations in general and to postpone for the time being any decision in the context of parts III and IV.<sup>11</sup>

## THE BASIS OF THE PRESENT REPORT

5. By 18 February 1971, replies had been received on the first group of articles adopted by the Commission at its twentieth session in 1968 from the following countries: Austria, Canada, Cyprus, Denmark, Ecuador, Israel, Netherlands, Sweden, Union of Soviet Socialist Republics, United States of America. Replies had been received on the second group of articles adopted by the Commission at its twenty-first session in 1969 or on the first and second groups of articles combined from the following countries: Belgium, Canada, Cyprus, Denmark, Finland, Israel, Madagascar, Mauritius, Netherlands, Sweden, Switzerland, United Kingdom and Yugoslavia; observations had also been submitted on the first and second groups of draft articles by the following international organizations: United Nations, the ILO, FAO, UNESCO, WHO, IMF, UPU, ITU, WMO and IAEA. Lastly, observations had been submitted on the third

<sup>1</sup> *Yearbook of the International Law Commission, 1968*, vol. II, p. 194, document A/7209/Rev.1, para. 21.

<sup>2</sup> *Ibid.*, 1969, vol. II, p. 206, document A/7610/Rev.1, para. 13.

<sup>3</sup> *Ibid.*, 1970, vol. II, p. 275, document A/8010/Rev.1, para. 16.

<sup>4</sup> *Ibid.*, p. 276, para. 24.

<sup>5</sup> *Ibid.*, p. 309, para. 86.

<sup>6</sup> *Ibid.*, p. 276, para. 25.

<sup>7</sup> *Ibid.*, 1969, vol. II, p. 221, document A/7610/Rev.1, foot-note 44.

<sup>8</sup> *Ibid.*, 1970, vol. II, p. 275, document A/8010/Rev.1, para. 21.

<sup>9</sup> *Ibid.*, para. 20.

<sup>10</sup> *Ibid.*, 1969, vol. II, p. 206, document A/7610/Rev.1, para. 18.

<sup>11</sup> *Ibid.*, 1970, vol. II, p. 276, document A/8010/Rev.1, para. 22.

group of articles by Israel, Madagascar, New Zealand, Pakistan, Poland and Switzerland and by the United Nations, the ILO, WHO, IMF, UPU, ITU and WMO. In addition, comments relating to all three groups of articles had been received from Australia and from IBRD and its affiliated agencies. The majority of the replies contained proposals and criticisms with regard to the substance or wording of the draft articles of the first, second and third groups of articles.<sup>12</sup>

6. The Secretariat furnished the Special Rapporteur with extracts from the records of the Sixth Committee at the twenty-third, twenty-fourth and twenty-fifth sessions of the General Assembly, setting out the comments of delegations on the preliminary questions relating to the form and scope of the draft articles as well as on a number of the articles in the three groups of articles respectively.

7. In addition, in pursuance of a decision taken by the Commission at its 1086th meeting, the Secretariat circulated: (a) observations and suggestions concerning the English text of the draft articles (A/CN.4/L.162/Rev.1 and Corr.1)<sup>13</sup> and (b) a note on differences in form between part II and part IV of the draft articles (A/CN.4/L.167).

8. The present report starts with preliminary considerations summarizing the views expressed regarding the form and scope of the draft articles; it then reviews article by article the comments of delegations, Governments and international organizations<sup>14</sup> as well as the observations and suggestions of the Secretariat referred to above (para. 7). The Special Rapporteur has taken all the comments into account in his re-examination of the draft articles, even though it has not been possible for him to deal with every one of them in the text of his report. He has given special attention to the observations of the Governments of the United States of America and Switzerland, owing to the special position of these two countries as host States in relation to the United Nations, the Office of the United Nations at Geneva and a number of specialized agencies.

## II. Revision of the draft articles in the light of the observations of Governments and international organizations

### *Preliminary considerations*

#### A. THE FORM OF THE DRAFT ARTICLES

##### 1. PREVIOUS DECISION OF THE COMMISSION

9. In its report on the work of its twentieth session, the Commission stated:

<sup>12</sup> For the observations of Member States, Switzerland and the international organizations on the draft articles adopted by the Commission at its twentieth, twenty-first and twenty-second sessions, see below, p. 356, document A/8410/Rev.1, annex I, sections A, B and C respectively.

Since the mimeographed documents originally containing the observations of Member States are now grouped together in document A/8410/Rev.1, annex I, section A, it has been necessary to delete in the present report the Special Rapporteur's references to

In preparing the draft articles the Commission had in mind that they were intended to serve as a basis for a draft convention and constitute a self-contained and autonomous unit. Some members of the Commission stated that they would have preferred to see the draft articles combined with those on representatives of organizations to States which the Commission might prepare at a future stage. They pointed out that relations between States and international organizations had two aspects—that of representatives of States to international organizations and that of representatives of international organizations to States; and that since the two aspects were closely related it would be preferable to treat them in one instrument. The majority of the members of the Commission thought, however, that since representatives of international organizations to States were officials of the organizations the question of their status was an integral part of the question of the status of the organizations themselves, a subject the consideration of which the Commission had deferred for the time being as a consequence of its decision to concentrate its work at the present stage on the subject of representatives of States to international organizations.

To make it clear that the draft articles prepared at this stage of its work related only to that specific aspect of the topic, the Commission decided that they should be entitled "Draft articles on representatives of States to international organizations".<sup>15</sup>

#### 2. OBSERVATIONS OF GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS

10. The comments made in the Sixth Committee on the first and second groups of articles in the course of the twenty-third and twenty-fourth sessions of the General Assembly in 1968 and 1969 did not contain explicit references to the question of the form of the draft articles. Most of the observations related to the scope of the draft articles or were addressed to specific draft articles. Several representatives expressed the view that the new set of draft articles adopted represented an important step forward in the codification and progressive development of international law relating to relations between States and external organizations. Several representatives welcomed the Commission's decision to transmit the draft articles through the Secretary-General to Governments of Member States for their observations and expressed satisfaction at the Commission's decision to transmit the draft articles to the Government of Switzerland and the Secretaries of the United Nations, the specialized agencies and IAEA for their observations.

11. During the discussion of the third group of articles in the Sixth Committee, in the course of the twenty-fifth session of the General Assembly in 1970, the question of the form of the draft articles was commented upon by a number of delegations.<sup>16</sup> The general opinion was that the draft constituted a suitable basis for a future convention on the subject. Some delegations, however, took the view

those documents. Consequently, where necessary, names of countries have been inserted in square brackets for ease of reference.

<sup>13</sup> The observations and suggestions of the Secretariat concerning the other languages will be circulated as documents A/CN.4/L.163 (French only), A/CN.4/L.164 (Spanish only), and A/CN.4/L.165 (Russian only).

<sup>14</sup> See foot-note 12.

<sup>15</sup> *Yearbook of the International Law Commission, 1968*, vol. II, page 195, document A/7209/Rev.1, paras 24-25.

<sup>16</sup> *Official Records of the General Assembly, Twenty-fifth Session Annexes*, agenda item 84, document A/8147, para. 20.

that it would be preferable to prepare a code to serve as a model, rather than a general convention which, owing to the great variety of international organizations and their differing purposes and functions, would probably have to be complemented by specific agreements in individual cases. Moreover, a convention would raise a number of legal problems, such as its relationship to existing agreements on the subject (conventions on privileges and immunities of specific international organizations, headquarters agreements, etc.) and the question whether or not international organizations, on which the draft imposed certain obligations, could become parties to the convention.

12. In the written observations submitted by Governments,<sup>17</sup> no exception seems to have been taken to the decision of the Commission to prepare the draft articles on representatives of States to international organizations with the intention that they serve as a basis for a draft convention and constitute a self-contained and autonomous unit. The Government of Sweden, however, expressed its preference for the idea of a code. In the first paragraph of the "General remarks" it made the following observation:

In view of the diversity of the purposes and functions of international organizations, the Swedish Government considers that a code intended to serve as a standard and a model for future international agreements would be more appropriate than a convention for the purpose of laying down general rules concerning the establishment and status of permanent missions to such organizations. In all likelihood, specific agreements will continue to be needed on the matters dealt with in the draft articles. Given the form of code, the articles would be useful by providing a basis for such agreements. On the other hand, general rules adopted in the form of a convention, even though they would be of a residuary character as provided in articles 3-5, would probably make special arrangements more difficult to achieve in practice, once these rules have been generally accepted and become binding on the States.

13. The observations of international organizations do not include specific reference to the question of the form of the draft articles. The question is, however, touched upon indirectly in the second paragraph of the observations of the ILO where it is stated:

The draft convention will be adopted by States. It naturally imposes certain obligations on these subjects of international law, but it also imposes a number of obligations on international organizations. It seems to us that this raises the question whether, legally, an inter-State agreement can impose obligations on a third subject of international law, in this instance international organizations of universal character. In the case of relations between States the validity of such obligations is doubtful at best according to authoritative legal opinion, unless the third State on which the obligations are imposed, signifies its acceptance of them.

The question is also referred to in paragraphs 4 to 5 of the observations of IBRD.

### 3. OBSERVATIONS OF THE SPECIAL RAPPORTEUR

14. The question which confronted the Special Rapporteur, in assessing the position of Governments and international organizations on the question of the form of the draft articles, was how much weight to attach to the

absence of specific comments on this question as an implied endorsement of the Commission in favour of a draft convention. The Special Rapporteur took into account the fact that in their observations on previous drafts prepared by the Commission on other topics, Governments, when they were not in favour of the idea of a draft convention, said so expressly. Furthermore, from the context of the observations on the specific articles of the present draft, it appears that underlying these observations is the assumption that the draft is intended to serve as a basis for a draft convention. Thus the observations of the United States of America on the first group of articles are preceded with a general statement that

the United States considers that these twenty-one draft articles have been carefully and thoughtfully worked out by the International Law Commission and is, in general, in accord with the Commission's proposals.

15. The Special Rapporteur does not share the doubts expressed by the Swedish Government regarding the curtailing effects which the adoption of general rules in the form of a convention might have on the development of special arrangements in practice. He wishes to recall that in paragraph 5 of the commentary on draft articles 4 and 5 (article 5 relates to future agreements which may contain provisions different from some of the rules laid down in the draft articles), the Commission states:

The Commission believes [. . .] that situations may arise in the future in which States establishing a new international organization may find it necessary to adopt different rules more appropriate to such an organization. It must also be noted that the draft articles are not intended—and should not be regarded as intending—in any way to preclude any further development of the law in this area.<sup>18</sup>

16. As to the point made in the observations of the ILO and of IBRD regarding the difficulties likely to arise out of the fact that a convention concluded by States only would impose obligations on international organizations, the Special Rapporteur wishes to make two observations. First, the Commission considered this question and its conclusion was stated in paragraph 2 of its commentary on article 22 as follows:

During the discussion in the Commission some doubt was expressed whether it was desirable that the obligations of international organizations should be stated in the draft articles inasmuch as this would raise the general question whether it was intended that the organizations themselves should become parties to the draft articles. However, it was pointed out by several members that the Commission was trying to state what was the general international law concerning permanent missions to international organizations. The question whether international organizations would become parties to the draft articles was a separate one to be considered at a later stage.<sup>19</sup>

Second, the Convention on the Privileges and Immunities of the United Nations<sup>20</sup> (1946) was opened for accession by States only, notwithstanding the fact that it contained provisions granting rights to and imposing obligations on the United Nations. It has been asserted by the United

<sup>18</sup> *Yearbook of the International Law Commission*, 1968, vol. II, p. 199, document A/7209/Rev.1, chap. II, E.

<sup>19</sup> *Ibid.*, 1969, vol. II, p. 207, document A/7610/Rev.1, chap. II, B.

<sup>20</sup> For the text of the Convention on the Privileges and Immunities of the United Nations, see United Nations, *Treaty Series*, vol. 1, p. 15.

<sup>17</sup> See foot-note 12 above.



Nations Secretariat—an assertion supported by some writers—that the United Nations could be considered in a sense to be a party to the Convention (see the statement by the Legal Counsel at the 1016th meeting of the Sixth Committee).<sup>21</sup>

## B. SCOPE AND TITLE OF THE DRAFT ARTICLES

### 1. PREVIOUS DECISIONS OF THE COMMISSION

17. In its report on the work of its twentieth session the Commission stated the following:

Members of the Commission had differing opinions on whether the work of the Commission on the topic should extend to regional organizations. In paragraph 179 of his first report,<sup>22</sup> the Special Rapporteur had suggested that the Commission should concentrate its work on this topic first on international organizations of a universal character and prepare its draft articles with reference to these organizations only, and should examine later whether the draft articles could be applied to regional organizations as they stood, or whether they required modification. In explaining his suggestion he stated that the study of regional organizations raised a number of problems, which would require the formulation of particular rules for those organizations. Some members of the Commission took issue with that suggestion. They thought that regional organizations should be included in the study, pointing out that relations between States and organizations of a universal character might not differ appreciably from relations between States and similar regional organizations. Indeed, they considered that there were at least as great differences between some of the universal organizations—for example, between the Universal Postal Union (UPU), the International Labour Organisation (ILO) and the United Nations—as between the United Nations and the major regional organizations. They further pointed out that if the Commission were to confine itself to the topic of relations of organizations of a universal character with States, it would be leaving a serious gap in the draft articles. Other members, however, expressed themselves in favour of the suggestion by the Special Rapporteur to exclude regional organizations at least from the initial stage of the study. They stated that any draft convention to be prepared concerning relations between States and international organizations should deal with organizations of a universal character and not with regional organizations, though the experience of the latter could be taken into account in the study. They argued that regional organizations were so diverse that uniform rules applicable to all of them could hardly be formulated. They therefore thought that it would probably be better to leave those regional organizations great latitude to settle their own relations with Governments. It was further pointed out that some regional organizations had their own codification organs, and that they should therefore be free to develop their own rules.

The Commission was able at its twentieth session to compose these differences and adopted an intermediary solution which is contained in paragraph 2 of article 2 of the draft articles.

Some members of the Commission were of the opinion that the scope of the draft articles should be confined to permanent missions to international organizations. In his third report the Special Rapporteur had included a number of articles on delegations to organs of international organizations and to conferences convened by international organizations and on permanent observers of non-member States to international organizations (part III and IV). The Commission was of the opinion that no decision should be taken on

that question until it had had an opportunity to consider those articles. If the Commission were to decide to cover those two subjects in the draft articles, the title of the draft articles would have to be changed.<sup>23</sup>

18. In its report on the work of its twenty-first session, the Commission stated:

At this session, the Commission again considered the question referred to in paragraph 28 of its report on the work of its twentieth session. At its 992nd meeting, it reached the conclusion that its draft should also include articles dealing with permanent observers for non-member States to international organizations and with delegations to sessions of organs of international organizations. Opinions were divided on whether the draft should, in addition, include articles on delegations to conferences convened by international organizations or whether that question ought to be considered in connexion with another topic. At its 993rd meeting, the Commission took a provisional decision on the subject, leaving the final decision to be taken at a later stage. The Commission intends to consider at its twenty-second session draft articles on permanent observers for non-member States and on delegations to sessions of organs of international organizations and to conferences convened by such organizations.<sup>24</sup>

19. At the twenty-second session of the Commission, the Special Rapporteur submitted a fifth report<sup>25</sup> containing draft articles, with commentaries, on permanent observer missions to international organizations (part III) and delegations to organs of international organizations and to conferences convened by international organizations (part IV). The Commission adopted a provisional draft of sixty-six articles<sup>26</sup> on the subjects included in sections 1 (permanent observer missions in general), 2 (facilities, privileges and immunities of permanent observer missions), 3 (conduct of the permanent observer mission and its members) and 4 (end of functions) of part III (permanent observer missions to international organizations) and sections 1 (delegations in general), 2 (facilities, privileges and immunities of delegations), 3 (conduct of the delegation and its members) and 4 (end of functions) of part IV (delegations of States to organs and to conferences).

The Special Rapporteur also submitted at the twenty-second session a working paper on temporary observer delegations and conferences not convened by international organizations<sup>27</sup> but the Commission did not consider that it should take up the matter at that time.<sup>28</sup>

### 2. OBSERVATIONS OF GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS

20. In the course of the consideration by the Sixth Committee of the first group of draft articles at the twenty-third session of the General Assembly in 1968, comments of delegations on the question of the inclusion or non-inclusion of regional organizations in the draft

<sup>23</sup> *Ibid.*, 1968, vol. II, pp. 195-196, document A/7209/Rev.1, paras. 26-28.

<sup>24</sup> *Ibid.*, 1969, vol. II, p. 206, document A/7610/Rev.1, para. 17.

<sup>25</sup> *Ibid.*, 1970, vol. II, p. 1, document A/CN.4/227 and Add.1 and 2.

<sup>26</sup> *Ibid.*, p. 276, document A/8010/Rev.1, chap. II, section B.

<sup>27</sup> A/CN.4/L.151.

<sup>28</sup> *Yearbook of the International Law Commission*, 1970, vol. II, p. 274, document A/8010/Rev.1, para. 14.

<sup>21</sup> *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98, document A/C.6/385.

<sup>22</sup> *Yearbook of the International Law Commission*, 1963, vol. II, p. 185, document A/CN.4/161 and Add.1.

articles were made with specific reference to article 2 (scope of the present articles).<sup>29</sup> Several representatives supported article 2 and endorsed the rule in paragraph 1 thereof limiting the application of the draft articles to international organizations of universal character. It was pointed out, in particular, that regional organizations had a special unity of purpose and that any attempt to standardize the practices which they followed might upset delicate balances and create numerous difficulties. Paragraph 2, moreover, stated a useful reservation to that rule and offered a sound solution for a problem which had long been a matter of concern to the International Law Commission. Others expressed regret that regional organizations had been excluded from the scope of the draft articles. As regards the other aspect of the question of the scope of the draft articles, some representatives raised two questions not covered in the first group of draft articles. The first was the question of delegations to sessions of organs of international organizations and to conferences convened by international organizations. The second was the question of permanent observers from non-member States to international organizations.

21. When the Sixth Committee considered the second group of draft articles at the twenty-fourth session of the General Assembly in 1969, a number of delegations addressed themselves to the question of the scope of the draft articles. Several representatives supported the decision of the Commission to limit the application of the draft articles, as a general rule, to international organizations of a universal character. Others observed that although the draft articles were intended to apply to international organizations of a universal character, they might be used as models for headquarters agreements of international organizations not of a universal character. Several representatives endorsed the Commission's decision to include in the draft articles provisions dealing with permanent observers of non-member States to international organizations. They agreed further with its conclusion that its draft should also include articles dealing with delegations to sessions of organs of international organizations. With regard, however, to delegations to conferences convened by such organizations, some representatives reserved their position. It was said, in this connexion, that an international conference was a sovereign body, irrespective of who convened it.<sup>30</sup>

22. The comments of delegations in the Sixth Committee when it considered the third group of draft articles in 1970, were summed up in the report of the Sixth Committee as follows:

It was generally considered appropriate that the Commission had limited the scope of the draft to international organizations of universal character (article 2) and had included in it provisions regulating the status of permanent missions of member States, permanent observer missions of non-member States, and delegations to organs of international organizations or to conferences convened by such organizations. Some representatives were nevertheless of the opinion that the Commission, when reviewing the draft, should try to

supplement it with provisions regulating the status of certain categories of missions, delegations or persons that had for the time being been excluded from its scope. In that connexion, certain representatives enumerated the following: permanent missions and permanent observer missions to international organizations not of a universal character; permanent observer missions of States, not members of an organization; non-permanent observer missions and temporary observers; observers to organs and at conferences; delegations to conferences convened by States; representatives of national liberation movements, of peoples who were victims of colonialism or of groups fighting against racial discrimination or *apartheid*.<sup>31</sup>

23. Only few of the written observations submitted by Governments contain references to the question of the place of regional organizations in the draft articles. These references are made in relation to article 1, sub-paragraph (b) (definition of an "international organization of universal character") and article 2 (scope of the articles). Commenting on article 1, sub-paragraph (b) in conjunction with article 2, paragraph 1, the Netherlands Government states that

The proposal that the present rules be restricted to "organizations of universal character" is inopportune, since this criterion is irrelevant in this connexion.

The Belgian Government states that

Universality of character is totally irrelevant and the only decisive factors should be the functional criterion and a consensus among the States concerned.

In its comments on article 1 (b), the United States of America observes that

Sub-paragraph (b), which defines an "international organization of universal character" as "an organization whose membership and responsibilities are on a world-wide scale", does not adequately dispose of all the problems raised by an attempt to distinguish between universal international organizations and all others.

In its comments on article 1 (b), Switzerland, while recognizing that

it seems desirable to restrict the scope of the draft articles to a limited category of organizations whose size and responsibilities justify the presence of permanent missions,

takes the view that

The definition may nevertheless still seem somewhat too wide.

24. No exception has been taken in the written observations submitted by Governments on the first and second groups of draft articles to the Commission's decision to include articles dealing with permanent observer missions of non-member States and delegations to organs of international organizations or to conferences convened by international organizations. That decision is explicitly endorsed in the comments of four Governments: the Government of Cyprus indicates that it

looks forward to receiving the draft articles on permanent observers of non-member States and on delegations to sessions of organs of international organizations and to conferences convened by such organizations.

The Government of Yugoslavia states that

noteworthy too is the important decision taken by the Commission to round off the draft articles with legal rules concerning permanent

<sup>29</sup> *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 84, document A/7370, paras. 24-25.

<sup>30</sup> *Ibid.*, *Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, paras. 18-21.

<sup>31</sup> *Ibid.*, *Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 17.

observers for non-member States and representatives attending sessions of organs of international organizations; without these provisions the draft would be incomplete.

The Government of Pakistan indicates that

It is necessary to provide a legal basis for permanent observer missions hitherto regulated by practice.

Finally, the Government of Poland states that

Part III of the draft pertaining to permanent observer missions is of considerable importance. The unification of practice existing in this field and the foundation of such practice on a solid legal basis can and should solve the difficulties existing in this respect and make possible the extension of the scope of co-operation through international organizations.

25. The observations of international organizations do not touch on the scope of the draft articles either in relation to the place of regional organizations in the draft or to the inclusion in it of articles covering permanent observer missions and delegations to organs and conferences.

### 3. OBSERVATIONS OF THE SPECIAL RAPPORTEUR

26. The observations of Governments and international organizations appear to indicate general agreement with the position adopted by the Commission regarding the place of regional organizations in the draft articles. Since the observations which took issue with this position were made in specific reference to article 2 (scope of the present articles), the Special Rapporteur proposes to defer his observations thereon and to take them up with the rest of the other observations on article 2.

27. As mentioned above,<sup>32</sup> the observations of delegations to the Sixth Committee at the twenty-fifth session of the General Assembly reflect a general endorsement of the Commission's decision to include in its draft provisions regulating the status of permanent observer missions of non-member States and delegations to organs of international organizations or to conferences convened by such organizations.

As to the suggestions made in some of these observations in favour of supplementing the draft articles with provisions regulating the status of certain other categories of missions, delegations or persons (permanent observer missions of States not members of an organization; non-permanent observer missions and temporary observers, observers to organs and at conferences, delegations to conferences convened by States and representatives of national liberation movements, of peoples who are victims of colonialism or of groups fighting against racial discrimination or *apartheid*), the Special Rapporteur intends to define his position on these suggestions at the end of the present report when he has received all the written observations of Governments and international organizations on the third group of draft articles, so as to be able to take into consideration any suggestion which might be contained in those observations.

28. The inclusion in the draft articles of provisions on permanent observer missions and delegations to organs and conferences would require a slight change in the title

of the draft. It will be recalled that the Commission stated in its report on the work of its twentieth session that if it were to decide to cover those two subjects in the draft articles, the title of the draft articles would have to be changed.<sup>33</sup> The Special Rapporteur proposes, therefore, that the title of the draft articles should be amended to read "Draft articles on representatives of States to international organizations and conferences".

## Part I. General provisions

### A. CONTENTS AND TITLE OF PART I

29. When the Commission drafted the articles contained in part I in 1968,<sup>34</sup> it envisaged certain provisions of an introductory character which would have a general application to the different parts of the draft. The text of those articles reveals, however, that they were drafted with specific reference to part II (permanent missions to international organizations), since the Commission did not have before it at that time the text of the provisions of parts III and IV. There is, therefore, no reference in articles 1 to 5 to non-member States or to conferences, in view of the fact that in 1968 the Commission was of the opinion that no decision should be taken on the question of including in its draft provisions regulating the subjects of permanent observer missions of non-member States and delegations to organs and conferences until it had had an opportunity to consider those provisions. The inclusion of parts III and IV in the draft requires slight changes in the articles in part I to extend their scope to those parts. Such a necessity was anticipated in paragraph 1 of the commentary to article 51 where the Commission states that it

will review what adjustments may be required in [...] articles in part I, such as article 2, in order to clarify their applicability to part III.

30. Subsequent to the adoption of the articles in part I, the Commission adopted, in the course of its elaboration of part II of its draft, certain provisions which it regarded as having such a general scope as to be applicable to other parts of the draft. Thus when the Commission placed article 50 (consultations between the sending State, the host State and the Organization) at the end of part II, it stated that

Article 50 was put provisionally at the end of the group of articles adopted by the Commission at its twenty-first session. Its place in the draft as a whole will be determined by the Commission at a later stage.<sup>35</sup>

<sup>32</sup> *Yearbook of the International Law Commission, 1968*, vol. II, pp. 195-196, document A/7209/Rev.1, para. 28.

<sup>34</sup> The texts of the draft articles on representatives of States to international organizations, together with the Commission's commentaries, have been published as follows:

(1) Articles 1-21: *Yearbook of the International Law Commission, 1968*, vol. II, pp. 196 *et seq.*, document A/7209/Rev.1.

(2) Articles 22-50: *Ibid.*, 1969, vol. II, pp. 207 *et seq.*, document A/7610/Rev.1.

(3) Articles 51-116: *Ibid.*, 1970, vol. II, pp. 276 *et seq.*, document A/8010/Rev.1.

<sup>35</sup> *Ibid.*, 1969, vol. II, p. 221, document A/7610/Rev.1, foot-note 44,

<sup>33</sup> See para. 22 above.

In that category of articles of general character may be included article 44 (non-discrimination), article 45 (respect for the laws and regulations of the host State), article 48 (facilities for departure), and the articles which the Commission may decide to adopt on the possible effects of exceptional situations—such as absence of recognition, absence or severance of diplomatic relations or armed conflict—on the representation of States in international organizations.

31. The Special Rapporteur does not consider it appropriate to transfer the above-mentioned articles to part I. The articles in part I are articles of an introductory character and as such their appropriate place is at the beginning of the draft. They deal with such introductory questions as the use of terms, the scope of the draft articles, the relationship between the articles and the relevant rules of international organizations or other existing international agreements and the derogation from the articles. Conversely, the category of articles referred to in paragraph 30 above do not possess such a preliminary character. They are substantive provisions which regulate the modalities of the institutions which constitute the subject matter of the draft articles or qualify the application of some of the rules contained in those articles. They should therefore follow the substantive articles and not precede them.

For these reasons, the Special Rapporteur wishes to propose that part I should be entitled "Introduction" and consist of the present articles 1 to 5, and that a new part V be added which would be entitled "General provisions" and would contain the other provisions of general applicability.

## B. INDIVIDUAL ARTICLES

### Article 1. Use of terms

#### GENERAL

##### (a) *Observations of Governments and international organizations*

32. The observations of Governments on article 1 refer mainly to sub-paragraphs (a) and (b), which concern the terms "international organization" and "international organization of universal character", respectively.

33. One of the written observations [Israel] suggests the addition in article 1 of a definition of "representative", since the terms are used both in the title and in the text of the draft articles.

34. The editing observations of the United Nations Secretariat point out that since article 1 is placed at the beginning of part I (General provisions), the definitions it contains might be expected to apply to the whole of the draft but that at first sight only sub-paragraphs (a), (b) and (c) appear to have such a scope; the remaining sub-paragraphs concern rather part II and could for the sake

of symmetry be placed at the beginning of that part just as the definitions applying to parts III and IV (articles 51 and 78 are placed at the beginning of those parts). The Secretariat points out however that there may be some disadvantages in placing at the beginning of each part the article on the use of terms applying to that part and suggests that the Commission consider the possibility of placing all the definitions, properly arranged, at the beginning of the draft, that is in part I (A/CN.4/L.162/Rev.1, section A).

35. Another editing observation by the United Nations Secretariat relates to the use of the verb "to mean" in some sub-paragraphs of article 1 and the verb "to be" in others. The Secretariat suggests (A/CN.4/L.162/Rev.1, section B) that, for the sake of uniformity, the verb "to mean" be used throughout as in article 2 of the Vienna Convention on the Law of Treaties,<sup>36</sup> and recalls that this suggestion was made during the Commission's twenty-second session and accepted by the Special Rapporteur.<sup>37</sup>

##### (b) *Observations of the Special Rapporteur*

36. The Special Rapporteur doubts the need for the addition of a definition of the terms "representative". The term does not appear in part II. What are used in this part are the terms "permanent representative" and "members of the permanent mission" for which definitions are given in article 1. The same applies to part III (permanent observer missions) where article 51 contains definitions for the terms "permanent observer" and "members of the permanent observer mission". The term "representative" is, however, frequently used in part IV (delegations of States to organs and conferences); that is why the Commission has included in article 78 a sub-paragraph (e) which reads:

a "representative" means any person designated by a State to represent it in an organ or at a conference.

37. As to the suggestions concerning the arrangement of the articles on the use of terms, the Special Rapporteur agrees with the United Nations Secretariat that it would not be advisable to have an article on definitions in both part I and part II. The central position which part II occupies in the draft articles justifies that the definitions relating to that part appear with the other definitions of general applicability and be combined in one article to be placed in the introductory part of the draft articles. As suggested by the Secretariat, the Commission may wish to consider the grouping of all definitions and the merging of articles 51 and 78 in article 1. If the Commission endorses this view, the Special Rapporteur would submit an amalgamated text on definitions.

38. The Special Rapporteur feels that there is a point in attempting to have uniformity in the sub-paragraphs

<sup>36</sup> For the text of the Vienna Convention on the Law of Treaties, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

<sup>37</sup> *Yearbook of the International Law Commission, 1970*, vol. I, pp. 60 and 64, 1054th meeting, paras. 5 and 41.

through the use of the verb "to mean" and he proposes to redraft the sub-paragraphs accordingly.

39. The Special Rapporteur wishes to recall that as a result of its consideration of article 25 (inviolability of the premises of the permanent mission) at its twenty-first session in 1969, the Commission decided to insert in article 1 adopted at its twentieth session a new sub-paragraph designated provisionally as (k) *bis* relating to the term "the premises of the permanent mission". The new paragraph (k) *bis*, which is based on sub-paragraph (i) of article 1 of the Vienna Convention on Diplomatic Relations,<sup>38</sup> reads as follows:

The "premises of the permanent mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the permanent mission, including the residence of the permanent representative.

#### PARTICULAR SUB-PARAGRAPHS OF ARTICLE 1

##### Sub-paragraph (a): Meaning of an "international organization"

###### (a) *Observations of Governments and international organizations*

40. In the course of the consideration by the Sixth Committee of the first group of draft articles at the twenty-third session of the General Assembly in 1968,<sup>39</sup> some representatives stressed that international organizations were not subjects of international law in the same way as States and that the scope of their legal personality depended on the will of their component States. In that connexion, regret was expressed that the Commission had not retained the definition of the term "international organization" which had been proposed by the Special Rapporteur in his third report.<sup>40</sup>

41. The written observations of one Government [Ecuador] expresses the view that the definition of an "international organization" is inadequate in that the statement that it means any intergovernmental organization does little to improve it. It expresses preference for the definition suggested by the Special Rapporteur in his third report. It concludes, however, by accepting the Commission's definition in view of the fact that sub-paragraph (i) of paragraph 1 of article 2 of the Vienna

Convention on the Law of Treaties contains a definition identical to that proposed in draft article 1 (a) and that the terms used in treaties sponsored by the United Nations should be consistent.

###### (b) *Observations of the Special Rapporteur*

42. The few comments made on sub-paragraph (a) of article 1 by delegations to the Sixth Committee were in fact addressed to the general question of the legal personality of international organizations and did not take exception to the Commission's definition. As to the above-mentioned written comment by one Government which expressed preference for the definition proposed by the Special Rapporteur in his third report, it ended by accepting the Commission's definition.

43. The Special Rapporteur has no intention of reintroducing the definition which he proposed in his third report. He recognizes the force in the considered opinion of the Commission that such an elaborate definition was not necessary for the time being since it was not dealing at the present stage of its work with the status of international organizations themselves, but only with the legal position of representatives of States to the organizations. He also appreciates the Commission's desire to harmonize the definition contained in sub-paragraph (a) with the corresponding provision of the Convention on the Law of Treaties.

##### Sub-paragraph (b): Meaning of an "international organization of universal character"

###### (a) *Observations of Governments and international organizations*

44. Two observations were made by delegations to the Sixth Committee concerning sub-paragraph (b). First it was said that the sub-paragraph did not indicate clearly enough that the universal character of an international organization should derive from its object and its purposes. Secondly, it was stated that the sub-paragraph should specify that an international organization of universal character was open to all States which accepted the rights and obligations established in its constitutive documents.

45. Five Governments commented on sub-paragraph (b) in their written observations. One Government [Ecuador] indicates that it would be advisable to expand the definition of "an international organization of universal character" by stating that such an organization should be open to all States which accept the rights and obligations established in its constitutive documents. Two Governments [Israel and Netherlands] suggest the omission of sub-paragraph (b) inasmuch as they consider the distinction between international organizations of universal character and others to be irrelevant or inopportune for the purposes of these articles. One of these Governments [Israel] points out that in so far as the provisions of these articles conflict with the relevant rules of constituent

<sup>38</sup> For the text of the Vienna Convention on Diplomatic Relations, see United Nations, *Treaty Series*, vol. 500, p. 95.

<sup>39</sup> For all references to the Sixth Committee's discussion of the first group of draft articles (articles 1-21), see *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 84, document A/7370, chap. II, B. For the Sixth Committee's discussion of the second group of articles (articles 22-50), *ibid.*, *Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, chap. III, A. For the Sixth Committee's discussion of the third group of articles (articles 51-116), see *ibid.*, *Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, chap. III, B.

<sup>40</sup> That definition read as follows [article 1 (a)]: "An 'international organization' is an association of States established by treaty, possessing a constitution and common organs, and having a legal personality distinct from that of the member States". (*Yearbook of the International Law Commission, 1968*, vol. II, p. 124, document A/CN.4/203 and Add.1-5.)

instruments of any international organization at all, whatever the characteristic of that organization, the latter will in any case prevail by virtue of articles 3, 4 and 5 and therefore proposes that article 2 be omitted. The other Government [Netherlands] points out that the fact that an organization has world-wide responsibilities and membership does not necessarily qualify it for the institution of permanent missions; on the other hand, the institution might be useful for organizations of more limited scope, e.g., some of the regional organizations. It cites the Council of Europe as a good example. It concludes that article 2 could be omitted altogether.

46. In the view of the Government of the United States of America the definition of "an international organization of universal character" as "an organization whose membership and responsibilities are on a world-wide scale" does not adequately dispose of all the problems raised by an attempt to distinguish between universal international organizations and all others. It observes that the phrase "on a world-wide scale" leaves open such questions as whether membership has to be substantially universal or merely representative of all the regions of the world and that the same problem arises in connexion with the concept of responsibilities. It further observes that while the existing international organizations to which permanent missions are accredited may not give rise to substantial difficulties regarding the application of article 1 (b), and the strictly regional organizations, such as OAS, would clearly be excluded, it is not difficult to find organizations which occupy a penumbral area. It cites the case of the parties to the Commodity Agreements, observing that they may not meet a requirement of practically universal membership but that, none the less, most of them have a sufficiently varied membership to meet the requirement of being "world-wide" if that phrase is construed liberally. It further notes that the same conclusion could be reached regarding the responsibilities of the organizations established under those Agreements.

Another example cited by the Government of the United States is the Asian Development Bank which, in its opinion, although ostensibly a regional organization, has a very widely distributed membership and very widely distributed responsibilities if considered on a reciprocal basis. The Government of the United States concludes its observations on sub-paragraph (b) by posing a query whether, in view of the ability of any international organization to limit the application of the articles through adoption of a "rule", the attempt to distinguish between organizations of universal and non-universal character is either necessary or desirable.

47. In the view of the Government of Switzerland, though it seems desirable to restrict the scope of the draft articles to a limited category of organizations whose size and responsibilities justify the presence of permanent missions, "the definition [in sub-paragraph (b)] may nevertheless still seem somewhat too wide". The Swiss Government points out that not all organizations with responsibilities on a world-wide scale have activities of a type which require the presence of permanent missions or, if missions do seem necessary, which justify granting them privileges as extensive as those envisaged in the draft. It

suggests that it would be advisable to replace the word "responsibilities" by an expression suggesting that there are special additional conditions which must be fulfilled. The Swiss Government further suggests that the application of the draft could also be limited to institutions of the United Nations family, which would have the advantage of avoiding any dispute about the universal character of an organization.

48. An editing observation by the United Nations Secretariat suggests that in sub-paragraph (b) it would be better to say "An international organization of a universal character" and that the indefinite article should be included here, as it is in the phrase "on a world-wide scale" (A/CN.4/L.162/Rev.1, section B).

#### (b) *Observations of the Special Rapporteur*

49. The observations of Governments on sub-paragraph (b) can be grouped into three principal categories. The first category suggests the omission of the sub-paragraph. The second category suggests the extension of the definition of "an international organization of universal character" through the inclusion of additional elements. The third category suggests that the criterion of universality should be defined more precisely.

50. As regards the suggestions for the omission of sub-paragraph (b), it is to be noted that these suggestions do not take issue with the definition contained in that sub-paragraph itself. In fact, they are presented by some Governments as consequential to their position on article 2—according to which the distinction between universal organizations and regional organizations as provided for in the rule formulated in article 2 is irrelevant or inopportune for the purposes of the present draft articles.

51. The Special Rapporteur fully supports the principle of the universality of membership of international organizations of universal character which underlies the suggestion contained in the observations of some Governments to the effect that sub-paragraph (b) should specify that an international organization of universal character is open to all States which have accepted the rights and obligations established in its constitutive document. He doubts, however, that it falls within the purview of a definition of "an international organization" to go into the conditions of admission to the organization, a question which is regulated by the constitutional instruments of the organization and the resolutions of its competent organs.

52. The Special Rapporteur doubts the need for changing the drafting of sub-paragraph (b) to make it indicate clearly that the universal character of an international organization should derive from its object and purpose as suggested by some Governments. He considers the term "responsibilities", which is used in Article 57 of the Charter where reference is made to the "various specialized agencies, established by intergovernmental agreement and having wide international responsibilities", to be a term broad enough to include the elements of "object" and "purpose".

53. The Special Rapporteur has no intention to enter into a detailed discussion of the examples of international organizations cited in the written reply of the United States of America in support of its observation that the phrase "world-wide scale" does not adequately dispose of all the problems raised by an attempt to distinguish between universal international organizations and all others. He considers it pertinent, however, to make the following general observations. First, however comprehensive a definition may be, there is always the possibility of encountering individual cases of *sui generis* character which occupy a penumbral area and which may not be adequately covered by the definition. Secondly, in deciding whether an international organization is universal, the determining factor is not the actual character of its membership but rather its potential scope. The criterion is therefore a constitutional and not a pragmatic one. Membership in the organization must be open in principle to all States and not to a group or to groups of States.

54. The Special Rapporteur agrees with the editing observation of the United Nations Secretariat that in sub-paragraph (b) it would be better to say "An international organization of a universal character" and that the indefinite article should be included here, as it is in the phrase "on a world-wide scale".

#### **Sub-paragraph (c): Meaning of the "Organization"**

55. One editing observation was made on sub-paragraph (c) by the United Nations Secretariat (A/CN.4/L.162/Rev.1, section A, para. 1). In that observation it is stated that in the United Nations documents the expression "the Organization", with an initial capital letter, traditionally means the United Nations, so that its use throughout the draft to mean "the international organization in question" may be confusing. It is also contrary to English typographical practice; a capital letter is sometimes used for a particular existing organization, but not for an unspecified hypothetical one. Since the meaning of the expression is defined, the initial capital would only serve a purpose if the same expression were used without it to mean something different, which does not seem to be the case. It is therefore suggested that "the organization" be written with an initial lower-case letter.

56. The Special Rapporteur does not share the doubt expressed by the United Nations Secretariat regarding the confusion which may arise from the use of the expression "the Organization" with an initial capital letter throughout the draft to mean "the international organization in question". No such doubt has been expressed in the deliberations of the Commission or in the observations made by delegations to the Sixth Committee or sent by Governments and international organizations.

57. As to the difficulty caused by the use of a capital letter in the expression "the Organization" for an unspecified hypothetical international organization, the Commission may wish to consider this observation in conjunction with typographical practice in the other languages of the draft.

#### **Sub-paragraph (d): Meaning of a "permanent mission"**

##### *(a) Observations of Governments and international organizations*

58. The Government of Ecuador points out that in the definition of a "permanent mission" in sub-paragraph (d), the word "permanent" is repeated and that this does not clarify the term as it ought to be clarified in a definition.

59. The Government of Sweden is of the opinion that the purpose and meaning of the expression "representative character" as used in the definition of a "permanent mission" in sub-paragraph (d) are not clear. That Government contends that if it is intended that some categories of missions should be excluded from the application of the provisions of the draft articles on the ground that they are not "representative", it would be necessary to indicate in what manner or on the basis of what criteria the representative character of a permanent mission is to be determined. If, on the other hand, the Swedish Government goes on to say, this expression simply means that a permanent mission should represent the sending State, this could of course be stated in more direct terms, and it is in fact clearly stated in article 7.

60. The Government of Sweden further points out that the expression "sent . . . to the Organization" in sub-paragraph (d) would not be adequate as regards the permanent mission of the host State in cases where the organization in question has its seat in the capital of that State. It suggests, therefore, that those words should be replaced by "representing in the organization".

61. The United Nations Secretariat suggests in its editing observations that in sub-paragraph (d) it would be better to say "a mission of a representative and permanent character" (A/CN.4/L.162/Rev.1, section B).

##### *(b) Observations of the Special Rapporteur*

62. The Special Rapporteur wishes to point out that the repetition of the word "permanent" in sub-paragraph (d) is necessary for differentiating the permanent mission from the delegation to an organ or a conference which has a temporary character. He wishes to point out further that the term "permanent" is self-explanatory and need not be clarified in the definition of the "permanent mission".

63. The Special Rapporteur is unable to share the view that the purpose and meaning of the expression "representative character" as used in sub-paragraph (d) are not clear. The expression serves the purpose of differentiating the permanent mission from non-governmental missions which do not represent the State. It has been reflected in the corresponding provisions of the Vienna Convention on Diplomatic Relations and the Convention on Special Missions<sup>41</sup> without any need for indicating in what manner or on the basis of what criteria the representative character is to be determined.

<sup>41</sup> For the text of the Convention on Special Missions, see General Assembly resolution 2530 (XXIV), annex.



64. The Special Rapporteur feels that there is substance in the point that the expression "sent . . . to the Organization" in sub-paragraph (d) may not be adequate as regards the permanent mission of the host State in cases where the organization in question has its seat in the capital of that State. He wishes to point out that the word "sent" is used in sub-paragraph (d) in a juristic sense and refers to accreditation. The Commission may wish, however, to replace the expression "sent . . . to the Organization" by the phrase "accredited to the Organization" or "representing in the Organization".

65. The Special Rapporteur agrees with the United Nations Secretariat that in sub-paragraph (d) it would be better to say "a mission of a representative and permanent character".

**Sub-paragraph (e): Meaning of the "permanent representative"**

*(a) Observations of Governments and international organizations*

66. One Government [Yugoslavia] stated that the inference to be drawn from the definition of the term "permanent representative" is that the main function of a permanent representative is to be the head of a permanent mission; in the view of that Government, the definition should emphasize his function as representative of a State to an international organization, which would be in keeping with sub-paragraph (d) of the article.

*(b) Observations of the Special Rapporteur*

67. The Special Rapporteur wishes to point out that the definition in sub-paragraph (e) is drafted in broad terms, like the corresponding definition in the Convention on Diplomatic Relations, namely that of the "head of the mission" (article 1, sub-paragraph (a)). The Commission may consider it preferable, for the sake of uniformity, to retain the present text as it is.

68. There are two other questions which the Special Rapporteur wishes to take up in connexion with sub-paragraph (e). The Commission will recall that in paragraph 5 of its commentary on article 25, it stated that during the discussion in the Commission some members pointed out that it would be preferable to refer to the person in charge of the permanent mission as "head of the mission"; the Commission indicated that it would give further consideration to this question when it undertook the second reading of the draft articles and that it intended to examine again the use of the term "permanent representative" as defined in sub-paragraph (e). In the absence of any views on this question in the observations of delegations or written observations of Governments and international organizations which might provide thought for the consideration of the Commission, the Special Rapporteur wishes to make the following reflections. He appreciates the argument advanced by some members of the Commission in sug-

gesting the replacement of the term "permanent representative" by that of "head of the permanent mission" in order to harmonize the terminology in these draft articles with that used in the Convention on Diplomatic Relations and the Convention on Special Missions. It is to be noted that the use of the term of "head of mission" in the Convention on Diplomatic Relations is necessary to cover the different categories of diplomatic missions whether embassies or delegations. The use of the term "head of a special mission" is also necessary in the Convention on Special Missions since the term "special representative" is not a term which has acquired in practice a well-defined and established meaning. No such considerations obtain in the case of permanent missions where we encounter one category of missions and where the term "permanent representative" is used in general to designate the heads of permanent missions to international organizations. The use of that term has become the prevailing pattern in the law and practice of international organizations, both universal and regional, since the adoption in 1948 of General Assembly resolution 257 A (III) on permanent missions. The inclination of the Special Rapporteur is, therefore, to retain the term "permanent representative".

69. In one of the written observations of Governments [Israel] it was suggested that the Commission should consider adding a definition of "representative", since the term is used both in the title and in the text of the draft articles. It is true that the Convention on Special Missions includes a definition of the term "representative of the sending State in the special mission" which reads: "any person on whom the sending State had conferred that capacity" (article 1 (e)). It is to be noted, however, that unlike the case of the Convention on Special Missions, the draft articles on representatives of States to international organizations and conferences seek to regulate three separate subjects in one draft convention, namely permanent missions, permanent observer missions and delegations to organs and to conferences. The term "representative" assumes a different meaning within the context of each of these three subjects. While the term designates a representative function of general character within the framework of permanent missions and permanent observer missions, it connotes within the framework of delegations to organs or conferences a specific mandate of well defined limits which empowers the representative to vote on behalf of the State he represents on the adoption of resolutions or of the text of treaties in a specific organ or at a specific conference. Moreover, the difference between the representative function of a permanent mission and a permanent observer mission was recognized by the Commission in the drafting of articles 7 and 53 respectively. As stated in paragraph 2 of the commentary on article 53,

Permanent observers, being representatives of States non-members of the organization, do not perform functions identical with those of permanent missions of member States as set forth in article 7. They do not, in particular, represent the State "in" the organization as stated in article 7 (a) in the case of permanent missions. Rather they represent it "at" the organization.

The Special Rapporteur doubts, therefore, the feasibility of a definition of the term "representative" which



would adequately cover its meaning for the purposes of the different subjects regulated in the present draft articles.

**Sub-paragraph (f): Meaning of the "members of the permanent mission"**

70. No comments were made on this sub-paragraph, which the Special Rapporteur therefore proposes to maintain without change.

**Sub-paragraph (g): Meaning of the "members of the staff of the permanent mission"**

**Sub-paragraph (h): Meaning of the "members of the diplomatic staff"**

*(a) Observations of Governments and international organizations*

71. In the written observations of one Government [Belgium], it is stated that the use of the term "diplomatic staff" in sub-paragraphs (g) and (h) is a clear indication of how it has become customary in international and domestic law to assimilate the status of a permanent mission to that of a diplomatic mission. It is pointed out that this is in effect an explicit cross-reference to the Convention on Diplomatic Relations. It is further pointed out that assuming that it does not simply follow from this that the régime laid down in that Convention is accorded to the persons concerned, confusion in the use of terms should be avoided, and the fact that the experts and advisers are included makes no difference.

72. In the opinion of another Government [Sweden], the definition of the term "members of the diplomatic staff" in sub-paragraph (h) should be more precise and the words "diplomatic status", the meaning of which is not clear, could be dispensed with, if sub-paragraph (h) were changed to read:

The "members of the diplomatic staff" are the members of the staff of the permanent mission having diplomatic rank or serving as experts or advisers.

*(b) Observations of the Special Rapporteur*

73. The Special Rapporteur is unable to share the view that the use of the term "diplomatic staff" in sub-paragraph (g) and (h) is an explicit cross-reference to the Convention on Diplomatic Relations. Nor does he agree that it may lead to a confusion likely to create the impression that the régime laid down in that Convention is accorded to the persons concerned inasmuch as the status and privileges and immunities of the persons are elaborately regulated by the present draft articles. The use of the term "diplomatic staff" within the framework of permanent missions to international organizations is based on the observation of the fact that the composition of permanent missions is, generally speaking, similar to the composition of inter-State bilateral diplomatic

missions. In its written observations, the Swiss Government states that it

can [...] support the International Law Commission with regard to the general principle on which its draft is based, that is, the assimilation of permanent missions to diplomatic missions. This principle does not rest on a superficial analogy, but is solidly founded on State practice.

This approach is clearly reflected in the written observations of the Union of Soviet Socialist Republics which conclude by stating that

The status of members of the staff of such missions [permanent missions] should be analogous to the status of staff of the corresponding category in diplomatic missions.

74. As to the allegation that the term "diplomatic status" is not clear, the Special Rapporteur wishes to point out that the term was already used in the text of the corresponding provision of the Convention on Special Missions (article 1, (h)). It has a broader connotation than the term "diplomatic rank" and covers not only persons having diplomatic titles but also experts and advisers assimilated to them. The inclusion of experts and advisers is particularly necessary and noticeable in international organizations of technical character where there is need for their expertise and specialized knowledge and experience.

**Sub-paragraph (i): Meaning of the "members of the administrative and technical staff"**

**Sub-paragraph (j): Meaning of the "members of the service staff"**

**Sub-paragraph (k): Meaning of the "private staff"**

75. No comments were made on these sub-paragraphs, which the Special Rapporteur therefore proposes to maintain without change.

**Sub-paragraph (k) bis:<sup>42</sup> Meaning of the "premises of the permanent mission"**

*(a) Observations of Governments and international organizations*

76. The Swiss Government noted (in its observations on article 25) that sub-paragraph (k) bis includes the residence of the permanent representative in the premises of the mission. It stated that it considered this definition acceptable provided that, even if there were several permanent representatives, only one residence would be considered to form part of the premises of the mission, the other residences being sufficiently protected by article 31. In its observations on article 31, the Netherlands Government suggested deleting the words "including the residence of the permanent representative", since in its view, this idea is covered by article 31, paragraph 1.

<sup>42</sup> Sub-paragraph (k) bis, which is based on sub-paragraph (i) of article 1 of the Convention on Diplomatic Relations, was added by the Commission to article 1 in the course of the consideration of article 25 (Inviolability of the premises of the permanent mission) at its twenty-first session in 1969. (See *Yearbook of the International Law Commission*, 1969, vol. II, p. 209, document A/7610/Rev.1, chap. II, B, para. 4 of the commentary to article 25.)

*(b) Observations of the Special Rapporteur*

77. Since the Swiss Government considers the definition in sub-paragraph (k) *bis* acceptable, the Special Rapporteur does not deem it necessary to elaborate it further. As to the suggestion of the Netherlands Government, its adoption would constitute serious departure from the Convention on Diplomatic Relations (article 1 (i)) which does not seem justified in the present case.

**Sub-paragraph (l): Meaning of the "host State"***(a) Observations of Governments and international organizations*

78. The Swiss Government observes that the commentary (paragraph 7 of the commentary on article 1) seems to imply that the Commission intends the term "office" to mean an establishment constituting a sort of second seat, as distinct from a bureau or a separate organ established in a country other than that in which the organization has its seat. In the opinion of the Swiss Government, the term "seat", and for that matter the term "office", should probably be defined in sub-paragraph (l). The definition could read as follows:

...its seat, that is, the principal establishment of its permanent organs and its secretariat, or an office, that is, another establishment having responsibilities analogous to those of the seat.

79. An editing suggestion was made in the written observations of one Government [Israel] to the effect that the words "are established" as used in sub-paragraph (l) be replaced by "may be established".

*(b) Observations of the Special Rapporteur*

80. The Special Rapporteur wishes to point out that the words "are established" are those used in the text of the corresponding provisions of the Convention on Diplomatic Relations and the Convention on Special Missions. The Commission may prefer not to depart from that pattern.

81. With respect to the observations of the Swiss Government, it is the understanding of the Special Rapporteur that in drafting sub-paragraph (l), the Commission has the intention of covering the case in which an international organization has more than one seat. International organizations usually have one seat. The United Nations, however, has, in addition to its headquarters in New York, an office in Geneva. Furthermore the term "office" as used in sub-paragraph (l) is broad enough to cover the exceptional case in which permanent missions are established to an organ of the organization which is situated in a country other than that where the organization itself is situated—for example, the United Nations Economic Commission for Africa which has its seat in Ethiopia. The Special Rapporteur, while conceding that the definition proposed by the Swiss Government may be more explicit in covering the case of an organization having more than one seat like the United Nations, does not find it necessary to change the present text of sub-paragraph (l).

**Sub-paragraph (m): Meaning of an "organ of an international organization"**

82. An editing observation by the United Nations Secretariat (A/CN.4/L.162/Rev.1, section B) is that sub-paragraph (m) should be amended to read

An "organ of an international organization" means a principal or subsidiary organ, or any commission, committee or sub-group of any such organ.

In the opinion of the United Nations Secretariat, the words "any of those bodies", in the plural, are confusing, because the word "bodies" has not previously been used, and the reference is to a "principal or subsidiary organ", which is singular; it would therefore be clearer to say "any such organ". This is the wording used in article 78, sub-paragraph (a). The United Nations Secretariat further contends that the expression "an organ of an international organization", being singular, can mean only one organ in any particular case, not several organs at once, and that it is therefore correct to say "or any commission" rather than "and any commission".

83. The Special Rapporteur recognizes the force in the logic of the editing observation by the United Nations Secretariat concerning sub-paragraph (m).

84. In the light of the above observations, the Special Rapporteur proposes that article 1 should be amended to read as follows:

**Article 1. Use of terms**

For the purposes of the present articles:

(a) An "international organization" means an intergovernmental organization;

(b) An "international organization of a universal character" means an organization whose membership and responsibilities are on a world-wide scale;

(c) The "Organization" means the international organization in question;

(d) A "permanent mission" means a mission of a representative and permanent character accredited by a State member of an international organization to the Organization;

[Other alternative: A "permanent mission" means a mission of a representative and permanent character representing a State member of an international organization in the Organization;]

(e) The "permanent representative" means the person charged by the sending State with the duty of acting as the head of a permanent mission;

(f) The "members of the permanent mission" mean the permanent representative and the members of the staff of the permanent mission;

(g) The "members of the staff of the permanent mission" mean the members of the diplomatic staff, the administrative and technical staff and the service staff of the permanent mission;

(h) The "members of the diplomatic staff" mean the members of the staff of the permanent mission, including experts and advisers, who have diplomatic status;

(i) The "members of the administrative and technical staff" mean the members of the staff of the permanent mission employed in the administrative and technical service of the permanent mission;

(j) The "members of the service staff" mean the members of the staff of the permanent mission employed by it as household workers or for similar tasks;

(k) The "private staff" mean persons employed exclusively in the private service of the members of the permanent mission;

(k) *bis* The "premises of the permanent mission" mean the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the permanent mission, including the residence of the permanent representative;

(l) The "host state" means the State in whose territory the Organization has its seat, or an office, at which permanent missions are established;

(m) An "organ of an international organization" means a principal or subsidiary organ, or any commission, committee, or sub-group of any such organ.

## Article 2. Scope of the present articles

### (a) *Observations of Governments and international organizations*

85. In the course of the consideration by the Sixth Committee of the first group of articles at the twenty-third session of the General Assembly, several representatives supported article 2 and endorsed the rule in paragraph 1 thereof limiting the application of the draft articles to international organizations of universal character. It was pointed out, in particular, that regional organizations had a special unity of purpose and that any attempt to standardize the practices which they followed might upset delicate balances and create numerous difficulties. Paragraph 2, moreover, stated a useful reservation to that rule and offered a sound solution for a problem which had long been a matter of concern to the International Law Commission. Some representatives, however, criticized the rule laid down in paragraph 1. Among them were representatives who found the rule too broad and thought that the application of the draft articles should be restricted solely to genuinely important universal organizations. Others considered it too restrictive and expressed regret that regional organizations had been excluded from the scope of the draft articles. It was proposed in that connexion that the presumption embodied in article 2 should be reversed and that it should be specified that the draft articles applied to all important international organizations but that States members of regional organizations could adopt other rules for the latter organizations by mutual agreement.

86. When the Sixth Committee considered the second group of draft articles at the twenty-fourth session of the General Assembly in 1969, certain representatives considered that the draft articles should apply only to major organizations of a universal character and not to all organizations of a universal character, as implied in paragraph 1 of article 2. Others observed further that, although the draft articles were intended to apply to international organizations of a universal character, they might be used as models for headquarters agreements of international organizations not of a universal character.

87. In the written observations submitted by Governments and international organizations, only few Governments took issue with the rule formulated in article 2. Reference has already been made to the views of some of those Governments in the course of the consideration of the observations on sub-paragraph (b) of article 1 (mean-

ing of an "international organization of a universal character", owing to the fact that the relationship between the provisions of article 1 (b) and article 2 led to some kind of overlapping in the comments thereupon. Suffice it here to recall briefly the points addressed specifically to article 2 which can be summed up as follows: first, a valid or workable distinction cannot be drawn between international organizations of a universal character and others, for the purposes of these articles. Secondly, the fact that an organization has world-wide responsibilities and membership does not necessarily qualify it for the institution of permanent missions; on the other hand, the institution might be useful for organizations of regional character. Thirdly, in view of the ability of any international organization to limit the application of the articles through the adoption of a "rule" (articles 3, 4 and 5), the attempt to distinguish between organizations of universal and non-universal character is unnecessary. Fourthly, the application of the draft could be limited to institutions of the United Nations family, which would have the advantage of avoiding any dispute about the universal character of an organization. Fifthly [as pointed out by the Belgian Government], if the scope of the articles is in practice limited to the United Nations and the organizations referred to in Article 57 of its Charter, the question of permanent missions could be settled simply by drawing up supplementary protocols to the instruments relating to the privileges and immunities of those organizations. Sixthly [as stated by the Netherlands Government], if article 2 is retained, the last sentence of paragraph 2 should be deleted, since it is superfluous and confusing: it goes without saying that States can agree to apply the present rules to their representatives to organizations whose membership and responsibilities are not global.

88. The United Nations Secretariat made an editing observation to the effect that in paragraph 1 the indefinite article "a" be added before the words "universal character" (A/CN.4/L.162/Rev.1, section B).

### (b) *Observations of the Special Rapporteur*

89. The Special Rapporteur has already taken up the points concerning the difficulty of drafting a definition of universal organizations or the possibility of working out a precise criterion of distinction between them and other organizations.<sup>48</sup> He will therefore confine his observations here to the questions relating to the necessity or relevance of such a distinction for the purposes of the present articles.

90. The Special Rapporteur detects in some of the observations of Governments which took issue with article 2 a kind of misunderstanding of the assumption which underlies the article. The rule laid down in article 2 is not based on considerations inherent in the institution of permanent missions which would make their establishment to universal organizations more appropriate than their establishment to regional organizations. Rather, the rule is based on considerations of approach which were

<sup>48</sup> See paras. 49-54 above.

stated in the report of the Commission on the work of its twentieth session.<sup>44</sup>

91. The Special Rapporteur does not agree with the view that the ability of any international organization to limit the application of the articles through the adoption of a "rule" (articles 3, 4 and 5) makes article 2 unnecessary. The purpose of articles 3, 4 and 5 is to give the draft the necessary flexibility which would allow its application as a general pattern and a uniform rule without prejudicing some of the special rules applicable within a given organization or arresting the development of the law in this field. The purpose of paragraph 2 of article 2 is different. It is intended to leave it open for States members of the organizations not covered in paragraph 1 to decide to apply the provisions of the draft articles to their representatives to such organizations by adopting such instruments as they may find appropriate.

92. As regards the suggestion to limit the draft to institutions of the United Nations family, it is to be noted that that method of determining the scope of the convention leaves out such organizations as IAEA, which is not considered, strictly speaking, a specialized agency as defined in the Convention on the Privileges and Immunities of the Specialized Agencies,<sup>45</sup> in view of the circumstances of its creation and the nature of its relationship with the United Nations. It also leaves out other organizations of universal character which are outside what has become known as the United Nations "system" or "family" or the United Nations and its "related" or "kindred" agencies. Examples of such organizations are the Bank for International Settlements, the International Institute of the Unification of Private Law, the International Wheat Council, and the Central Office for International Railway Transport. The wording of paragraph 1 of article 2 of the draft articles is designed to fill that gap by using the method of a general definition covering all international organizations of universal character.

93. The Special Rapporteur agrees with the editing observations of the United Nations Secretariat that in paragraph 1 the indefinite article "a" be added before the words "universal character".

94. In the light of these observations and taking into account the suggestion made before by the Special Rapporteur regarding the extension of the scope of part I of the draft articles to make it applicable also to parts III and IV,<sup>46</sup> the Special Rapporteur proposes that article 2 should be amended to read as follows:

#### **Article 2. Scope of the present articles**

1. The present articles apply to representatives of States to international organizations and conferences of a universal character.

2. The fact that the present articles do not refer to representatives of States to other international organizations and conferences is

without prejudice to the application to those representatives of any of the rules set forth in the present articles to which they would be subject independently of these articles. Likewise, it shall not preclude States members of those other organizations from agreeing that the present articles apply to their representatives to such organizations or conferences.

#### **Article 3. Relationship between the present articles and the relevant rules of international organizations**

#### **Article 4. Relationship between the present articles and other existing international agreements**

#### **Article 5. Derogation from the present articles**

##### *(a) Observations of Governments and international organizations*

95. In the course of the consideration by the Sixth Committee of the first group of draft articles at the twenty-third session of the General Assembly, many representatives endorsed the provisions of articles 3, 4 and 5. Several of them emphasized that those provisions gave the draft articles the necessary flexibility and made allowance for the diverse character of international organizations and the need for the formulation of particular rules.

96. Of the five Governments which referred to articles 3, 4 and 5 in their written observations, only one Government took a negative position. Two of them [Ecuador and the United States of America] endorsed these articles without any qualification. They pointed out that these articles are reasonable and necessary provisions. These articles recognized that the diversity of international organizations, varying character of existing agreements with host States and the unforeseeable variances in headquarters agreements with host States required the maintenance of flexibility and preservation of wide degrees of tolerance.

97. One Government [Israel] made the following drafting suggestions and observations:

(a) the formulation of article 4 should correspond more closely with the terms of paragraph 2 of article 30 of the Convention on the Law of Treaties;

(b) in the title of article 4, the word "existing" appears, but in the text reference is made to "other international agreements in force". It is therefore not clear whether the article does or does not apply to future agreements;

(c) in article 4, the words "between States or between States and international organizations" are superfluous.

Another Government [Switzerland] observed that article 4 provides that the rules established in the articles "are without prejudice to other international agreements in force between States or between States and international organizations", while article 5 states that nothing in the articles shall preclude the conclusion of other international agreements. It does not seem, that Government went on to say, that the Commission, by this difference in wording, intended article 5 to refer to a category of

<sup>44</sup> See *Yearbook of the International Law Commission*, 1968, vol. II, p. 195, document A/7209/Rev.1, para. 26.

<sup>45</sup> For the text of the Convention on the Privileges and Immunities of the Specialized Agencies, see United Nations, *Treaty Series*, vol. 33, p. 261.

<sup>46</sup> See para. 29 above.

agreements more limited (or more extensive) than that mentioned in article 4. It would therefore be preferable to use the same wording in both articles.

98. In the opinion of the Government of Belgium

the fact that existing agreements will remain in force and the possibility of different provisions, will deprive the draft articles of any binding effect at all. A convention on permanent missions would, at best, be only of an indicative or supplementary nature—a fact which argues in favour of a model statute or a model code for international organizations.

99. The ILO points out that the full significance of article 3 does not seem to it very clear. It expresses the fear that, judging strictly from the text of the article and the explanation given by the Commission in the commentary, it would appear that the Organization, in its relations with the host State and with a sending State, could completely ignore the provisions of the convention, even if the latter had been ratified by the two States: it could contend that its relevant rules and practices were different from those set forth in the convention and that consequently only the former were applicable. The ILO suggests that as that is surely not the intent of this provision, it would presumably be desirable to clarify somewhat the relationship between existing rules and practices and the draft convention. It further contends that articles 4 and 5 justify some doubts. It points out that an existing agreement might not necessarily be in the usual form but might derive from an exchange of letters or even from unilateral decisions accepted as valid *per se* and applied over long periods. It poses the question whether these arrangements, which may even have acquired the character of customary law, would be maintained under the new system, or whether the draft convention would be regarded as replacing them. The ILO cites what it refers to as a particularly delicate situation which might arise if one or more of the sending States ratified the new convention and the host State did not. In such a case, it reasons, the earlier arrangements would presumably be maintained; however, the sending State could request the organization—which would be bound vis-à-vis the sending State by the new convention—to take the measures in its favour specified under the convention as being incumbent on the international organizations, while the host State did not recognize the organization's action. The ILO is of the opinion that such a situation would naturally be unsatisfactory, and that perhaps some clarification of the problems which would arise could be included in the convention itself.

100. IMF refers to the study prepared by the United Nations Secretariat on the practice of the United Nations, the specialized agencies and IAEA concerning their status, privileges and immunities.<sup>47</sup> It contends that it was recognized in that study<sup>48</sup> that questions relating to permanent representatives or member delegations to international organizations are not applicable to the Fund in the light of the Fund's organizational structure. It

further contends that articles 3 and 4 may also be taken to lead to the same conclusion of non-applicability to the Fund. IMF concludes its written observations by requesting the Special Rapporteur to consider the desirability of explicitly stating that the draft articles are not applicable to the Fund.

101. An editing suggestion is made by the United Nations Secretariat to the effect that in article 5 the word "having" be replaced by "containing" (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

102. The Special Rapporteur is unable to share the categorical assertion by the Government of Belgium that the fact that existing agreements will remain in force, and the possibility of different provisions, will deprive the draft articles of any binding effect. The draft articles contain many provisions on questions which have not been regulated by treaty law before. These provisions will have their binding effect but at the same time the new regulation will not prejudice certain rules which prevail within certain organizations and which reflect the particular needs of a particular organization. The same applies to the fear expressed by the ILO that the text of article 3 may enable the organization to completely ignore the provisions of the convention by contending that its relevant rules and practices are different from those set forth in the convention. Such an attitude is unlikely and would be at variance with good faith interpretation. As to the examples of arrangements cited by the ILO and its query whether such arrangements will be maintained under the new system, the Special Rapporteur has no hesitation in replying that the expression "relevant rules of the Organization" is broad enough to include all relevant rules whatever their source. As to the particular situations cited by the ILO, these are situations of treaties with different parties or with conflicting provisions which involve problems of interpretation regulated in the Convention on the Law of Treaties.

103. The Special Rapporteur does not agree with the interpretation of IMF as to the special treatment given to the Fund and a few other specialized agencies dealing with financial matters in the Study by the Secretariat. The reasons for this special treatment were stated in the Study by the Secretariat where it is explained that

the particular organizational structure of [those agencies] and the sources from which their privileges and immunities are derived rendered it difficult to attempt to classify their practice in conjunction with that of the other specialized agencies.<sup>49</sup>

The Special Rapporteur wishes to point out that a great deal of the draft articles have their field of application to the Fund and the other financial specialized agencies, and cannot therefore concur with the suggestion of the Fund that the draft articles explicitly state that they are not applicable to the Fund.

104. The Special Rapporteur wishes to turn briefly to the drafting suggestions made by some Governments. As

<sup>47</sup> Hereinafter referred to as Study by the Secretariat. See *Yearbook of the International Law Commission, 1967*, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2.

<sup>48</sup> *Ibid.*, p. 206, paras. 76-78.

<sup>49</sup> *Ibid.*, p. 204, para. 67.

to the use of the word "existing" in the title of article 4 and of the words "other international agreements in force" in the text of the article, it is to be noted that the economy of a title of an article does not allow for the elaborate spelling out which is possible in the text of the article itself. The question of the application of these articles to future agreements becomes clear when article 4 is considered in conjunction with article 5. The Special Rapporteur does not agree that the words "between States or between States and international organizations" are superfluous; the specific reference to agreements "between States and international organizations" is intended to safeguard the status of headquarters agreements concluded between host States and international organizations. Nor does he share the fear that the use of the words "other international agreements" may connote a category of agreements more limited or more extensive than that mentioned in article 4, if the words used in article 5 are interpreted with reference to those used in article 4.

105. The Special Rapporteur agrees with the editing suggestion of the United Nations Secretariat that in article 5 the word "having" should be replaced by "containing".

106. In the light of these observations, the Special Rapporteur proposes the following text for articles 3, 4 and 5:

***Article 3. Relationship between the present articles and the relevant rules of the international organizations***

The application of the present articles is without prejudice to any relevant rules of the Organization.

***Article 4. Relationship between the present articles and other existing international agreements***

The provisions of the present articles are without prejudice to other international agreements in force between States or between States and international organizations.

***Article 5. Derogation from the present articles***

Nothing in the present articles shall preclude the conclusion of other international agreements containing different provisions concerning the representatives of States to an international organization or conference.

***Part II. Permanent missions to international organizations***

**SECTION 1. PERMANENT MISSIONS IN GENERAL**

**Article 6. Establishment of permanent missions**

***(a) Observations of Governments and international organizations***

107. The Government of Ecuador is of the opinion that article 6 would be of doubtful value if the Commission had not made it clear that it was to be interpreted subject to the general reservations laid down in articles 3, 4

and 5. Otherwise, the Government of Ecuador goes on to say, this rule would oblige international organizations to agree to accept permanent missions established by States.

108. The Government of the Netherlands suggests that article 6 be reworded as follows:

Member States may establish permanent missions to the organization for the performance of the functions set forth in article 7 of the present articles, in so far as this is provided for in the relevant rules of the organization.

109. The Government of Belgium states that, as drafted, article 6 subjects the host State to automaticity and that implicit in it is a danger that permanent missions will proliferate far beyond the actual need.

110. The Government of Switzerland also expresses its concern that article 6 creates a right in favour of the members of an organization covered by this article, by virtue of which they may establish a permanent mission to the seat or at an office of the organization. It further points out that it is true that the article is to be applied without prejudice to any "relevant rules of the Organization" (article 3); however, such rules do not always exist and are not always rules of the organization. The Swiss Government suggests the insertion after the word "organization" of the words "in accordance with the latter's practice". It further suggests the addition of a paragraph 2, reading as follows:

They may establish a single permanent mission to several organizations.

In the opinion of the Swiss Government, the latter suggestion would facilitate the representation of sending States in countries where several organizations have their seats, and would enable them to organize their missions more rationally.

111. IAEA points out that article 6 provides that "member States may establish permanent missions . . .", and articles 7, 15, 16, 20 to 25, 27, 29, 38, 45 and 49 specifically refer to the "permanent mission", whereas all other articles refer to the "permanent representative" or "members of the permanent mission". It contends that this distinction implies that the two concepts are different from each other, and that, for example, a permanent mission may exist without a permanent representative and vice versa (e.g. in the case of a permanent representative operating from his offices established in a "third State"). Should this be the real intention of the Commission, IAEA goes on to say, one wonders whether in article 6, where a principle is being established, a similar provision could not be introduced for permanent representatives.

***(b) Observations of the Special Rapporteur***

112. The Special Rapporteur understands the concern expressed by some Governments with respect to the obligatory character of the institution of permanent missions which article 6 as presently drafted may convey. This question was thoroughly considered by the Commission. The Commission made it clear, in paragraph 5 of the commentary, that the establishment by member States of permanent missions is subject to the general reservations laid down in articles 3, 4 and 5 concerning the relevant

rules of the organizations, the existing international agreements, and derogation from the draft articles.

113. The Special Rapporteur does not share the fear expressed to the effect that the drafting of the article will cause excessive proliferation of the institution of permanent missions. It is to be noted that permanent missions have been established to international organizations as a result of a steady process and in response to actual needs. Observation of practice does not warrant such apprehension. The Special Rapporteur does not, therefore, see the necessity for the addition of the qualifying clauses suggested by the Governments of the Netherlands and Switzerland.

114. As regards the second suggestion of the Swiss Government, the Special Rapporteur wishes to note that the question of accrediting a permanent mission to more than one international organization is regulated in article 8.

115. As regards the suggestion of IAEA, the Special Rapporteur wishes to point out that article 6 refers to permanent missions as an institution and in the abstract. He is not sure he can agree with the contention of IAEA that a permanent mission may exist without a permanent representative and vice versa. The case of a permanent representative operating from his offices established in a third State is provided for in paragraph 2 of article 20.

116. In the light of the above observations, the Special Rapporteur proposes that no change should be made in the text of article 6, which would therefore read:

#### *Article 6. Establishment of permanent missions*

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

#### **Article 7. Functions of a permanent mission**

##### *(a) Observations of Governments and international organizations*

117. In the course of the consideration by the Sixth Committee of the first group of draft articles at the twenty-third session of the General Assembly, several representatives expressed support for the text of article 7 as adopted by the International Law Commission. Others, on the contrary, thought that it should be redrafted. It was suggested, for example, that in sub-paragraph (c) negotiations in the organization should be mentioned first instead of second so as to make it clear that permanent missions performed their functions in the context of multilateral diplomacy. Two observations were made on sub-paragraph (e). Some representatives said that it added nothing new and that either the sub-paragraph should be deleted or the words "in the Organization" should be added before the word "co-operation". Others proposed that the text should follow the corresponding provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations<sup>50</sup> and that

<sup>50</sup> For the text of the Vienna Convention on Consular Relations, see United Nations, *Treaty Series*, vol. 596, p. 261.

sub-paragraph (e) should specify that one of the functions of a permanent mission was to promote friendly relations and co-operation between the member States. It was also felt that a rule should be drawn up concerning the commencement of the functions of the permanent representative and staff of a mission in order to determine when their privileges and immunities began.

118. In its written observations, the Government of Ecuador stated that the enumeration in article 7 of the functions of a permanent mission was perfectly clear. It supported the suggestion for the addition in the article of a rule concerning the commencement of the functions of the permanent representative and staff of a mission in order to determine when their privileges and immunities begin.

119. The Government of the Netherlands expressed the opinion that article 7 rightly emphasized the diplomatic representational function of permanent representatives.

120. The Government of the United States of America stated that it doubted that clause (b) relating to liaison was necessary as it appeared to be subsumed under clauses (a) and (c).

121. The Government of Belgium made the following observation:

Although the functions listed [in article 7] certainly belong to permanent missions, they belong equally to the broader category of representatives of States; for, while permanent missions are involved in what has come by general agreement to be termed "multilateral diplomacy", they have no monopoly of it.

122. The ILO expressed its views as follows:

[article 7] should [...] be expanded, as far as the ILO is concerned, to take into account the fact that the ILO's relations with member States [...] are for the most part [...] handled through the "government departments of any of the Members which deal with questions of industry and employment", which communicate with the Director-General, when necessary, through the representative of their Government on the Governing Body.

The ILO alleged that the impression given by article 7 was that henceforth only the permanent mission, as normally constituted, or with the addition of technical experts, would be competent to have dealings with the ILO. It therefore suggested that it might be useful to specify what the situation would be, at least in an appropriate commentary on the draft convention. The ILO further observed that article 7 also provided that one of the functions of the permanent mission is that of "carrying on negotiations with or in the Organization" (sub-paragraph (c)). This provision did not seem to be applicable to the ILO,

since no negotiations are carried on in the Organisation, at least as regards the adoption of the most important ILO instruments, namely conventions and recommendations, which takes place in the Conference.

123. A drafting suggestion was made in the written observations of one Government [Israel] that sub-paragraph (e) be inserted immediately after sub-paragraph (a), in view of its generality and importance.

124. The United Nations Secretariat made two editing suggestions. It first proposed that in sub-paragraph (b), the word "keeping" be replaced by "maintaining", as this



was the word used in article 53 in a similar context, and "maintaining liaison" was the more usual expression. Secondly, it suggested that in sub-paragraph (c) it might be better to say "Carrying out negotiations" or simply "Negotiating", as in article 3, paragraph 1 (c), of the Convention on Diplomatic Relations and article 53 of the draft. It observed in that respect that the words "carrying on" suggested that the negotiations had already been started, which would not necessarily be the case (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

125. The Special Rapporteur is not convinced that a new paragraph should be added to article 7 embodying a rule concerning the commencement of the functions of the permanent representative and staff of a mission in order to determine when their privileges and immunities begin. The purpose of article 7 is to state generally the functions of a permanent mission. The place of a rule on the commencement of the enjoyment of the privileges and immunities is, as was rightly decided by the Commission, in article 42 which regulates the question of the duration of privileges and immunities.

126. The Special Rapporteur does not share the doubt expressed on the necessity of sub-paragraph (b) relating to the liaison function of the permanent mission and does not agree that such function is subsumed under sub-paragraphs (a) and (c). The liaison function is one which characterizes a principal activity of the permanent mission. Historically, it is at the origin of the evolution of the institution of permanent missions whose principal function at the early stage of the development of that institution was to maintain contact with the United Nations Secretariat on a continuous basis. This function should therefore be specified in the enumeration of the functions of a permanent mission.

127. The Special Rapporteur does not share the view that article 7 should be expanded to take into account the special situation which prevails in the ILO. Such special positions are safeguarded by the clauses in articles 3, 4 and 5. Neither does the Special Rapporteur share the view that article 7 gives the impression that henceforth only the permanent mission would be competent to have dealings with the organization. The article merely sets forth the functions of a permanent mission. It does not seek to, and in fact cannot, lay down restrictions on the activities of other channels of communication between an international organization and the government departments of member States. It may be, however, useful to adopt the suggestion of the ILO to clarify this point through an appropriate reference in the commentary. Nor does the provision in article 7 concerning the functions of "carrying on negotiations with or in the Organization" prejudice in any way the case of the ILO instruments, the adoption of which takes place in the Conference.

128. With respect to the drafting suggestion that sub-paragraph (e) be inserted immediately after sub-paragraph (a) in view of its generality and importance, the

Special Rapporteur wishes to point out that the listing of the functions of a permanent mission follows a certain order of logic which does not imply necessarily a grading of importance.

129. As regards the editing suggestions made by the United Nations Secretariat it is to be noted that similar drafting points were raised in the Commission and referred to its Drafting Committee which considered them thoroughly. The Special Rapporteur proposes that the Drafting Committee take another look at these drafting suggestions before finalizing the text of article 7. Subject to this suggestion, the Special Rapporteur does not propose any change to the text of article 7, as follows:

**Article 7. Functions of a permanent mission**

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

- (a) Representing the sending State in the Organization;
- (b) Keeping the necessary liaison between the sending State and the Organization;
- (c) Carrying on negotiations with or in the Organization;
- (d) Ascertaining activities and developments in the Organization, and reporting thereon to the Government of the sending State;
- (e) Promoting co-operation for the realization of the purposes and principles of the Organization.

**Article 8. Accreditation to two or more international organizations or assignment to two or more permanent missions**

**Article 9. Accreditation, assignment or appointment of a member of a permanent mission to other functions**

(a) *Observations of Governments and international organizations*

130. In the course of the consideration by the Sixth Committee of the first group of draft articles at the twenty-third session of the General Assembly, the use of the term "accreditation" in the title of article 8 and of the term "accredit" in the body of the article was criticized. It was pointed out that the word "accreditation" had been borrowed from the terminology of bilateral diplomacy and that, in order to avoid any confusion with the rules governing that subject, it would be desirable to replace it by another term, such as "appointment".

131. In the written observations of Governments and international organizations a number of comments, mostly of drafting character, were made on article 8, or on articles 8 and 9 combined.

132. One Government [Ecuador] pointed out that despite the fact that, in a regional context, it had contended that representatives should be appointed to international bodies on an *ad hoc* basis—in other words, that they should not simultaneously be representatives of their country to the body in question and to the State in which it had its headquarters—articles 8 and 9, being designed to meet needs at the global as opposed to the regional level, were clear and could be accepted, on the understanding that draft articles 3, 4 and 5 would allow certain



bodies to lay down rules departing from this general pattern.

133. In their written observations, only two Governments took issue with the substance of the rules embodied in articles 8 and 9. One of them [Israel] expressed the opinion that article 8 was superfluous and could well be omitted. It pointed out that it was only the need to preserve the right of receiving States to withhold their consent that necessitated the inclusion of paragraph 1 of article 5 of the Vienna Convention on Diplomatic Relations and article 4 of the draft articles on special missions.<sup>51</sup> In the opinion of that Government, the hypothesis of article 8 was not analogous to that with which those other provisions dealt. Another Government [Belgium] contended that the possibility of a permanent representative's being assigned as a member of another mission, or of a member of a permanent mission's being assigned as head of a diplomatic mission to the host State, hardly seemed compatible with the rules governing precedence and rank.

134. The Government of Switzerland pointed out that practice had shown that difficulties might arise in the case of multiple accreditations envisaged in article 8 if the accreditation was not officially notified to the host State. It suggested that provision be made for this in article 17, for it might happen that such notifications were not given in the case of persons already enjoying the immunities involved. The Government of Switzerland further suggested that notification of such dual assignments as those envisaged in article 9 should also be mentioned in article 17.

135. The other comments of Governments, which are of a drafting character, can be grouped as follows:

(1) In article 8, the phrase "as a member of another of its permanent missions", which occurs in both paragraphs 1 and 2, should in each case be replaced by "as a member of the staff of another of its permanent missions" [Israel].

(2) In article 9, the phrase "as head of a diplomatic mission", which occurs in paragraphs 1 and 2, should in each case be replaced by "as head of a diplomatic or special mission" [Israel].

(3) Why are the permanent representative and the members of the staff of a permanent mission named separately in paragraphs 1 and 2 of article 9, whereas in paragraph 3 they are mentioned together? Paragraphs 1 and 2 of article 9 should be combined [Netherlands].

136. The United Nations Secretariat made elaborate editing observations on articles 8 and 9 (A/CN.4/L.162/Rev.1, section B); they are reproduced below:

The following suggestions may be made with respect to articles 8 and 9 [...]

(a) The action of appointing a person to a permanent mission is expressed in the two articles by three different verbs: "to accredit", "to assign" and "to appoint". In article 10 that action is expressed by

a single verb—"to appoint"—with respect to all the members of the mission. The Convention on Diplomatic Relations uses "appointment" for all the members of the diplomatic mission in article 10. 1 (a); "to accredit" for the head of mission in articles 5 and 6; "to appoint" for the members of the staff of the mission in article 7; and "to assign to [a] State" for the members of the diplomatic staff in article 5. It does not use the expression "to assign as a member". The Commission may therefore wish to retain in articles 8 and 9 the verb "to accredit" when referring to the permanent representative but, for the sake of uniformity, to replace the expression "to assign as a member" by "to appoint as a member".

(b) Article 8—but not article 9—indicates that the accreditation or appointment is done by the sending State. It would seem preferable that such an indication should also appear in article 9.

(c) Paragraph 2 of article 8 and paragraphs 1, 2 and 3 of article 9 do not state expressly that the member of the permanent mission continues to exercise his functions in the mission after his accreditation or appointment to other functions. That is however expressly stated in paragraph 1 of article 8 and should therefore be so stated in the other provisions of the two articles.

(d) The first phrases of paragraphs 1 and 2 of article 8 provide for the accreditation of a member of the permanent mission to one or more other functions. All the other provisions of articles 8 and 9 deal with accreditation or appointment of a member of the permanent mission to only one other function. It would seem preferable that they too should deal with the accreditation or appointment to one or more other functions.

(e) In paragraph 2 of article 9, the expression "as a member of a diplomatic or special mission" includes the head of the diplomatic mission. Since the latter is already dealt with in the paragraph, the reference should be not to a member of the diplomatic mission but to a member of the staff of the diplomatic mission. This change will require the drafting of a separate provision for the appointment to a special mission.

(f) The expression "Accreditation . . . to other functions" in the title of article 9 is unusual. A person is accredited to a State or to an international organization, not to a function. It is therefore suggested to amend the title of article 9 to read "Other accreditations or appointments".

(g) In view of the discussion summarized in paragraph (4) of the commentary on article 9, the Commission may wish to place at the beginning of that article the following introductory phrase:

"1. Nothing in the present articles shall prevent a member of a permanent mission from being also:

"(a) etc . . ."

If the above suggestions are accepted, articles 8 and 9 could be amended to read:

*"Article 8. Accreditation to two or more international organizations or appointment to two or more permanent missions"*

"1. The same person may be:

"(a) accredited by the sending State as its permanent representative to two or more international organizations.

"(b) appointed by the sending State as a member of the staff of its permanent missions to two or more international organizations.

"2. A person accredited by the sending State as its permanent representative to one or more international organizations may also be appointed by that State as a member of the staff of its permanent missions to one or more other international organizations.

"3. A person appointed by the sending State as a member of the staff of its permanent missions to one or more international organizations may also be accredited by that State as its permanent representative to one or more other international organizations."

<sup>51</sup> See *Yearbook of the International Law Commission*, 1967, vol. II, p. 349, document A/6709/Rev.1, chap. II, D. Article 4 of the draft articles has become, in a somewhat amended form, article 4 of the Convention on Special Missions.

*"Article 9. Other accreditations or appointments"*

"1. Nothing in the present articles shall prevent a member of a permanent mission from being also:

"(a) accredited by the sending State as head of one or more of its diplomatic missions [to the host State or to other States];<sup>52</sup>

"(b) appointed by the sending State as a member of the staff of one or more of its diplomatic missions [to the host State or to other States];

"(c) appointed by the sending State as a member of one or more of its special missions [to the host State or to other States];

"(d) appointed by the sending State as a member of one or more of its consular posts [in the host State or in other States].

"2. The accreditation and appointment referred to in paragraph 1 of this article shall be governed by the rules of international law concerning diplomatic and consular relations."

*(b) Observations of the Special Rapporteur*

137. The criticism voiced in the Sixth Committee against the use of the term "accreditation" in the title of article 8 and of the term "accredit" in the body of the article and the suggestion to replace them by other terms, such as "appointment" and "appoint" will be taken up by the Special Rapporteur in the context of the consideration of the observations on articles 12 and 13 on "Credentials of the permanent representative" and "Accreditation to organs of the Organization".

138. The Special Rapporteur recognizes the validity of the observation that the hypothesis of article 8 is not analogous with those envisaged in article 5, paragraph 1, of the Vienna Convention on Diplomatic Relations and article 4 of the draft articles on special missions. The need for the inclusion of the rules stated in article 8 may not have the character which it assumes within the framework of bilateral diplomatic relations and special missions. The Special Rapporteur does not consider, however, article 8 to be superfluous if one wants the regulation which these articles try to achieve to be as complete as possible.

139. As to the question whether the possibility of a permanent representative's being assigned as a member of another mission, or of a member of a permanent mission's being assigned as head of a diplomatic mission to the host State would not be incompatible with the rules governing precedence and rank, such difficulties are inevitable and rules are likely to develop in practice to cope with them.

140. With respect to the suggestion that in article 8, the phrase "as a member of another of its permanent missions" be replaced in both paragraphs 1 and 2 by "as a member of the staff of another of its permanent missions", the Special Rapporteur wishes to point out that the text as drafted by the Commission is intended to cover the permanent representative.

141. The Special Rapporteur agrees with the suggestion that in article 9, the phrase "as head of a diplomatic mission" in both paragraphs 1 and 2 be replaced by "as

head of a diplomatic or special mission". However, he is not in favour of combining these two paragraphs.

142. The editing observations of the United Nations Secretariat involve a number of drafting questions which were thoroughly examined by the Commission. The Special Rapporteur has nevertheless deemed it useful to bring them to the attention of the Commission, which may wish to consider them before finalizing the text of articles 8 and 9. Apart from the inclusion of the words "or special" after the words "head of a diplomatic" in paragraphs 1 and 2 of article 9, the Special Rapporteur does not propose any change to the text of articles 8 and 9, which would therefore read as follows:

*Article 8. Accreditation to two or more international organizations or assignment to two or more permanent missions*

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

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

*Article 9. Accreditation, assignment or appointment of a member of a permanent mission to other functions*

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

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

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

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

*Article 10. Appointment of the members of the permanent mission**(a) Observations of Governments and international organizations*

143. In the course of the consideration by the Sixth Committee of the first group of draft articles at the twenty-third session of the General Assembly, several representatives emphasized the importance of article 10, which, subject only to the reservations mentioned in it, set forth the rule of freedom of choice by the sending State of the members of the permanent mission. This article was regarded as establishing a fundamental difference between permanent missions to international organizations and traditional diplomatic missions, for in the latter case the freedom of choice of the members of the mission by the accrediting State was restricted by the rules concerning

<sup>52</sup> The Commission may wish to consider whether the phrases between brackets in sub-paragraphs (a), (b), (c) and (d) are necessary (Note by the Secretariat).

the *agrément* of the head of the mission and the declaring of a member of the mission to be *persona non grata* or unacceptable. Those rules did not, however, apply to permanent missions to international organizations.

144. In its written observations, one Government [Belgium] took issue with the underlying principle of article 10, namely the non-subjection of the freedom of choice by the sending State of the members of its permanent mission to an international organization to the *agrément* of either the organization or the host State. Two Governments proposed certain qualifications to that principle.

145. One Government [Belgium] pointed out that in diplomacy, the receiving State is entitled to refuse its *agrément* to the appointment of a head of a mission and to declare certain persons unacceptable. It asserted that control by the host State should be exercisable with regard to permanent missions, in accordance with certain procedures appropriate to the structure of international organizations. Thus, it concluded,

it should be clear this is a case, not of accreditation *stricto sensu* to the international organization, but of a designation which the organization would notify to the host State, and to which the latter could then object.

146. Another Government [Israel] took the view that

The host State should have the right to refuse its consent to the appointment of members of permanent missions in the following two cases: (1) in the case of a person who has previously been convicted in the host State of a serious criminal offence; (2) in the case of a person whom the host State has previously declared *persona non grata*.

It suggested the inclusion of a provision to this effect either as a new paragraph to be added to article 10 or as a new article 10 *bis*.

147. The Government of Switzerland, while conceding that the *agrément* procedure was not in keeping with the nature of the relations between the host State and the sending State, pointed out, however, that in view of the position which the representative to an international organization was called upon to occupy in the territory of the host State, the latter should be authorized to formulate objections to the presence of a given individual in its territory as a member of a permanent mission. The Swiss Government added that such objections could be examined by the conciliation commission whose establishment it suggested in its observations on article 50. It further stated that in the absence of such an objection procedure, the host State should be empowered to refuse to grant all or some of the immunities to the person concerned.

#### (b) *Observations of the Special Rapporteur*

148. The Special Rapporteur fails to see the point in the allegation that because the position of a representative to an international organization vis-à-vis that organization is not that of accreditation *stricto sensu* but a designation, the host State could object to the appointment of the person concerned. The legal basis of the non-requirement of the consent of the host State in the case of members of permanent missions is that these representatives are not

accredited to the host State and do not enter into direct relationship with the host State, unlike the case of bilateral diplomacy. This legal basis does not differ whether the representative is considered accredited or designated to the organization.

149. The Special Rapporteur does not favour the addition of a provision allowing objection by the host State to the appointment of a member of a permanent mission in certain exceptional cases such as the ones mentioned in paragraph 146 above. He also sees danger in allowing the host State to refuse to grant all or some of the immunities to a member of a permanent mission in the situation envisaged in the comments of the Swiss Government.<sup>53</sup>

150. In the light of the foregoing observations, the Special Rapporteur does not propose any change to the text of article 10. Article 10 would therefore read:

#### **Article 10. Appointment of the members of the permanent mission**

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

#### **Article 11. Nationality of the members of the permanent mission**

##### (a) *Observations of Governments and international organizations*

151. In its written observations, the Government of Ecuador expressed the view that article 11 was appropriate, in view primarily of the problems which a citizen would create for his own country in respect of privileges and immunities.

152. In its comments on article 11, the Government of Belgium stated that once it was accepted that diplomatic status should be granted to permanent missions, there was no compelling reason to diverge from the provisions of the Vienna Convention on Diplomatic Relations.

153. The Government of Switzerland referred to the statement in paragraph 6 of the Commission's commentary on the question of stateless representatives. It suggested that in this connexion it should be specified that the host State should not be obliged to accept the presence of stateless representatives unless the sending State took them under its protection and was prepared to admit them to its territory at the end of their mission.

##### (b) *Observations of the Special Rapporteur*

154. The Special Rapporteur is not clear in his mind on the exact meaning of the statement by the Belgian Government that there is no compelling reason to diverge from the provisions of the Vienna Convention on Diplomatic Relations. If this is a reference to the Commission's decision to limit the scope of article 11 to nationals of the host State and not to extend it to nationals of a third State, the reasons for that decision were adequately stated

<sup>53</sup> See para. 147 above.

in paragraph 4 of the Commission's commentary on article 11.

155. As to the suggestion of the Swiss Government concerning the stateless persons, the Special Rapporteur wishes to point out that the problems of stateless persons are regulated by a number of instruments. He feels reluctant to insert in the commentary on the article any statement that might be construed as impairing the protection accorded by those instruments.

156. In the light of the above, the Special Rapporteur does not propose any change to the text of article 11. Article 11 would therefore read:

**Article 11. Nationality of the members of the permanent mission**

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

**Article 12. Credentials of the permanent representative**

*(a) Observations of Governments and international organizations*

157. The comments of delegations to the Sixth Committee did not include references to article 12. As regards written observations of Governments and international organizations, one Government made a suggestion of substance and another one raised two drafting points.

158. The Government of Yugoslavia took the view that to add "another competent minister" to the list of authorities empowered to issue credentials to the permanent representative would be at variance with the norm adopted in General Assembly resolution 257 A (III) of 3 December 1948, inasmuch as it would derogate from his representative character.

159. The drafting suggestions [Israel] are the following:

(1) To replace the words "or by another competent minister" by the words "or by any other authority competent to do so under the laws of the sending State". The reasons given in support of this suggestion are that credentials are in fact sometimes issued by authorities other than ministers and that the word "minister", unlike "Minister for Foreign Affairs", has no clearly defined meaning in international law.

(2) To omit the phrase "if that is allowed by the practice followed in the Organization", since the idea is already covered by article 3.

*(b) Observations of the Special Rapporteur*

160. As to the point of substance raised by the Yugoslav Government, the Special Rapporteur wishes to observe that the resolution of the General Assembly cited by that Government was drafted with particular reference to the

United Nations. The inclusion of the words "another competent minister" in article 12 is intended to cover the case of international organizations of a technical character (e.g. the specialized agencies) where the credentials of the permanent representative may be issued by the member of government responsible for the department which corresponds to the field of competence of the organization concerned. The Special Rapporteur is not certain he can share the view that this would derogate from the representative character of the permanent representative, since it could be assumed that the member of government who issues the credentials has delegated authority.

161. The Special Rapporteur agrees with the drafting suggestion of replacing the words "or by another competent minister" by the words "or by another competent authority". He does not however favour the omission of the phrase "if that is allowed by the practice followed in the Organization". He considers a specific reference to the practice of the Organization useful in this particular context.

162. In view of the foregoing, the Special Rapporteur proposes the following text for article 12:

**Article 12. Credentials of the permanent representative**

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

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

*(a) Observations of Governments and international organizations*

163. In the course of the consideration by the Sixth Committee of the first group of draft articles at the twenty-third session of the General Assembly, the use of the term "accreditation" in the title of article 13 was criticized. It was pointed out that the word had been borrowed from the terminology of bilateral diplomacy and that, in order to avoid any confusion with the rules governing that subject, it would be desirable to replace it by another term such as "appointment". As regards the text of article 13, attention was drawn to an apparent contradiction between the two paragraphs of that article. It was pointed out that paragraph 2 established the presumption that a permanent representative had general competence to represent the sending State in all the organs of the organization to which he had been accredited. Under paragraph 1, however, the sending State could specify in the credentials given to its permanent representative that he represented it in one or more organs of the Organization. The question was whether in such a case the presumption embodied in paragraph 2 was still valid or whether the fact that a State enumerated certain organs in the credentials given to its permanent representative prevented him from representing it in other organs.

164. In its written observations, one Government [Israel] made a comment on the substance of article 13 and two Governments [Israel and Netherlands] expressed preference for the formulation appearing in paragraph 7 of the commentary on the article.

165. The Government of Ecuador made an observation on article 13 which is very elaborate and which the Special Rapporteur prefers to reproduce here in its entirety:

This article establishes clearly the field of action of the permanent representative but it is not logical to presume that, if the permanent representative acts as such only in relation to certain organs (or, in the event that there are no special requirements as regards representation in other organs of the organization and the sending State does not decide otherwise, if he is also permanent representative to the latter organs), the permanent mission, as such, could assume representative functions in relation to the organization as a whole—as draft articles 6 and 7 apparently provide. It would not be proper for permanent missions to be accredited to an organization as a whole while permanent representatives were accredited solely to certain organs of that organization. There should be a parallelism between the scope of representative functions of permanent missions and that of permanent representatives so that the missions would not appear juridically to discharge representative functions wider in scope than those exercised by the heads of such missions.

It would not be difficult to embody this principle of parallelism juridically in an instrument sponsored by the United Nations, even though this dual principle has more or less been established in current practice. If the present texts of articles 6 and 13 are to be reconciled, they will need to be interpreted in the sense that a permanent mission accredited to an organization in accordance with article 6 is the one which represents the sending State in the organs of the organization in accordance with article 13. The commentary on this rule could well be drafted to indicate that the apparent duality in articles 6 and 13 should be construed in the light of the foregoing interpretation.

166. The formulation appearing in paragraph 7 of the commentary on article 13, which was suggested by some members of the Commission, reads as follows:

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

2. In other cases its permanent representative may represent it in all the organs of the Organization unless there are special requirements as regards representation in any particular organ or the State in question otherwise provides.

167. It is to be noted that one of the two Governments which expressed preference for the above cited alternative formulation of article 13 [Israel] suggested, however, that the words “unless there are special requirements as regards representation in any particular organ” (para. 2) be omitted, since, in its view, this point is already covered by article 3.

#### *(b) Observations of the Special Rapporteur*

168. The problem of reconciling article 13 with article 7 does not appear to the Special Rapporteur to present great difficulties. To his mind, article 7 is a general statement of the functions of permanent missions as an institution. Article 13 deals with the accreditation of the

permanent representative to represent his State in one or more organs of the Organization.

169. The Special Rapporteur prefers the text of article 13 in its present form to the formulation appearing in paragraph 7 of the commentary.

170. In view of the foregoing, the Special Rapporteur does not propose to make any change in article 13. Article 13 would therefore read:

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

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

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

#### *Article 14. Full powers to represent the State in the conclusion of treaties*

##### *(a) Observations of Governments and international organizations*

171. In the course of the consideration by the Sixth Committee of the first group of draft articles at the twenty-third session of the General Assembly some representatives pointed out that paragraph 1 of article 14 referred only to the adopting of the text of a treaty between the sending State and the international organization concerned whereas the corresponding provision of the draft Convention on the Law of Treaties (article 6, para. 2 (c))<sup>54</sup> applied to any treaty adopted by an international organization. They questioned the desirability of thus limiting the powers which in the draft convention on the law of treaties were accorded to permanent representatives in regard to adopting the text of a treaty. On the other hand, several members of the Sixth Committee considered that the rule formulated in article 14 was not open to dispute. Some, however, felt that that rule was perhaps more properly a part of the law of treaties, and they wondered whether it belonged in a draft concerned with relations between States and international organizations.

172. In its written observations, the Government of Switzerland pointed out that article 14 relates to the conclusion of treaties between States and international organizations, a field which would perhaps be eventually codified. It suggested therefore that this article should be deleted.

173. The Government of Belgium stated that it seemed too restrictive to cover only treaties between member States and the organization; it expressed the view that treaties concluded under the auspices of the organization might constitute a much more far-reaching and important category.

<sup>54</sup> In the Vienna Convention on the Law of Treaties article 6 has become article 7.

174. The Government of the Netherlands took the view that the title of article 14 was too wide. It pointed out that actually the article referred to only one category of conventions. It therefore suggested that the title be redrafted as follows "Representation of States in the conclusion of treaties with international organizations".

175. The Government of Sweden noted that the expression "adopting the text of a treaty" was not ordinarily used in connexion with bilateral treaties. It suggested that this expression be replaced by the term "negotiating". It further pointed out that because of the differing opinion on the nature of agreements between international organizations and member States and on the legal personality of international organizations, the word "treaty" in article 14 should be replaced by the more neutral expression "agreement".

*(b) Observations of the Special Rapporteur*

176. With respect to the observations summarized in paragraph 172 above, the Special Rapporteur is not convinced that the fact that the question of treaties between States and international organizations will perhaps be eventually codified justifies the deletion of article 14.

177. As to the point made by the Belgian Government to the effect that article 14 does not cover treaties concluded under the auspices of the organization, the Special Rapporteur wishes to point out that these treaties involve delegations to organs or conferences.

178. The Special Rapporteur agrees with the suggestion of the Government of the Netherlands regarding the title of article 14.

179. The Special Rapporteur does not share the view of the Swedish Government regarding the difficulties which may be caused by the use of the term "treaty" in article 14. He wishes to point out that the legal personality of international organizations and their treaty-making capacity are now universally recognized. As to the suggestion to replace the term "adopting" by the term "negotiating", it is to be noted that the prevailing opinion in the Commission is that article 14 should be in line with the provisions of the Convention on the Law of Treaties.

180. In view of the foregoing, the Special Rapporteur proposes the following text for article 14:

**Article 14. Representation of States in the conclusion of treaties with international organizations**

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

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

**Article 15. Composition of the permanent mission**

*(a) Observations of Governments and international organizations*

181. Two observations only were made on article 15. The first relates to the place of the article and suggests that the article be merged with article 6, so as to form the second paragraph of that article [Israel]. The second relates to paragraph 4 of the Commission's commentary on the article and suggests that that paragraph be deleted [Netherlands].

*(b) Observations of the Special Rapporteur*

182. The Special Rapporteur prefers the present place of article 15 to keep the necessary co-ordination with the Vienna Convention on Diplomatic Relations and the Convention on Special Missions. He proposes to make no change in the text of article 15. Article 15 would therefore read:

**Article 15. Composition of the permanent mission**

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

**Article 16. Size of the permanent mission**

*(a) Observations of Governments and international organizations*

183. Referring to paragraph 8 of the commentary on article 16, several delegations to the Sixth Committee noted with satisfaction that the International Law Commission was contemplating the inclusion in the draft articles of a provision of general scope concerning remedies available to the host State in the event of claims of abuses by a permanent mission.

184. The Government of Belgium expressed the opinion that the right of the host State to intervene in matters relating to the size of the permanent mission should be recognized and should be exercisable in accordance with specific procedures.

185. The Government of Switzerland stated that unless what was intended in article 16 was merely a moral exhortation addressed to the sending State, it would be desirable to allow the host State the possibility of objecting to the size of the permanent mission, the objection being handled in accordance with the conciliation procedure described in that Government's comments on article 50.

186. The ILO pointed out that article 16 gave no indication of who would decide what was reasonable and normal. It also expressed the fear that the article could place the organization in a very difficult situation, considering that article 50 provides for negotiations between the sending State, the host State and the organization and that the organization would then be

obliged to take a position on a problem which had very little to do with it.

*(b) Observations of the Special Rapporteur*

187. The Special Rapporteur wishes to recall that all the above-mentioned points were thoroughly discussed in the Commission and that the commentary on the article elaborates the reasons for the present formulation of article 16.

188. In view of the foregoing, the Special Rapporteur does not propose to make any change in article 16. Article 16 would therefore read:

*Article 16. Size of the permanent mission*

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

**Article 17. Notifications**

*(a) Observations of Governments and international organizations*

189. The Government of Switzerland stated in its written observations that it was the permanent mission, not the organization, which should give notification to the host State. In its opinion, this procedure was simpler and safer and made for prompter issue of the cards (*cartes de légitimation*).

190. The ILO expressed the fear that the considerable amplification of the obligation to notify provided for in article 17 would make it necessary to set up a very cumbersome system in which the organization would simply act as a transmitting body. It also pointed out that at Geneva the members of the permanent missions are in the great majority of cases assigned to several organizations at the same time. It contended that to oblige the permanent missions to notify each of the organizations of the names of all the persons referred to in article 17 and to oblige all the organizations to transmit that information to the host State would entail a duplication of effort which would hardly seem justifiable. The ILO therefore suggested that perhaps in cases of accreditation to several organizations the notification could be made to only one of them, which would be responsible for informing the host State and the other organizations.

191. The following drafting points were raised in the written observations of one Government [Israel].

(1) In sub-paragraph (a) of paragraph 1, the words "of the members" should be replaced by "of members" and the words "their arrival and final departure" by "their arrival and their final departure"; at the end of the sub-paragraph, the following words should be added "and, in the case of temporary absences, their departure and return";

(2) In sub-paragraph (b), the words "where appropriate" should be deleted;

(3) Paragraph 2 should be drafted along the same lines as paragraph 2 of article 11 of the draft articles on special missions.

192. The United Nations Secretariat made the following editing observations:

(1) For the sake of uniformity, the first part of paragraph 1 (a) should be amended to bring it into line with article 89, paragraph 1 (a), which is more concise.

(2) In the first line of paragraph 1 (b) the words "a person" should be replaced by "any person". This wording would be closer to the Spanish and (suggested) French versions and is in itself an improvement.

(3) While the expression in paragraph 1 (d) "engagement [. . .] as members of the permanent mission" is good English, the same cannot be said for "discharge [. . .] as members of the permanent mission". To avoid this difficulty the paragraph might be redrafted to read:

(d) the engagement, as members of the permanent mission or as private staff entitled to privileges and immunities, of persons resident in the host State and the discharge of such persons. (A/CN.4/L.162/Rev.1, section B.)

*(b) Observations of the Special Rapporteur*

193. As regards the suggestion of the Swiss Government that it is the permanent mission which should give notification to the host State, the Special Rapporteur wishes to point out that the rationale of the rule adopted in article 17 is that since the direct relationship is between the sending State and the organization, notifications are to be made by the sending State to the organization.

194. With respect to the suggestions of the ILO, the Special Rapporteur wishes to point out that the independence of international organizations from one another would make it difficult to assign to one of them on behalf of the others the task of sending the required notifications.

195. In view of the foregoing, the Special Rapporteur does not propose to make any substantial change in the text of article 17. He wishes, however, to recommend to the Commission that it refers the drafting points and editing observations to the Drafting Committee. Article 17 would therefore read as follows:

*Article 17. Notifications*

**1. The sending State shall notify the Organization of:**

(a) The appointment of the members of the permanent mission, their position, title and order of precedence, their arrival and final departure or the termination of their functions with the permanent mission;

(b) The arrival and final departure of a person belonging to the family of a member of the permanent mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the permanent mission;

(c) The arrival and final departure of persons employed on the private staff of members of the permanent mission and the fact that they are leaving that employment;

(d) The engagement and discharge of persons resident in the host State as members of the permanent mission or persons employed on the private staff entitled to privileges and immunities.

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



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

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

### Article 18. *Chargé d'affaires ad interim*

#### (a) *Observations of Governments and international organizations*

196. In its written observations, one Government [Sweden] suggested that the temporary head of a permanent mission should ordinarily be designated as "acting permanent representative" rather than as "*chargé d'affaires ad interim*" and that the text and title of article 18 should be changed accordingly.

197. Another Government [Israel] noted that no provision had been made for the accreditation of "*chargés d'affaires ad interim*". It pointed out that this might be needed, in view of the fact that the post of permanent representative was sometimes vacant for a considerable time.

198. In its editing observations, the United Nations secretariat suggested that in the last line the words "in case he is unable to do so" should be replaced by "if he is unable to do so" (A/CN.4/L.162/Rev.1, section B).

#### (b) *Observations of the Special Rapporteur*

199. As regards the first suggestion, the Special Rapporteur wishes to stress that the Commission did consider this point and decided in favour of the term "*chargé d'affaires ad interim*".

200. As to the second suggestion, he points out that it would prove difficult in practice to determine in advance the length of the period during which the post of a permanent representative may remain vacant.

201. In view of the above, the Special Rapporteur does not propose to make any change in the text of article 18. He wishes however to recommend to the Commission that it refers to the Drafting Committee the editing observation of the United Nations Secretariat (para. 198 above). Article 18 would, therefore, read as follows:

#### *Article 18. Chargé d'affaires ad interim*

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

### Article 19. Precedence

#### (a) *Observations of Governments and international organizations*

202. The Government of the United States stated in its written observations that the purpose of the article was to

lay down a residual rule if an organization did not have a rule relating to precedence; consequently, it went on to say, affording a choice between two solutions in accordance with established practice did not offer a definite solution. The Government of the United States therefore suggested adopting the rule of alphabetical order since that procedure was generally followed in international organizations.

203. The ILO suggested that the article should specify which alphabetical order was meant, as it would vary according to the language used.

204. The United Nations Secretariat suggested in its editing observations that the word "the" before "alphabetical order" be deleted (A/CN.4/L.162/Rev.1, section B).

#### (b) *Observations of the Special Rapporteur*

205. The Special Rapporteur agrees with the suggestion of the United States. With regard to the point made by the ILO, he believes that it is covered by the words "in accordance with the practice established in the Organization". As to the editorial suggestions made by the United Nations Secretariat, the Special Rapporteur recommends that it should be referred to the Drafting Committee.

206. In view of the foregoing, the Special Rapporteur proposes the following text for article 19:

#### *Article 19. Precedence*

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

### Article 20. Offices of permanent missions

#### (a) *Observations of Governments and international organizations*

207. In its written observations, the Government of Belgium expressed the view that article 20 was unnecessary and might give rise to difficulties. It stated that obviously a permanent mission should normally be established in the vicinity of the seat of the organization. It further pointed out that cases in which the functions of representation to the organization concerned developed upon a diplomatic mission, or upon a permanent mission to another organization in the host country or in a third country, were covered by articles 8 and 9.

208. The Government of the United States stated that paragraph 1 contained a slight ambiguity as a result of the word "localities". It posed the question:

May the sending State establish an office of the permanent mission in another State without the consent of the State where the seat of the organization is established if there is an office of the organization in that other State?

In the opinion of the Government of the United States, there would not appear to be any particular reason for



such a restriction but under paragraph 1 as worded it could be argued that such permission was necessary.

209. The following drafting suggestions were made in the written observations of one Government [Israel]:

(1) In paragraph 1, the word "express" should be inserted after "prior" in order to bring the text into conformity with that of article 12 of the Vienna Convention on Diplomatic Relations.

(2) The words "within the host State" should be inserted after "localities".

*(b) Observations of the Special Rapporteur*

210. With respect to the comments of the Belgian Government, the Special Rapporteur points out that the normal practice is of course for a sending State to establish the premises of its permanent mission in the city where the organization has its seat. There are however a number of exceptions some of which are mentioned in the commentary on article 20. He also points out that articles 8 and 9 deal with an entirely different question, that of the compatibility of various types of functions. The Special Rapporteur is therefore unable to share the view that article 20 is unnecessary.

211. With regard to the observation of the Government of the United States, the Special Rapporteur wishes to point out that in view of the definition of the "host State" in sub-paragraph 1 of article 1, it is clear that if the organization has in a given State an office at which permanent missions are established, that State acts as the host State to the office and it is therefore its consent which would be required in the eventuality envisaged in paragraph 1.

212. As to the drafting points mentioned in paragraph 209 above, the Special Rapporteur recommends that they be referred to the Drafting Committee.

213. In view of the foregoing, the Special Rapporteur does not propose to make any change in article 20. Article 20 would therefore read:

*Article 20. Offices of permanent missions*

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

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

**Article 21. Use of flag and emblem**

*(a) Observations of Governments and international organizations*

214. In its written observations, the Belgian Government stated the following:

This article is, in substance, a repetition of the corresponding article of the Convention on Diplomatic Relations regarding the use of

national emblem. One may suspect that the addition of material that had been omitted from the articles of the Vienna Convention was not necessitated by the nature of permanent missions but should, rather, be interpreted as an attempt—valid enough in itself—to make good certain deficiencies or fill certain gaps in the Convention.

215. Another Government [Israel] proposed that the second sentence of paragraph 1 be omitted, but that the first sentence be completed by the addition of the words "and on its means of transport when used on official business", in conformity with paragraph 1 of article 19 of the draft articles on special missions.

*(b) Observations of the Special Rapporteur*

216. With respect to the comments quoted in paragraph 214 above, the Special Rapporteur only wishes to point out that the commentary duly explains the reasons why article 21 differs to some extent from the corresponding provision of the Vienna Convention on Diplomatic Relations.

217. As to the proposed addition of the words "when used on official business", the Special Rapporteur points out that these words, which are borrowed from article 29 of the Vienna Convention on Consular Relations, do not appear in article 20 of the Vienna Convention on Diplomatic Relations. He therefore does not favour their inclusion in article 21.

218. In view of the foregoing, the Special Rapporteur does not propose to make any change in article 21. Article 21 would therefore read:

*Article 21. Use of flag and emblem*

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

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

\* \* \*

**DOCUMENT A/CN.4/241/ADD.3**

**NOTE**

The present addendum is based on the comments of Governments and international organizations referred to in the introduction to the report<sup>55</sup> and on the additional comments received by the Special Rapporteur before 31 March 1971, namely, those from Japan. It is arranged along the same lines as explained in the introduction.<sup>56</sup>

<sup>55</sup> See above, p. 10, document A/CN.4/241 and Add.1 and 2, paras. 5-7.

<sup>56</sup> *Ibid.*, p. 11, para. 8.

**Part II. Permanent missions to  
international organizations (continued)**

**SECTIONS 2, 3 AND 4  
IN GENERAL**

**(a) Observations of Governments  
and international organizations**

1. In the course of the debate in the Sixth Committee,<sup>57</sup> a number of representatives indicated in general their approval of sections 2, 3 and 4 of part II of the draft articles. Others stressed the importance which they attached to matters covered by some of the draft articles contained in those sections. In this connexion, particular mention was made of articles 24, 25, 27, 28, 29, 30, 31, 32 and 44.<sup>58</sup> The observation was made by certain representatives that the twenty-nine draft articles included in part II

seemed to deal only with permanent missions of States other than the host State. In their view, they should also cover the permanent mission of the host State itself, to which many of the twenty-one draft articles adopted in 1968 applied. Finally, it was remarked that the Commission should be a little more bold in recasting the material and departing from the structure and contents of the 1961 Vienna Convention on Diplomatic Relations, in order to simplify the presentation of the draft. Articles 39 and 40, for example, were confused, when read after articles 30 to 38.<sup>59</sup>

2. In their written comments some Governments<sup>60</sup> [*inter alia*, those of Australia, Cyprus, Finland and Mauritius] expressed in general their agreement with the articles contained in part II of the draft. One Government [Finland] stated in this connexion that they were "suited as a basis for the final draft". It was also stated [Cyprus] that the articles were

aimed... at achieving a proper balance between the legitimate interests of the three parties concerned, viz., the sending State, the receiving State and the Organization itself. The topics dealt with in these draft articles (facilities, privileges and immunities, conduct of the permanent missions and their members, and end of the functions), are topics of particular interest and with the ever increasing importance of representation to international organizations, especially as far as newly independent and small States not having extensive embassy networks are concerned, are also of particular importance.

3. One Government [Finland] pointed out that the provisions contained in articles 22 to 50 were "closely related" to the Vienna Convention on Diplomatic Relations,<sup>61</sup> the Vienna Convention on Consular Relations<sup>62</sup> and the Convention on Special Missions<sup>63</sup> and were

<sup>57</sup> For all references to the Sixth Committee's discussion of the draft articles, see foot-note 39 above.

<sup>58</sup> For all references to the draft articles and the Commission's commentaries, see foot-note 34 above.

<sup>59</sup> See *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 24.

<sup>60</sup> See foot-note 12 above.

<sup>61</sup> See foot-note 38 above.

<sup>62</sup> See foot-note 50 above.

<sup>63</sup> See foot-note 41 above.

"often variants of these, adapted to the special circumstances related to international organizations". Another Government [Yugoslavia] deemed it to be a very important point that the Commission,

having regard to the specific nature of the institution of permanent missions of States to international organizations, has introduced a number of provisions in the draft (e.g. articles 24, 28, 34 and 39) which constitute in a sense a further elaboration of the Vienna Conventions system

In this connexion, the view was expressed by one Government [Finland] that it had

no special observations to make about the main principles as embodied in the draft articles, provided there were no inconsistencies between the articles and the three Conventions mentioned above.

4. In its written comments, IAEA stated the following:

There is clearly a difference between the relations of "host States" with international organizations and the relation of other States with international organizations. This distinction seems to have been introduced in the draft by confining its part I to relations between States in general and the international organizations, while dealing mostly in part II with the relations between *host States* and international organizations. However, in view of the definition of the "host State" in article 1, sub-paragraph (f), on the one hand, and the provision on the possibility of establishing permanent missions in third States in accordance with article 20, paragraph 2, on the other, we have doubts on whether many of the rights and obligations regulated in part II should really be confined to "host States" (in the sense in which the expression is used in the draft articles) rather than be made applicable to all States. We wonder whether, for instance, the provision of article 22 should not extend to all member States, that of article 23 to any State which would give its consent pursuant to article 20, paragraph 2, etc. We therefore believe that the term "host State" may be used more restrictively, and the relations special to the "host State" be regulated more precisely in order to make them more distinguishable from the relations of other States with the organizations.

5. In its note (A/CN.4/L.167) on differences in form between part II and part IV of the draft articles, the Secretariat of the United Nations indicated that in preparing its editorial suggestions it had noted the existence of a difficulty which it wished to draw to the attention of the Commission. In its view, this difficulty, which affected the text in the four working languages in differing degrees, was

due to the fact that the draft contains a number of parallel provisions some of which are based on the Vienna Convention on Diplomatic Relations while others are based on the Convention on Special Missions.

After quoting from paragraph 16 of the Commission's general comments on part IV, section 2, regarding the nature and extent of the facilities, privileges and immunities of members of delegations, the United Nations Secretariat observed that

On the other hand, many provisions of part II of the draft articles—especially those concerning the facilities, privileges and immunities of permanent missions—are based on the Vienna Convention on Diplomatic Relations. However, although that Convention and the Convention on Special Missions contain many similarities, since the latter is based on the former, they also reveal some differences in form. These are not differences in nature, purpose or wording but simply reflect the desire to make some improvements in the style of the syntax of the Vienna Convention. Some of these differences in form are encountered in part II and part IV of the draft

articles. While they might be justified in the case of two separate conventions, the same cannot be said for two parts of one and the same instrument.

The Secretariat expressed the view that, "accordingly, the Commission may wish to eliminate the differences in question by choosing in each case the wording that it feels is most suitable."

(b) *Observations of the Special Rapporteur*

6. As regards the general comments reflected above, the Special Rapporteur will limit his observations to those which specifically concern the sections of part II of the draft covered in this addendum. For those which are applicable to the draft as a whole, he refers to his general observations in the introduction to the present report.<sup>64</sup>

7. With respect to the comment made in the Sixth Committee reflected in paragraph 1 above, the Special Rapporteur wishes to observe that the twenty-nine articles adopted by the Commission at its twenty-first session, most of which comprise section 2 (Facilities, privileges and immunities) of part II, do not deal "only", but "mainly" with permanent missions of States other than the host State. This is, of course, due to the fact that most of the provisions of those articles impose obligations on the host State concerning the granting of privileges and immunities, and that, under existing diplomatic law, a representative of a State does not enjoy, in principle, privileges and immunities vis-à-vis the government or the laws of his own State. However, as far as the obligations assumed by the organization in recognition of its role and interests are concerned, the permanent mission of the host State is not, of necessity, likewise excluded. The Special Rapporteur believes that these elements are appropriately reflected in the provisions of the twenty-nine articles covered in the present addendum as they are presently drafted. As regards the comment concerning the relationship in general between the present draft and the Vienna Convention on Diplomatic Relations, the Special Rapporteur wishes to refer to the comments of Governments reproduced in paragraph 3 above, which in his view, accurately reflect the approach adopted by the Commission in that respect.

8. As far as the comments reflected in paragraph 4 above are concerned, the Special Rapporteur wishes to point out that part II is not limited to "relations between host States and international organizations" but extends to sending and third States as well. Furthermore, article 20, paragraph 2 of the present draft does not provide for "the possibility of establishing permanent missions in third States" but rather for the establishment in those States of "offices of the permanent mission". In any event, the Special Rapporteur wishes to observe that the obligations on the granting of privileges and immunities concern mainly the host State because of its position as such, namely, having in its territory the seat or an office of the organization, at which permanent missions are established. It is in view of the special relationship between a

State and the organization implicit in the concept of host State that the obligations of third States as regards privileges and immunities do not call for a treatment similar to that concerning the obligations of the host State. In the view of the Special Rapporteur this has been reflected in the draft as presently drafted.

9. The Special Rapporteur takes note of the general comment made by the Secretariat of the United Nations in its editorial suggestions.

## SECTION 2. FACILITIES, PRIVILEGES AND IMMUNITIES

### General observations

#### (a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee at the twenty-fourth session of the General Assembly a number of representatives agreed that permanent missions to international organizations

should enjoy privileges and immunities analogous to those accorded to diplomatic missions in the context of bilateral relations. It was pointed out in this connexion that for all practical purposes, both kinds of missions enjoyed an almost identical status in most instances. Consequently, it was considered that the provisions of the Vienna Convention on Diplomatic Relations had properly been used as a basis for the formulation of the new draft articles on representatives of States to international organizations. Nevertheless, it was felt that the analogy principle should be applied in such a manner as to respect the particular characteristic of the permanent mission.

2. Some representatives said that,

In drafting the new articles, the Commission had struck the right balance; it had departed from the precedents of the Vienna Convention when it had been necessary owing to the inapplicability of certain key features of diplomatic privileges and immunities in the classic sense—the principle of reciprocity and the concepts of *agrément* and *persona non grata*—to a triangular relationship between sending State, host State and international organization. In this regard, the observation was made that the difference between diplomatic missions and permanent missions was evidenced by the fact that a State might send a permanent mission to an international organization whose headquarters were in a host State with which the sending State had no diplomatic relations.

3. Several representatives agreed that

The starting point towards the establishment of the privileges and immunities of permanent missions to international organizations should be the modern theory of the "functional necessity" rather than the "extraterritoriality" or the "representative character" theories.

4. The view was expressed that

If the future convention were to command the widest possible acceptance two considerations should be taken into account. First, if the basis was functional necessity, the level of the privileges and immunities to be granted to the permanent missions should vary according to the functions which they performed; it was therefore considered appropriate to cover only those privileges and immunities regarded as essential, and to leave the others to be agreed between the host State and the international organization concerned.

<sup>64</sup> See above, p. 10, document A/CN.4/241 and Add.1 and 2, paras. 1-8.

Secondly, it was stated that since the principle of reciprocity was not applicable, it would seem wise not to impose too heavy a burden on the host State with regard to the privileges and immunities to be accorded to permanent missions from other States, particularly in view of the tendency of international organizations to congregate in a limited number of States with suitable conditions for their efficient functioning. A realistic attitude should be adopted and the protection afforded to the permanent mission should not extend beyond what was functionally necessary.

5. Stressing the importance of the functional element over diplomacy in relations between States and international organizations, a number of representatives, referring in particular to articles 4 and 5, considered that

The draft articles should be based as far as possible on existing agreements on privileges and immunities. They therefore emphasized the need to take into account the current practice of States and international organizations in that regard. The opinion was expressed that the draft might be more readily acceptable given the fact that it was without prejudice to other international agreements in force. Nevertheless, it was considered that problems of incompatibility might still arise between certain new provisions and existing instruments or practices.

6. The belief was expressed that

A closer examination should be made of cases where an agent had functions of a dual nature, serving as the representative of the sending State not only to the host State but also to an international organization situated in the territory of the host State.

7. The view was held that

Care should be taken in elaborating the various exemptions included in the draft. The immunities under consideration were purely procedural in character and, as such, could be waived with proper authorization from the sending State. Thus, there could be no absolute immunity even from the jurisdiction of the host country, let alone immunity from its substantive law.

8. The statement in paragraph 5 of the Commission's general comments on section 2, to the effect that the representative of a State to an international organization represented his State "before" the organization, was considered to be "misleading"; it was said that

The representative represented his State "in" the organization and "before" any organization or personality as might be necessary in the performance of his duties; the member State was itself part and parcel of the organization and the organization was not something apart from its members.<sup>65</sup>

9. In its written comments, the Government of Switzerland considered it desirable,

in view of the rapid development of international organizations, to define the normal status of certain categories of organizations, both as regards the immunities and privileges of the organizations themselves and of their personnel and as regards the representatives (especially representatives of States) to the organizations.

It further observed that

With regard to immunities and privileges, it would seem preferable to deal first—as indeed the International Law Commission had done—with the status of permanent representatives of member States to the organizations, [...] a subject on which many conventions (including the headquarters agreement to which Switzerland is a party) are silent. Furthermore, the status of such permanent representatives, unlike that of persons employed by the

organizations or connected with them (such as non-permanent representatives), is very similar to that of diplomatic agents or members of special missions. That being so, there are good grounds for considering them first and, as it were, in parallel with the texts already prepared by the Commission.

10. Some Governments also recognized that permanent representatives to international organizations have, under existing international agreements and practice, a status similar to that of members of diplomatic missions [see, *inter alia*, the observations of Belgium, Netherlands, Switzerland and the United Kingdom]. It was stated [Belgium] in this connexion that

a State establishing a permanent mission regards the mission as performing on a multilateral basis representational functions equivalent to those performed by a diplomatic mission on a bilateral basis. This, in fact, is reflected in the internal legislation of States relating to foreign service careers and the classification of posts. It has accordingly become common practice, by an express or tacit consensus arrived at between the host State and the member States through the organization, to accord diplomatic status to the permanent missions of States to international organizations. However, once it is decided to grant diplomatic status, there exists at present only one possible guide to such status, namely, the Vienna Convention on Diplomatic Relations of 18 April 1961.

It was also observed [Netherlands] that

from the sending State's point of view there is not much difference between the positions of permanent missions to States and to international organizations. In both cases, residence in the host State is permanent and the mission's task is not confined to one specific assignment.

This similarity justifies the privileges and immunities in the present draft being wider in scope than those laid down in the Convention on Special Missions; they conform in a large measure to those laid down in the Vienna Convention on Diplomatic Relations.

11. Some Governments, noting that the articles contained in part II broadly provide for permanent missions to international organizations a status approximating that of diplomatic missions supported such approach as being "reasonable" and "satisfactory" [Australia, Canada]. The Government of Switzerland also expressed support for the Commission

with regard to the general principle on which its draft is based, that is, the assimilation of permanent missions to diplomatic missions. This principle does not rest on a superficial analogy, but is solidly founded on State practice. In a field where customary rules are rare, if not non-existent, it is particularly important that codification should proceed in line with the facts of experience, as derived from the conventional rules in force and the practice of host countries. The rules in question, formed in the relations between the organization and the host State and confirmed by long usage, are extremely consistent in their effects. They are designed to avoid unnecessary friction and prevent abuses, preserving both the sovereignty of the host State and the independence of the organization.

12. Another Government [Israel] stated its inclination towards a broad formulation of facilities, privileges and immunities for the official representatives of States as it considered that uniformity of treatment is preferable to the many ambiguities and obscurities now encountered. If, however, that view was not adopted, it suggested that the Commission might wish to consider presenting the material in a series of separate instruments. Another Government [Netherlands] likewise expressed its agreement in principle to the assimilation of both kinds of

<sup>65</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, paras. 25-32.*

permanent missions and indicated that it would not, therefore, make proposals designed to restrict privileges and immunities, as it deemed appropriate to make with regard to diplomats *ad hoc*.

13. A number of those Governments which recognized as a fact or agreed to the assimilation of the status of permanent missions to international organizations and diplomatic missions, expressed however, some reservations on the implications to be drawn from such acknowledgement or accord. One Government [United Kingdom] stated in this connexion that the mere recognition of a fact did not imply, in commenting on articles 22 to 50, that it regarded any general modification of the law on this subject as necessary or desirable or that any general assimilation of the status of representatives of States to international organizations with that of diplomatic personnel on a permanent or temporary mission as laid down in the Vienna Convention on Diplomatic Relations or the Convention on Special Missions would be acceptable to it or that it would not welcome reconsideration by the Commission of its general approach to the topic and of the assumptions on which it is based.

14. Another Government [Australia] observed that one important difference between permanent missions to international organizations and diplomatic missions was that,

In the case of the former, three entities are involved (the organization, the host State and the sending State), whereas in the latter only two are involved (the receiving State and the sending State). In its view the present draft tended to underestimate the difficult position of the host State; it suggested therefore that this aspect might be considered further by the Commission.

In this connexion the opinion was also expressed [Japan] that

in drawing up the diplomatic law, of representatives of States to international organizations, the interest of the sending States should be guaranteed, but at the same time, ample consideration should be given to the adequate protection of the interests of the host States. It is to be expected that the presence of numerous permanent missions in one locality will impose a particularly heavy burden on the host State of an international organization of universal character. Particular attention should be given to safeguard the interests of the host State against possible abuses of privileges and immunities by permanent missions and their members.

15. One Government [Netherlands] further expressed the view that

From the point of view of host States there is an essential difference between receiving permanent missions in bilateral diplomatic relations and receiving permanent missions accredited to an international organization having its seat in the territory of the host State. In bilateral diplomatic relations, the host State accords diplomatic facilities to ensure the efficient conduct of its diplomatic relations with the sending State. This clearly serves the direct interests of both the sending State and the host State itself. In the case of missions accredited to international organizations, however, such facilities accorded by the host State are intended to ensure the efficient functioning of the organization. The host State has only an indirect interest here, namely the promotion of the work of the organization and its acting as a good host.

16. The same Government observed that

The requirement of *agrément* does not apply to members of missions to international organizations. Such missions can be sent by

States not recognized by the host State or even by States whose relations with the host State could hardly be called friendly.

In view of the considerations thus made, it took the view that

In some respects the present draft could approach the matter of privileges and immunities to be accorded by the host State in a more restrictive sense.

17. Other Governments also made reference to the concept of *agrément*, as well as to the concepts of *persona non grata* and reciprocity. Thus, one Government [Japan] considered that the articles did not

adequately ensure for the protection of the interests of the host State by providing measures comparable to the provisions on *persona non grata* and *agrément* designed to protect the interests of the receiving State in bilateral relations. The procedure envisaged in article 50 [. . .] will not provide the host State with sufficient protection. It is, therefore, hoped that the Commission will give consideration to devising more effective procedures for the protection of the interests of the host State (conciliation procedure, for example).

18. The view was also expressed [Belgium] that it seemed inconsistent with international law to decide that the host State would have no authority with regard to *agrément*, declarations of *persona non grata* and reciprocity, as a result of which permanent missions would enjoy all the advantages of the diplomatic régime without being subject to the safeguarding measures associated therewith. This would run counter to the headquarters agreements and conventions dealing with the subject. [. . .] In the final analysis, it is the host State that grants privileges, and ways must therefore be found to reconcile the two aspects which an objective analysis of the *sui generis* situation [. . .] discloses, the first being the representative nature of a permanent mission to an international organization and the second the granting of diplomatic status by the host State, although, perhaps, in accordance with a multilateral decision.

19. Some Governments stressed the importance they attached to the principle of functional necessity. It was said in this connexion [Australia] that that principle was fundamental to a consideration of the level of privileges and immunities in the international field and that the draft articles should not attempt to depart from it; if they did, the possibility of wide acceptance of the articles would be greatly prejudiced. It was also stated [Japan] that draft articles on the diplomatic law on the relationship between States and international organizations should be based on the functional necessity, due regard being paid to the existing rules and practice. Owing to the approach taken by the Commission of following closely the corresponding provisions of the Vienna Convention on Diplomatic Relations, the element of diversity of functions and needs of international organizations was not sufficiently taken into consideration. Thus the draft articles substantially departed from the prevailing practices and principles of international organizations regarding privileges and immunities. Another Government [Belgium] expressed the view that

As a rule, only the corps of officials is of a permanent nature, and it is for this reason that most of the legal instruments concerning privileges and immunities of international organizations refer to representatives of States only from the standpoint of such facilities as are requisite to enable them and their staffs to attend sessions of deliberative bodies at the most varied levels.

20. Also in this connexion, one Government [United Kingdom] stated that it continued to share the view

expressed by the General Assembly of the United Nations in its resolution 22 D (I) of 13 February 1946 on the co-ordination of the privileges and immunities of the United Nations and the specialized agencies:

[...] the General Assembly considers that the privileges and immunities of the United Nations should be regarded, as a general rule, as a maximum within which the various specialized agencies should enjoy such privileges and immunities as the appropriate fulfilment of their respective functions may require, and that no privileges and immunities which are not really necessary should be asked for.

It further pointed out that the Council of Europe had carried out a study of the question of the privileges and immunities of international organizations and, on 26 September 1969, the Committee of Ministers of the Council of Europe had adopted the report prepared by the European Committee on Legal Co-operation. The United Kingdom Government expressed support for the report's conclusion to the effect that:

It is not necessary or desirable to lay down a scale of privileges and immunities applicable to international organizations generally. Rather the privileges and immunities to be accorded to each organization should be determined with due regard to the needs of the organization for the accomplishment of its aims and the exercise of its functions.<sup>66</sup>

21. Some Governments raised also general questions affecting a limited number of the articles contained in part II. Thus one Government [Netherlands], referring to "the role of the organization", observed that

In articles 22-24 and in article 50, the Organization is assigned a certain role in the relations between the sending State and the host State [and expressed full support for] this principle. The present draft differs from the three previous codifications of diplomatic law in that the organization occupies a key position in the relations between the sending State and the host State.

However, it expressed the opinion that

This principle has not been elaborated quite satisfactorily. The organization's intermediary role in questions between the sending and host States should be defined more accurately; the solving of such difficulties is in the organization's own interest, since they ultimately affect its proper functioning.

It feared that

The present wording of articles 22-24 could create the impression that the organization should be concerned solely with the interests of the sending State. It is important that the Organization's role be formulated in such a manner that its independent position be made quite clear; it must be in a position to act in the interests of both the sending State and the host State.

Another Government [Belgium], also in reference to articles 23 and 24, considered that

The role of the Organization should be limited to the strict application of its own statutory, budgetary and administrative rules. The consequences of the granting of diplomatic status should continue to be of a bilateral nature.

22. One Government [United Kingdom], referring to articles 25, 30, 31 and 32, expressed the view that

These articles once again raise the question of the compatibility of the service of legal process with the inviolability of premises and persons. Given that there are exceptions to the immunity from jurisdiction of persons, problems can arise in relation to the service of process, in cases covered by these exceptions, on persons who have inviolability or who are in premises which have inviolability. This problem was left unresolved by the Vienna Conference on Diplomatic Relations of 1961 and the Commission may like to consider whether it can be resolved on this occasion.

#### (b) *Observations of the Special Rapporteur*

23. The Special Rapporteur notes that the comments of Governments and international organizations on the facilities, privileges and immunities of permanent missions to international organizations, as systematically presented in the preceding section, concerned, in particular, the assimilation of the status of permanent missions to international organizations to diplomatic missions, the importance of the theory of "functional necessity", the inapplicability of the principle of reciprocity and the concepts of *agrément* and *persona non grata*, and the relevance of the practice of States and international organizations on the subject. The Special Rapporteur observes that, as regards those aspects, the comments made confirm in general the approach taken by the Commission to the treatment of the subject as reflected in the corresponding articles of the draft and highlighted in the Commission's general comments on section 2 of part II.<sup>67</sup> In these circumstances the Special Rapporteur finds it inappropriate to enter into considerations of a general character in this section of the present addendum, since his observations concerning the aspects mentioned above, as well as others, have been made in the context of the concrete provisions of the corresponding articles, both in the preceding sections of his report and in the present addendum.

### Article 22. General facilities

#### (a) *Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 22 related to the article as a whole as well as to each of the two sentences of the article and to the questions raised in paragraph 2 of the Commission's commentary on the article.

#### *Article as a whole*

2. In the course of the debate in the Sixth Committee at the twenty-fourth session of the General Assembly some representatives supported article 22 because, in their opinion, "its provisions merely confirmed the practice of certain international organizations".<sup>68</sup>

<sup>66</sup> Council of Europe, *Privileges and immunities of international organizations: Resolution (69)29 adopted by the Committee of Ministers of the Council of Europe on 26 September 1969, and Explanatory Report* (Strasbourg, 1970), p. 71, para. 188 (3).

<sup>67</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 207, document A/7610/Rev.1, chap. II, B.

<sup>68</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 33.

*First sentence*

3. One Government [Netherlands] expressed the opinion that

The term "full facilities" [. . .] seems to suggest facilities of too wide a scope [. . .]. Since the host State accords facilities with a view to the proper functioning of the *organization*, the phrase "such facilities as are required for the performance of its functions" seems to be more appropriate.

*Second sentence*

4. In the course of the debate in the Sixth Committee the view was expressed that the inclusion of the second sentence

might make it possible to interpret in a less absolute manner the obligations imposed in the first sentence, since it seemed to imply that obligations would not be honoured unless the organization assisted the permanent mission.<sup>69</sup>

5. In its written comments, one Government [Belgium] deemed it

inconsistent with international practice to involve the organization in the granting of facilities and privileges that are not determined by the relevant rules of the organization but derive from the diplomatic status which the host State has undertaken to grant.

Another Government [Japan] observed that it was not convinced of the necessity of the second sentence. It expressed the view that

the provision is not supported by the practice of existing international organizations. Moreover, if the organization has the competence to accord certain facilities in accordance with internal rules or regulations, it will accord such facilities in virtue of those internal rules or regulations irrespective of the obligation envisaged in article 22.

6. The secretariat of UNESCO considered it to be open to question whether the clause contained in the second sentence "would not be out of place in such a convention".

7. The secretariat of WHO expressed reservations on the more general obligations contained in article 22. In its view,

If by "facilities", office space or related facilities are intended to be included, then the administrative and budgetary aspects become predominant, particularly in view of the fact that WHO headquarters has itself been perennially short of space.

*The questions raised in paragraph 2 of the Commission's commentary on article 22*

8. In paragraph 2 of the Commission's commentary on article 22, it was stated that:

During the discussion in the Commission some doubt was expressed whether it was desirable that the obligations of international organizations should be stated in the draft articles inasmuch as this would raise the general question whether it was intended that the organizations themselves should become parties to the draft articles. However, it was pointed out by several members that the Commission was trying to state what was the general international law concerning permanent missions to international organizations.

The question whether international organizations would become parties to the draft articles was a separate one to be considered at a later stage.

9. Two distinct though related questions of a general character, concerning the whole draft, are raised in the foregoing passage. First, the question whether it is desirable that the obligations of international organizations should be stated in the draft articles. Second, the question concerning the participation of international organizations in the future convention embodying the draft articles. The Special Rapporteur will consider those two questions separately.

*(i) The question whether it is desirable that the obligations of international organizations should be stated in the draft articles*

10. In the course of the debate in the Sixth Committee some representatives were of the opinion that even if the answer to the question of participation, dealt with below, were in the affirmative

the question would also have to be settled whether it was better to state the rights and duties of international organizations in separate articles or to deal with them as incidental and dependent on articles concerning primarily the rights and duties of the host, sending or third States or of the missions themselves and their members. In this connexion, it was also said that, in view of the fact that in the group of twenty-nine draft articles the international organization figured merely as an intermediary or agent, it might be better not to speak of an obligation of the international organization but rather to stress the obligation of the host State to accept the good offices of the organization whenever they were offered with regard to any matter affecting the facilities, privileges and immunities of permanent missions.<sup>70</sup>

11. In its written comments, one Government [Sweden] expressed the view that the question whether it was desirable that the obligations of international organizations should be stated in the draft articles apparently needed further consideration. Making reference to article 3 and to paragraph 5 of the Commission's commentary on that article, it regarded it as "somewhat questionable to speak of 'obligations'". In its view, it seemed that "they could be invalidated simply by unilateral action—resolutions, practice—taken by the organization".

*(ii) The question of the participation of international organizations in the future convention embodying the draft articles*

12. This question has been already touched upon by the Special Rapporteur in his preliminary considerations regarding the form of the draft articles.<sup>71</sup> However, for the convenience of the members of the Commission, the Special Rapporteur has deemed it appropriate to revert to it under article 22, in order to provide a more detailed account of the comments of Governments and international organizations on the question than the one that was advisable to make in the context of his preliminary

<sup>69</sup> *Ibid.*, para. 35.

<sup>71</sup> See above, p. 12, document A/CN.4/241 and Add. 1 and 2, paras. 14-16.

<sup>68</sup> *Ibid.*, para. 34.



considerations, and to supplement his observations in the light of those comments.

13. In the course of the debate in the Sixth Committee, some representatives, referring to the Commission's commentary, considered that

The question whether the organizations themselves should become parties to the future convention involved a matter of principle, whose resolution would determine to a large extent the final text of the draft articles.<sup>72</sup>

14. Although most of the Governments which commented in writing on the question did so in reference to paragraph 2 of the Commission's commentary on article 22, some Governments expressed their views on that question in the context of their comments on some other provisions of the draft. Thus, one Government [Netherlands] pointed out that its proposal for inclusion of an additional phrase in article 24,<sup>73</sup> "underlines the need to consider the fundamental question whether, in case the draft should take the form of a convention, the organizations themselves ought to become parties to the convention". Another Government [Yugoslavia], referring to articles 2, 3 and 4, was of the view that the stress placed in those articles on the optional nature of the draft "should make it easy for this international instrument to be adopted by a large number of interested parties" including international organizations.

15. One Government [Australia] expressed the view that the question was

an important question of principle which should be decided now, since the final shape of the draft articles will be dependent to a considerable degree on whether or not international organizations are to become parties to them and whether or not they are to assume obligations under them—and indeed to obtain rights under them.

16. Some Governments observed that article 22, as well as other articles such as article 24, involved the placing or creation of obligations on organizations. In this respect, one Government [United Kingdom] stated that it was not "in principle opposed to the participation of organizations in such a convention". The Government of Switzerland, referring to articles 22, 24 and others dealing with relations between the organization and the sending State, and article 50 on consultations, considered that the structure established by those articles,

which would be peculiar to this particular convention, would seem to justify its being opened, in an appropriate form, for signature and accession by the organizations which it covers.

17. Three international organizations referred also to the question. The secretariat of the ILO stated the following:

I should like to make a general comment which we feel is of very considerable importance.

The draft convention will be adopted by States. It naturally imposes certain obligations on these subjects of international law, but it also imposes a number of obligations on international organizations. It seems to us that this raises the question whether,

legally, an inter-State agreement can impose obligations on a third subject of international law, in this instance international organizations of universal character. In the case of relations between States the validity of such obligations is doubtful at best according to authoritative legal opinion, unless the third State on which the obligations are imposed signifies its acceptance of them.

It is true that certain international conventions, such as the constitutions of international organizations, impose certain obligations on those organizations. However, in such cases the situation is different from the one we are dealing with here, for what those constitutions define is in fact the functions and purposes of the organizations, whereas in the present case the obligations imposed on the organization are not part of the latter's constitutional functions.

A comparison with the general conventions on privileges and immunities, whether of the United Nations or of the specialized agencies [74], does not seem to us entirely satisfactory, for under those conventions the obligations imposed on the international organizations are in reality simply prior conditions which the organizations must fulfil in order to obtain certain privileges or immunities. In the present instance, however, the obligations have no connexion with any rights which the organizations may enjoy.

As to this point, therefore, we feel that in order to clarify the situation the organizations should if possible be parties to the future convention or should at least have the opportunity formally to accept the obligations which it would impose on them.

18. The secretariat of UPU stated the following:

Since the treaty now being drawn up lays down the rights and obligations not only of the States parties to the treaty but also of international organizations of universal character, being subjects of international law, the question arises of the procedure for establishing the legal relationship between the treaty in question and a given organization. It seems to us imperative that this question should be settled, for otherwise one would be forced to the conclusion that, in the case of an international organization for which no link has been established (in accordance with its constitutional rules) in relation to the treaty, the provisions of the treaty are *res inter alios acta*.

19. The secretariat of IBRD stated the following:

The World Bank understands that no decision has yet been reached on the procedure for formulating a definitive instrument on the basis of the draft articles. It is therefore hoped that, in whatever standing or *ad hoc* forum this is to be done, the substantial interest of organizations in the proposed instrument will be recognized by devising a procedure whereby these might participate actively in at least the final stages of the drafting process. While it may not be feasible to devise a mechanism allowing the organizations to vote in such a forum, it would be desirable if they could participate through representatives entitled to speak and to introduce proposals directly rather than only through observers whose restricted role is appropriate for most international legislative endeavours but would in this instance be inconsistent with the intention to formulate rules of direct relevance to the organizations.

Even more important than any arrangements for the effective participation of international organizations in the formulation of the proposed instrument, is to devise some procedure whereby each organization (i.e., its member States) could choose whether or not, or how, it should be covered by such instrument—which, as now formulated, would place several direct obligations on the organizations covered (see, for example, draft articles 22-24). While various means to this end could be proposed, it would seem that the pertinent provisions of the Convention on the Privileges and Immunities of the Specialized Agencies present the most useful

<sup>72</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 35.*

<sup>73</sup> See below, Article 24, para. 3 of the observations.

<sup>74</sup> See foot-notes 20 and 45 above.



model, which, with minor changes, could be incorporated into the proposed instrument as well as into subsequent ones having a similar scope:

(a) Each organization potentially within the ambit of the proposed instrument should be able to decide (presumably through its competent representative organ) whether or not it is to be covered by the proposed instrument. As with respect to the Specialized Agencies' Convention, this decision might be made and communicated in connexion with that foreseen in sub-paragraph (b) below.

(b) Each organization to be covered would be permitted to devise an "annex" to the instrument in which it would specify any deviations, with respect to it, of the terms of the principal instrument. This right, which is provided for in the Specialized Agencies' Convention, is somewhat analogous to the right of a party to a multilateral treaty to propose a reservation on becoming a party to it; however, if the right of an organization to choose whether or not to be covered by the instrument is admitted (see sub-paragraph (a)), it is not essential, though it may still be useful, that the right here proposed also be granted.

(c) States, on becoming parties to the instrument or at any subsequent time, would indicate the organizations with respect to which they are to be bound by the instrument. If an organization changes its annex (sub-paragraph (b)), such altered provisions would also have to be individually approved by the States already parties with respect to the organization.

(d) If reservations are formulated by a State, each organization selected could object thereto and prevent the application to it of the altered instrument.\*

(e) Under the above-stated conditions, every intergovernmental organization might be permitted to choose coverage by the Convention. Though there may be objections to abandoning all limitations, it should be considered that such a decision can only be effected with the concurrence of an appropriate majority of the member States of the organization (sub-paragraph (a)) and that no State (whether or not a member of an organization) could be bound without its consent with respect to any particular organization (sub-paragraph (c)). Alternatively, the General Assembly of the United Nations might be authorized to admit organizations to coverage by the Convention. One advantage of either of these approaches would be to eliminate any uncertainty about the automatic or potential coverage of the Convention resulting from any indefiniteness in the relevant definitions in the instrument.\*\*

\* By analogy to article 20, paragraph 4, of the Vienna Convention on the Law of Treaties.

\*\* These definitions are now contained in draft articles 1, sub-paragraphs (a) and (b), and 2, paragraph 1.

### (b) *Observations of the Special Rapporteur*

20. As regards the comment referred to in paragraph 3 above, the Special Rapporteur observes that it is precisely in recognition of the fact that "the host State accords facilities with a view to the proper functioning of the Organization" that the expression "for the performance of its functions" is used in relation to the permanent mission. In his view, also, that expression determines the precise meaning to be given to the word "full".

21. With respect to the comment referred to in paragraph 4 above, the Special Rapporteur fails to see how, as presently drafted, the second sentence of the article could be read as establishing a condition on which the obligation imposed by the first sentence would depend.

22. In connexion with the comments referred to in paragraph 5 above, the Special Rapporteur wishes to

draw attention to the opinion expressed in the Sixth Committee by some representatives to the effect that the provisions of article 22 merely confirmed the practice of certain international organizations.<sup>75</sup> Furthermore, he wishes to point out that as regards the facilities to be accorded by the host State the obligation of the organization is "to assist"; the organization's obligation to grant facilities is limited to those which "lie within its own competence", the meaning of this latter expression having been clearly explained in paragraph 3 of the Commission's commentary to article 22.

23. With respect to the comments reproduced in paragraphs 5 and 6 above, in so far as they question the necessity or propriety of the inclusion of a provision such as that of the second sentence of the article, the Special Rapporteur wishes to refer to paragraph 2 of the Commission's commentary, according to which, as pointed out by several of its members, "the Commission was trying to state what was the general international law concerning permanent missions to international organizations".

24. In relation to the comment reproduced in paragraph 7 above, the Special Rapporteur wishes to point out that in paragraph 3 of its commentary to article 22 the Commission did indeed emphasize the applicability of those rules of the organization which concern budgetary and administrative matters.

25. As regards the comments reflected in paragraphs 10 and 11 above, the Special Rapporteur wishes to refer to his observations in paragraph 23 above as well as to those he made in the context of articles 3, 4 and 5.<sup>76</sup> Furthermore, he wishes to point out that the obligatory character of the duties imposed on the organization is a result of the fact of their establishment as such in the legal norm, not of their nature in the light of the position which may be ascribed to the organization in the draft as a whole.

26. With respect to the comments reflected in paragraphs 13 to 20 above, the Special Rapporteur, in addition to his observations in the context of the preliminary considerations to the present report,<sup>77</sup> wishes to point out that the questions raised by Governments and international organizations related to the participation of international organizations both in a future convention and in the procedure for formulating such a definitive instrument. As to the latter question the Special Rapporteur wishes to stress that it is incumbent upon the General Assembly of the United Nations to finally decide on the form of the instrument to embody the draft articles and, in case it is a convention, the forum in which it will be formulated and who should be invited to attend. With respect to the question of participation in the future convention in general as well as in regard to the modalities it may take, the Special Rapporteur observes

<sup>75</sup> See para. 2 above.

<sup>76</sup> See above, p. 25, document A/CN.4/241 and Add.1 and 2, paras. 102-106.

<sup>77</sup> *Ibid.*, p. 12, paras. 14-16.

that that is a question to be decided by the organ entrusted with the formulation of the conventional instrument in the context of the final provisions to the convention. In these circumstances the Special Rapporteur does not believe that the Commission is called upon to take a position on the questions raised. However, recognizing the merit of the opinions expressed and the suggestions made, he is of the view that they should be brought to the attention of the General Assembly together with the Commission's final report on the topic.

27. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 22 would therefore read as follows:

**Article 22. General facilities**

The host State shall accord to the permanent mission full facilities for the performance of its functions. The Organization shall assist the permanent mission in obtaining those facilities and shall accord to the mission such facilities as lie within its own competence.

**Article 23. Accommodation of the permanent mission and its members**

**(a) Observations of Governments and international organizations**

1. The comments made by Governments and international organizations in connexion with article 23 related to the title and to expressions common to both paragraphs of the article, and to paragraph 2 of the article.

2. In its editorial suggestions, the Secretariat of the United Nations stated the following:

It should be noted that article 23 is entitled "Accommodation of the permanent mission and its members". It refers both to premises of the permanent mission and to the accommodation of the members of the mission. The corresponding article of part IV—article 93—is entitled "*Premises and accommodation*". In part III, article 66, which corresponds to articles 23 and 24 ("Assistance by the Organization in respect of privileges and immunities"), is entitled "*Accommodation and assistance*". The Commission may wish to review the titles of those articles. (A/CN.4/L.162/Rev.1, section B.)

3. In the course of the debate in the Sixth Committee at the twenty-fourth session of the General Assembly, the use of the word "accommodation" and of the term "suitable accommodation" was criticized. It was said that

The word was open to different interpretations and that it was not clear which would be the criteria to determine whether the accommodation was "suitable" or not.<sup>78</sup>

**Paragraph 2**

4. Three international organizations made comments on the provision of paragraph 2 of the article. The ILO expressed the view that

The organization's role with reference, in particular, to obtaining accommodation is not clearly defined, and could include the

obligation to provide private accommodation for members of the permanent missions. It is difficult to see how the organizations could carry out such an obligation.

5. WHO indicated that as regards

the specific question of housing under article 23, [...] WHO does not have in Geneva any arrangements for assisting its own staff (outside the United Nations housing service) and therefore could not assist permanent missions.

6. UNESCO stated the following:

Article 23, paragraph 2, sets forth the obligation of the organization to assist permanent missions, where necessary, to obtain suitable accommodation for their members. Such an obligation seems to me to be questionable and often difficult to fulfil. In any event, it seems to me quite unwarranted, if not wrong, to base such an obligation on the idea that this assistance by the organization "would be very useful, among other reasons, because the Organization itself would have a vast experience of the real estate market and the conditions governing it" (commentary, para. 3). A specialized agency is not a real estate brokerage, and it is certainly going too far to assume that it has such experience. Moreover, the same question arises here as in the case of article 22,<sup>79</sup> namely, whether a provision of this kind is not out of place in a convention of this kind.

**(b) Observations of the Special Rapporteur**

7. As regards the suggestions reflected in paragraph 2 above, the Special Rapporteur is of the view that questions concerning titles (their inclusion and eventual wording) can only be settled once the Commission has completed its discussion of all the provisions to be included in the final draft. At that stage the Commission should certainly take into account the editorial comments made by the United Nations Secretariat concerning uniformity of treatment.

8. With respect to the criticism reflected in paragraph 3 above, the Special Rapporteur wishes to observe that expressions such as "suitable accommodation" are common and, in cases, unavoidable in legal instruments. The interpretation of the texts in which they appear is, of course, to be made in accordance with the relevant rules of international law concerning interpretation, the most recent, complete and authoritative statement of which is contained in the Vienna Convention on the Law of Treaties.<sup>80</sup>

9. As regards the comments of the ILO and WHO reproduced in paragraphs 4 and 5 above, concerning paragraph 2 of the article, the Special Rapporteur wishes to stress that the Organization's obligation under that paragraph is "to assist in obtaining", not "to provide". He wishes also to observe that the statement of the obligation does not prejudice the question of the manner in which it may be discharged, which may certainly include the use of arrangements such as those existing at present at the Headquarters of the United Nations in New York or at its Office in Geneva.

10. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 23 would therefore read as follows:

<sup>78</sup> Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 36.

<sup>79</sup> See above, Article 22, para. 6 of the observations.

<sup>80</sup> See foot-note 36 above.

**Article 23. Accommodation of the permanent mission and its members**

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

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

**Article 24. Assistance by the Organization in respect of privileges and immunities**

*(a) Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee the opinion was expressed that article 24

might induce organizations to intervene in relationships between sending and host States in cases where no real problem concerning privileges and immunities had arisen.<sup>81</sup>

Referring to the Commission's commentary on draft article 24, some representatives endorsed the statement of the Legal Counsel, speaking as the representative of the Secretary-General, to the effect that the rights of representatives should properly be protected by the United Nations and not left entirely to the bilateral action of the States immediately involved. It was in the interest of the Organization itself that the representatives of the Member States should enjoy the privileges and immunities necessary to help them discharge their functions. Other representatives disagreed with the principle—referred to in that statement—that the United Nations itself was a party to the Convention on the Privileges and Immunities of the United Nations. In their opinion, a distinction should be made between multilateral conventions to which only States were parties and headquarters agreements to which organizations could become parties.<sup>82</sup>

2. In its written comments one Government [Cyprus] stressed the significance it attaches to the provision of article 24.

3. Another Government [Netherlands] observed that

Paragraph 3 of the commentary on article 50 shows that the International Law Commission intends article 24 to impose upon the Organization the duty to ensure the application of the provisions of the present draft.

It expressed agreement with this view, but deemed it "desirable that this should be clearly stated in the article". It therefore proposed that the phrase "take steps to ensure the application of the present articles and assist . . ." be inserted in article 24 after the words "where necessary".

4. A third Government [Japan] was of the opinion that

The Commission's intention, as it appears in the commentary, to enable the organization to assist the sending State may well be taken care of by the provision of article 50 on consultations between the sending State, the host State and the organization. As it stands, the formulation of the present article might raise the question whether the organization will intervene in the disputes between the sending State and the host State solely in favour of the former.

5. WHO stated the following:

As regards the securing of the enjoyment of privileges and immunities, I would observe that in practice most of the time devoted to this matter concerns the situation of individuals particularly as regards fiscal matters, personal disputes, traffic accidents and road traffic regulations and customs regulations. This is time-consuming and we only have limited facilities and time available for dealing with such matters.

In WHO, our practice is invariably to waive the immunity of our officials in cases where the interests of the organization are not involved so that difficulties could arise if, for example, we were requested to secure the privileges or immunities of a member of the staff of a permanent mission under circumstances where we would have waived the immunity.

Moreover a difficult situation would arise if a mission were to consider that the organization had not been sufficiently diligent in securing its interests or if there were to be an actual difference between the organization and the mission as to the interpretation or extent of the privileges and immunities claimed. For these reasons it would seem that the application of article 24 would have to be limited to substantial matters and that day-to-day personal questions should be excluded.

*(b) Observations of the Special Rapporteur*

6. As regards the comments referred to in paragraph 1 above, the Special Rapporteur is unable to agree, *a priori*, with the contention that in cases where there is no real problem concerning privileges and immunities, international organizations would be induced to intervene in relationships between sending and host States because of the provisions of article 24.

7. With respect to the comment reflected in paragraph 3 above, the Special Rapporteur wishes to point out that the obligation imposed by article 24 on the organization relates to the articles of the present draft providing for privileges and immunities. In his view, the suggested insertion does not seem to find its right place in the context of article 24 as it would extend the scope of the provision beyond that of privileges and immunities.

8. The Special Rapporteur is again unable to agree, *a priori*, with the contention made in paragraph 4 above that organizations would intervene solely in favour of the sending State in disputes between that State and the host State because of the provision of article 24.

9. As regards the comments reflected in paragraph 5 above, the Special Rapporteur wishes simply to refer to the provisions of articles 3, 4 and 5 of the present draft and to his observations in the context of those articles.<sup>83</sup>

10. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 24 would therefore read as follows:

**Article 24. Assistance by the Organization in respect of privileges and immunities**

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

<sup>81</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 37.

<sup>82</sup> *Ibid.*, para. 38.

<sup>83</sup> See above, p. 25, document A/CN.4/241 and Add.1 and 2, paras. 102-106.

## Article 25. Inviolability of the premises of the permanent mission

### (a) *Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 25 concerned the article as a whole and specifically paragraphs 1 and 3 of the article. The inclusion of a new provision was also suggested.

#### *Article as a whole*

2. In the course of the debate in the Sixth Committee some representatives gave "general support to article 25, subject to the incorporation in its text of proper safeguards to prevent the arbitrary use of its provisions".<sup>84</sup>

3. In its written comments, one Government [Cyprus] expressly agreed with the substance of article 25. Another Government [Japan] considered the provision of the article to be "reasonable".

#### *Paragraph 1*

4. In the course of the debate in the Sixth Committee the view was expressed that

Only in extreme cases, such as disasters, could an exception be allowed to the principle of inviolability and that the host State should have the burden of proving that the circumstances justified any departure from that principle.<sup>85</sup>

5. In its written comments, one Government [Cyprus] stressed the foregoing view that

Only in the most extreme cases of fire or other disaster can the exemption from the principle of inviolability of the permanent mission premises be invoked, and that the host State would have the burden of proving that the circumstances justified the action taken.

6. In the course of the debate in the Sixth Committee, some representatives, referring to the last sentence of paragraph 1, considered that

In view of the permanent and representative character of missions to international organizations, and of their functions, there was no reason why the corresponding provisions of the Vienna Convention on Diplomatic Relations should not be followed. Certain representatives further considered that the last sentence in paragraph 1 established a limitation on the principle of inviolability which might lead to the virtual negation of the principle. It was said that an objective and concrete legal prerogative was made dependent on the subjective judgement of the authorities of the host State as to what constituted "fire or other disaster that seriously endangers public safety". The term "other disaster" was deemed to be particularly vague and to leave a wide margin for arbitrary interpretation. In addition, it was stated that the phrase "only in the event that it has not been possible to obtain the express consent of the permanent representative" could be interpreted to mean that the premises of the permanent mission could be broken into, even against the wishes of the permanent representative.<sup>86</sup>

<sup>84</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 39.*

<sup>85</sup> *Ibid.*, para. 40.

<sup>86</sup> *Ibid.*

It was also considered that

The concept of public safety was not clearly defined and that no indication was given as to who was to determine whether or not public safety was seriously threatened.<sup>87</sup>

7. In its written comments, one government [Japan] considered that the third sentence of paragraph 1 should be retained.

8. Another Government [Belgium] expressed the view that

New material of the kind contained in article 25, paragraph 1, regarding the presumed consent of the permanent representative in case of disaster, could quite well have been included in the Convention [on Diplomatic Relations] as it in fact was in the Vienna Convention on Consular Relations of 24 April 1963.

9. One Government [Canada] was of the view that

In situations involving serious danger to public safety, the provision that agents of the host State are prohibited from entering the premises of the mission to eliminate or contain that danger without the express consent of the permanent representative unless it has not been possible to obtain that consent is perhaps too restrictive and might instead be based on the reasonableness of efforts to obtain the consent of the permanent representative.

10. One Government [Belgium], considering that the term "public safety" could be "very broadly interpreted", stated that the wording of article 31, paragraph 2, of the Convention on Consular Relations was "preferable by far to that proposed in the present draft".

#### *Paragraph 3*

11. During the debate in the Sixth Committee it was said that "the expression 'other property thereon' should be more closely defined".<sup>88</sup>

12. In its written comments one Government [Netherlands] considered that there seemed to be

no reason for making the means of transport of the permanent mission immune from search, requisition, attachment or execution without any restriction. Such immunity should at any rate be restricted to *official journeys*. Furthermore, it is recommended that for official journeys, a restriction of immunity be introduced similar to that adopted in *paragraph 2 of article 38* with regard to personal baggage, namely to permit inspection and attachment if the competent authorities in the host State have serious grounds for presuming that the law has been infringed in some way.

#### *New provision*

13. The Government of Switzerland drew the Commission's attention to the last sentence of article 31, paragraph 4, of the Vienna Convention on Consular Relations, which provides for the case of expropriation. In its view that provision "could usefully be added to article 25".

### (b) *Observations of the Special Rapporteur*

14. As regards the view expressed in the Sixth Committee reflected in paragraph 2 above, the Special Rapporteur

<sup>87</sup> *Ibid.*, para. 39.

<sup>88</sup> *Ibid.*, para. 41.

observes that no indication was given of the reasons in support of the reading of the present text as allowing in general for arbitrariness in the use of its provisions. The Special Rapporteur is, on the contrary, of the view that as presently drafted the article contains the necessary general safeguards as against any such reading. A different matter is, of course, trying to provide in any legal text, strictly in definitional terms and independently of the notion of sanctions, in a manner which would assure of no violation of its provisions. The Special Rapporteur hopes he is not being called upon to deal with such a question in the present narrow context.

15. The Special Rapporteur notes that the comments made by Governments in connexion with paragraph 1 related only to the provision of the last sentence of that paragraph. Apart from the question whether a provision of the sort should be included or not in the present draft, questions were raised on its text, regarding the nature of the condition on which the exception hinges and the problems of interpretation to which the expressions or words used in that sentence could allegedly give rise. In this connexion, the Special Rapporteur wishes to recall that the substance of the provision of the last sentence of paragraph 1 was first incorporated in the corresponding provision of the Vienna Convention on Consular Relations (para. 2 of article 31). Also that, the language in which that sentence is couched in the present draft is, with the requisite adaptations, the same used in the corresponding provision of the Convention on Special Missions (para. 1 of article 25). It would seem, therefore, that in view of the existence of such a provision in the context of consular posts and special missions the question as to whether it should be included in the present draft does not necessarily have to be answered in terms of the nature of the mission concerned (whether temporary or permanent) or its status, in the light of the precedent of the Vienna Convention on Diplomatic Relations. In the view of the Special Rapporteur, the inclusion of a provision such as that of the last sentence of paragraph 1 of the present draft in the two Conventions mentioned above, concluded after the Convention on Diplomatic Relations, may be considered as evidence that it was deemed necessary in order to satisfy a practical need. In these circumstances the Special Rapporteur does not see compelling reasons to revert to the precedent of the Convention on Diplomatic Relations. Furthermore, the Special Rapporteur is of the view that the text, as presently drafted, reflects in a balanced manner the various elements involved. In this as in more terminological respects, he wishes to refer to the thorough discussion on the matter in the General Assembly of the United Nations in connexion with its consideration of the item entitled "Draft Convention on Special Missions".<sup>89</sup>

16. As regards the criticisms levied against expressions or words such as "public safety" or "disaster" used in the last sentence of paragraph 1, the Special Rapporteur wishes to refer to his observation in the context of article 23.<sup>90</sup>

<sup>89</sup> *Ibid.*, Twenty-third Session, Annexes, agenda item 85; *ibid.*, Twenty-fourth Session, Annexes, agenda item 87.

<sup>90</sup> See above, Article 23, para. 8 of the observations.

17. The Special Rapporteur agrees with the view expressed in the Sixth Committee, reflected in paragraph 11 above, that the expression "other property thereon" in paragraph 3 of the article should be more closely defined. He therefore proposes that the word "thereon" be replaced by "attaching to those premises".

18. As regards the comments reflected in paragraph 12 above, the Special Rapporteur points out that no reasons were given in support of the suggested restriction of the immunity of means of transport to official journeys, to be further restricted along the lines of paragraph 2 of article 38 of the present draft. The Special Rapporteur wishes to recall that, in the opinion of the same Government which made the suggestions, the similarity, from the sending State's point of view, between the positions of permanent missions to States and to international organizations

justified the privileges and immunities in the present draft being wider in scope than those laid down in the Convention on Special Missions; they conform in a large measure to those laid down in the 1961 Vienna Convention on Diplomatic Relations.

That Government further stated that in the context of the present draft, it would not "make proposals designed to restrict privileges and immunities" such as that whereby "the rule of no immunity in the event of damage due to road accidents [should] be extended to official journeys". The Special Rapporteur is in agreement with the approach reflected in the preceding passages and he therefore sees no reason to depart from the precedent of the Vienna Convention on Diplomatic Relations (para. 3 of article 22) in the context of the provision of paragraph 3 of article 25 of the present draft.

19. As regards the suggestion referred to in paragraph 13 above, the Special Rapporteur is of the view that questions relating to the expropriation of property of another State, including the determination of the nature of compensation, are to be dealt with more appropriately in the context of the law of State responsibility than in that of the present draft.

20. In the light of the foregoing, the Special Rapporteur is of the view that the article should be retained in its present form, subject to the amendment referred to in paragraph 17 above. Article 25 would therefore read as follows:

**Article 25. Inviolability of the premises  
of the permanent mission**

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

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

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

## Article 26. Exemption of the premises of the permanent mission from taxation

### (a) *Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 26 related to the article as a whole and specifically to paragraph 1 of the article, and paragraph 2 of the article in the light of paragraph 3 of the Commission's commentary on the article.

#### *Article as a whole*

2. One government [Canada] expressed the view that

This article appears to be acceptable [...] in its present form now that a definition of the term 'premises of the permanent mission' has been added to article 1 as indicated in the report of the Commission on the work of its twenty-first session.

3. Another Government [Finland] observed that the article

seems to refer to direct taxes but leaves room for the interpretation that also indirect taxes (sales tax and other similar taxes) are covered.

In its view,

Indirect taxes, levied for the building elements and for services in connexion with construction, although buildings or parts thereof are in themselves tax exempt, should be excluded from the exemption. Difficulties may also arise in obtaining tax exemption, especially in a federal State, with regard to the implementation of tax laws imposed by a State or some other non-federal authority.

#### *Paragraph 1*

4. One Government [Israel] considered that

The expression "another member of the permanent mission acting on behalf of the mission" introduces a new element which may be of much broader significance than this article. In so far as it embraces the "acting permanent representative", it would seem preferable that the issue of principle be dealt with elsewhere and the text of article 26 co-ordinated with it. On the other hand if, as seems to be the case, article 26 does not mean to refer to an acting permanent representative, then some other language should be used than the phrase in question.

In this context, it made reference to its observations on article 18.<sup>91</sup>

5. In its editorial suggestions, the Secretariat of the United Nations considered that the words "or another member" should be replaced by "and the members", as in article 95, paragraph 1. In its view "since this is an enumeration of the entities and persons exempted from taxation, the correct conjunction to use is 'and', and not 'or'". (A/CN.4/L.162/Rev.1, section B.)

6. One Government [Finland] drew attention to the fact that in its country

There have been difficulties in interpretation with regard to taxation of apartments of diplomatic missions [...] held by virtue of the shares of the title-holder in housing corporations. Article 26 should be altered to take the ownership of these shares into consideration. The words "in respect of the premises" cannot be interpreted so broadly as to include the exemption of such shares.

<sup>91</sup> See above, p. 36, document A/CN.4/241 and Add.1 and 2, para. 197.

#### *Paragraph 2*

7. In paragraph 3 of its commentary to the article the Commission indicated its intention to examine the matters dealt with therein

again at the second reading of the draft articles in the light of the information which the Special Rapporteur would elicit from the specialized agencies and the view of Governments.

8. In the course of the debate in the Sixth Committee the view was expressed that

It was only fair that the exemption established in article 26 should extend to any premises rented by the mission, so that States which were not in a position to purchase the necessary premises would not be deprived of the benefits provided for in the article.<sup>92</sup>

9. In its written comments, one Government [Cyprus] stressed that it would like to see a formulation exempting the premises of the permanent missions from taxation, "not only in cases where the premises are owned by the mission, but also when such property is leased or rented". It further stated that

While appreciating the practical difficulties that may exist in certain cases, it is nevertheless of the opinion that a system should be devised to enable missions, the Governments of which are unable to purchase premises, to enjoy the same benefit of exemption as missions whose Governments can afford to own their premises. In the nature of things, it is the less well-off States that would be obliged to content themselves with rented premises, and it is both paradoxical and unfair that the wealthy States, which can afford to own their premises, should take advantage of the exemption, while the former would not.

10. Other Governments, however, took a different position on the question. In the view of one Government [Yugoslavia], "in principle, the provisions of paragraph 2 [...] should not go further than those of the Convention on Diplomatic Relations. Another Government [Canada] considered that "the inclusion of paragraph 2 of the article continues to be important". In its opinion, "residents of the Host State should be subject to real property taxes, such as those levied by municipalities, on real property they own, even when they lease it to members of permanent missions".

11. Also in this connexion, one Government [Sweden] observed that the inequality mentioned in paragraph 3 of the Commission's commentary on the article would

seem to be that premises owned by the sending State are not subject to taxation, while rented premises may be subject to taxes which are in law payable by the private owner but which in fact are charged to the sending State by being included in the rent. In the case of a special tax on rents it would probably be rather simple technically to exempt from such a tax rents paid for mission premises. Exemption from property tax based on a periodical evaluation of the property would be a more complicated matter, in particular if the mission premises are only part of the property. With respect to income taxes, it would hardly seem desirable to allow the owner to deduct from his income rent paid for mission premises. It may be doubted that the inequality referred to is grave enough to justify imposing on the receiving States tax exemptions which may cause both technical and political difficulties. Moreover, it is far from certain that the sending State and not the owner would in fact be the beneficiary of such exemptions.

<sup>92</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 42.*

Another Government [Netherlands] indicated that the practice in its country was that

premises *owned* by the sending State are exempt from land tax if and as long as they are intended for use by the diplomatic service. The exemption does not apply to *leased* premises, which are subject to land tax, to a tax levied on the value of the furnishings of the premises (and on their rental value) (called “*personele belasting*”) and to some municipal and polder-board dues and taxes. Since only small sums are involved, [it] is of the opinion that for the situation [in its country], special regulations are not called for in respect of leased premises.

(b) *Observations of the Special Rapporteur*

12. As regards the comments reflected in paragraph 3 above the Special Rapporteur does not believe that the article could be interpreted as covering also indirect taxes in view of the provisions of article 36 of the present draft, in particular sub-paragraph (a). He is also of the view that the difficulties referred to in the case of federal States would not appear to be likely to arise in view of the reference in paragraph 1 of article 26 to “regional or municipal dues and taxes”.

13. As regards the comment referred to in paragraph 4 above concerning paragraph 1 of the article, the Special Rapporteur wishes to recall his observations in the context of article 18 of the present draft.<sup>93</sup> Furthermore, he is of the opinion that the expression “another member of the permanent mission acting on behalf of the mission”, which does not necessarily refer to an acting permanent representative finds its *raison d'être* and is to be understood only within the narrow context of the provision of article 26.

14. As regards the comment referred to in paragraph 5 above, the Special Rapporteur is unable to agree to the suggested replacement of the words “or another member” by “and the members” in view of the provisions of sub-paragraph (f) of article 1 of the present draft according to which the “members of the permanent mission” mean “the permanent representative . . .”.

15. With respect to the comment referred to in paragraph 6 above, the Special Rapporteur is of the view that, in so far as the ownership of shares of the titleholder in housing corporations might be said to imply, however indirectly, ownership of real property, it would be covered by the provision of article 26.

16. As regards the question referred to in paragraph 3 of the Commission's commentary concerning paragraph 2 of the article the Special Rapporteur takes the view that the manner in which the Commission might dispose of the question cannot be said to have been clearly indicated by the comments of Governments reflected in paragraphs 8 to 11 above.

17. In the light of the foregoing the Special Rapporteur proposes that the article be retained in its present form. Article 26 would, therefore, read as follows:

**Article 26. Exemption of the premises of the permanent mission from taxation**

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

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

**Article 27. Inviolability of archives and documents**

(a) *Observations of Governments and international organizations*

1. Only one Government [Cyprus] commented on article 27, by stressing the significance it attaches to the provision of the article.

(b) *Observations of the Special Rapporteur*

2. The Special Rapporteur has no observations to make on the text of the article. He therefore proposes that the article be retained in its present form. Article 27 would then read as follows:

**Article 27. Inviolability of archives and documents**

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

**Article 27 bis. Entry into the host State**  
[New article]

(a) *Observations of Governments and international organizations*

1. In paragraph 2 of its commentary to article 48 the Commission indicated that it had

considered the possibility of including in the draft, as a counterpart to article 48, a general provision on the obligation of the host State to allow members of permanent missions to enter its territory to take up their posts. However, the Commission postponed its decision on this matter until the second reading of the draft.

2. In the view of one Government [Yugoslavia], the idea thus expressed by the Commission warranted “separate examination”.

3. In commenting on article 48 another Government [Israel] took the view that “a clause obliging the host State to allow members of permanent missions to enter its territory to take up their posts should be included in the draft articles.”

4. Another Government [Japan], however, considered it superfluous to include a provision on the obligation of the host State to allow members of permanent missions to enter its territory such as appears in paragraph 2 of the commentary [to article 48].

<sup>93</sup> See above, p. 36, document A/CN.4/241 and Add.1 and 2, para. 199.



5. The Secretariat of the United Nations expressed its views on the question in the following manner:

*Right of entry and sojourn*

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

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

In the draft articles in their present form, the right of entry is probably implied in article 28 dealing with "freedom of movement" in the host State, in article 48 on "facilities for departure" and in article 45, paragraph 2, on "recall". These provisions, on the other hand, appear to make its omission all the more conspicuous. Indeed, its absence renders the enumeration of privileges and immunities of representatives logically incomplete and the enjoyment of those already provided for possibly nugatory. Under article 42, every person entitled to privileges and immunities shall enjoy them only "from the moment he enters the territory of the host State". This provision would preclude a representative from claiming vis-à-vis the host State, any privilege and immunity, including that of entry, until he has entered the host State. It is therefore imperative to expressly provide for the right of entry into the host State. Without such a provision, a host State might in effect be given the unintended power of veto over the appointment by States of their representatives.

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

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

- (1) The host State should facilitate
  - (a) entry into its territory, and
  - (b) sojourn in its territory
 of all members of all permanent missions and members of their families forming part of their respective households;

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

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

Should the Commission decide to add a new article in the sense suggested above, the new article may be inserted so as to precede existing article 28 ("Freedom of movement"). For the convenience of the Commission in its consideration of this matter, the Secretariat appends the following draft text which indicates the substance which such article might cover:

*"Article 27 bis. Entry into and sojourn in the host State"*

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

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

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

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

6. The secretariat of IAEA noted that

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

*(b) Observations of the Special Rapporteur*

7. At the outset, the Special Rapporteur notes that the Commission, in its commentary to article 48, and the Governments which commented on the question there raised, referred to the possible inclusion of a new provision on "the obligation of the host State to allow members of permanent missions to enter its territory to take up their posts". The secretariat of the IAEA likewise referred to a new provision on "the facilitation of the entry of permanent representatives and staff into the host State", and, in addition, to a new provision on "the facilitation of the granting of visas". The Secretariat of the United Nations referred to a more detailed new provision



aimed at ensuring to "members of permanent missions and their families the right of entry into and sojourn in the territory of the host State and the freedom of transit to and from the premises of the international organization concerned". The United Nations Secretariat also included as elements to be covered by the new provision the granting of visas, as well as the inapplicability to the persons concerned of laws and regulations of the host State restrictive of entry and sojourn.

8. As regards the question of the possible inclusion of a provision on the obligation of the host State to allow members of permanent missions to enter its territory to take up their posts, the Special Rapporteur wishes to recall his view, transmitted to the Commission on the occasion of the discussion of the text prepared by the Drafting Committee on facilities for departure, to the effect that "there was no need for a special provision on the matter, which he believed was already covered by article 22".<sup>94</sup> The Special Rapporteur remains of the same opinion. Nevertheless, in view of the comments made by Governments and international organizations, he considers it appropriate to submit to the Commission in the present report a text for such a provision as a basis for discussion.

9. In his view, such a text should simply state, in general and unequivocal terms, the obligation of the host State. In this respect, the Special Rapporteur would note that although the Secretariat of the United Nations referred in its comments to a "right", it couched the text of its suggested provision in language which placed the emphasis rather on the obligation of the host State. The Special Rapporteur would be further of the view that such a general statement of the obligation would imply the inapplicability to the persons concerned of any restrictive laws or regulations, as well as facilitating the issue of visas, and that it would be superfluous to refer to them specifically in the text.

10. The Special Rapporteur would note also that an explicit reference in the new provision to the freedom of transit might be thought unnecessary in view of the provisions of article 28. However, in this latter article the freedom of movement and travel is in a given respect made subject to the laws and regulations of the host State; in order to avoid giving the impression that transit to and from and entry into the premises of the organization might be subject also to such a restriction, the Special Rapporteur would consider that a reference to this element would be warranted in the new provision. Lastly, the Special Rapporteur would deem it unnecessary to refer generally to "sojourn" in the new provision, as such element is inherent in most of the provisions of the present draft.

11. With regard to the facilitation of the granting of visas, the Special Rapporteur would agree with the secretariats of the United Nations and IAEA that the new article "should provide for the prompt issuance of visas where required; he would not believe it appropriate,

however, to go into such detail as to specify that the visas should be granted free of charge.

12. As regards the placing of the new provision, the Special Rapporteur would consider that it might be inserted as a separate article preceding article 28 or could be made into the first paragraph of a new article containing as paragraph 2 the present text of article 28, under an appropriate heading.

13. In the light of the foregoing considerations, the Special Rapporteur submits to the Commission, as a basis for discussion, the following text for a new article 27 *bis*:

#### *Article 27 bis. Entry into the host State*

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

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

#### *Article 28. Freedom of movement*

##### *(a) Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee the opinion was expressed that article 28

should be restricted to movement of members of the mission that was necessary in the performance of the functions of the mission, and that there was no need to extend it to their families.<sup>95</sup>

2. In its written comments, one Government [Yugoslavia] stated that it regarded

the broadening of the provisions concerning freedom of movement and travel of members of permanent missions and their families beyond the scope of the Vienna Conventions as sound, particularly as the principle of reciprocity does not apply in multilateral diplomacy.

3. The Government of Switzerland, while stressing that "it has never taken and does not intend to take any restrictive measures with regard to members of permanent missions", observed that "these facilities, unlike those provided for diplomatic and consular agents, are not really justified by the functions of the persons concerned". In that connexion, it made reference to article 27 of the Convention on Special Missions. Other Governments took a similar position. Thus, one Government [Japan] stated that the article, "goes beyond the Vienna Convention on Diplomatic Relations in extending freedom of movement to members of the families of members of the permanent mission". In its view

it does not seem essential for the performance of the functions of the permanent mission to assure such an extensive freedom of movement to "all members of the permanent mission and members of their families". It is doubtful if the liberal practice as mentioned by the Commission with regard to the members of the families of diplomatic agents can be regarded as an expression of a customary

<sup>94</sup> *Yearbook of the International Law Commission, 1969*, vol. I, p. 218, 1032nd meeting, para. 16.

<sup>95</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 43.

rule. It, therefore, suggested that the Commission should reconsider the matter so that the formulation be aligned with the provision of article 26 of the Vienna Convention on Diplomatic Relations.

Another Government [United Kingdom] likewise indicated that it was

not entirely convinced of the arguments in favour of a more extensive privilege in the matter of freedom of movement than that conferred by the Vienna Convention on Diplomatic Relations and the Convention on Special Missions.

#### *(b) Observations of the Special Rapporteur*

4. The Special Rapporteur notes that the comments made by Governments related to the two main questions referred to in the Commission's commentary on the article, namely, whether the provision of article 28 should not be restricted to movement which was necessary for the purposes of the functions of the permanent mission and whether it should go beyond the corresponding text of the Vienna Convention on Diplomatic Relations by covering also members of the families of the members of the permanent mission. The Special Rapporteur wishes to recall that both questions were thoroughly discussed in the Commission and that the Commission's commentary to the article includes some of the views expressed by members on it and states some of the reasons supporting the present formulation. No additional arguments were presented by Governments when commenting on those two questions. In these circumstances the Special Rapporteur, who is in agreement with the Commission's conclusions as reflected in the Commission's commentary, proposes that the article be retained in its present form. Article 28 would therefore read as follows:

#### *Article 28. Freedom of movement*

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure freedom of movement and travel in its territory to all members of the permanent mission and members of their families forming part of their respective households.

#### *Article 29. Freedom of communication*

##### *(a) Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 29 concerned the article as a whole and specifically paragraphs 1 and 7 of the article. The inclusion of a new provision was also suggested.

##### *Article as a whole*

2. One Government [Cyprus] stressed the significance it attaches to the provision of article 29.

##### *Paragraph 1*

3. One Government [Yugoslavia] considered, having regard to the development of international relations and the need to ensure that representatives of States and their missions are

provided with appropriate means of communication with their Governments, and in the interests of the normal performance of the tasks of the international organization itself, [. . .] justifiable to allow permanent missions to send messages in code or to use a wireless transmitter, as provided in the Vienna Conventions system.

4. The secretariat of the IAEA stated the following:

Article 29 establishes the freedom of communication of the "permanent mission" with the government of the sending State, its diplomatic missions, its permanent missions, its consular posts and its special missions. Since the draft articles are intended to regulate relations between States and international organizations the question comes to mind whether the freedom of communication of the "permanent mission" with the organization to which it is accredited should not be ensured in the same manner. This question would have particular merits if a "permanent mission" is established in a "third State".

##### *Paragraph 7*

5. In its editing observations, the United Nations Secretariat considered that, although the expression "to land at [a] port" appears in article 27, paragraph 7, of the Convention on Diplomatic Relations and in article 28, paragraph 8, of the Convention on Special Missions, the word "land" in the third line of paragraph 7 of the present article should be replaced by "arrive" or "call", which would be closer to the French and Spanish versions, as "a ship does not 'land' at a port". (A/CN.4/L.162/Rev.1, section B.)

##### *New provision*

6. One Government [United Kingdom] indicated that it would favour the inclusion of a provision on the lines of article 28, paragraph 3, of the Convention of Special Missions.

##### *(b) Observations of the Special Rapporteur*

7. The Special Rapporteur is unable to agree with the interpretation given by IAEA in its comment reflected in paragraph 4 above. In the opinion of the Special Rapporteur the first sentence of paragraph 1 of the article establishes in general the freedom of communication on the part of the permanent mission "for all official purposes" and thus covers, above all, the freedom of communication of the permanent mission, wherever situated, with the organization. The reference in the second sentence of paragraph 1 to the Government of the sending State, its diplomatic missions, its permanent missions, its consular posts and its special missions is only made in relation to the means ("all appropriate means, including couriers and messages and code or cipher . . .") which the permanent mission may employ in communicating with those listed subjects. That reference cannot be interpreted as establishing the freedom of communication of the permanent mission only in respect of the government of the sending State, its missions and consular posts.

8. As regards the suggestion reflected in paragraph 6 above, the Special Rapporteur wishes to point out that article 28 of the Convention on Special Missions departed from article 27 of the Vienna Convention on Diplomatic Relations, apart from the requisite adaptations, only in that it added the provision contained in paragraph 3 of

said article 28. Such addition was justified by the particular nature of special missions but is not so in the present part II concerning permanent missions to international organizations, the relevant provision of which (article 29) is likewise based on article 27 of the Vienna Convention on Diplomatic Relations, relating to permanent diplomatic missions.

9. With respect to the editorial suggestion of the United Nations Secretariat reflected in paragraph 5 above the Special Rapporteur wishes to point out that the first sentence of paragraph 7 does not admit only of the interpretation which the Secretariat gives to it, namely, that the word "land" applies also to "a ship". In these circumstances, the acceptance of the Secretariat's suggestion might imply an unwarranted departure from the precedent of the Convention on Diplomatic Relations. But even accepting that the interpretation referred to by the Secretariat were the correct one, the Special Rapporteur considers that the fact the word "land", which was originally used in the Convention on Diplomatic Relations, was kept after thorough discussion in the corresponding provision of the Convention on Special Missions, would seem to indicate that for the purpose of the instruments codifying diplomatic law, the word "land" in the context of the provisions concerning freedom of communication has acquired, as regards ships, a juridical meaning equivalent to the grammatically more correct terms "arrive" or "call".

10. For the foregoing considerations, the Special Rapporteur proposes that the article be retained in its present form. Article 29 would, therefore, read as follows:

#### *Article 29. Freedom of communication*

1. The host State shall permit and protect free communication on the part of the permanent mission for all official purposes. In communicating with the Government of the sending State, its diplomatic missions, its permanent missions, its consular posts and its special missions, wherever situated, the permanent mission may employ all appropriate means, including couriers and messages in code or cipher. However, the permanent mission may install and use a wireless transmitter only with the consent of the host State.

2. The official correspondence of the permanent mission shall be inviolable. Official correspondence means all correspondence relating to the permanent mission and its functions.

3. The bag of the permanent mission shall not be opened or detained.

4. The packages constituting the bag of the permanent mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the permanent mission.

5. The courier of the permanent mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the permanent mission may designate couriers *ad hoc* of the permanent mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the permanent mission's bag in his charge.

7. The bag of the permanent mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized

port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a courier of the permanent mission. The permanent mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

#### *Article 30. Personal inviolability*

##### *(a) Observations of Governments and international organizations*

1. One Government [Cyprus] stressed the significance it attaches to the provision of article 30.

2. Another Government [Netherlands] recalled its general comment<sup>98</sup> according to which the similarity, from the sending State's point of view, between the positions of permanent missions to States and to international organizations "justifies the privileges and immunities in the present draft being wider in scope than those laid down in the Convention on Special Missions". It, therefore, stated that it would "not propose—as it did in its comments on the draft articles on special missions—that the personal inviolability of diplomatic staff be restricted to acts performed in the discharge of official duties". In its view, it seemed

inappropriate to regulate the position of permanent representatives to international organizations on this point in conformity with the Convention on Diplomatic Relations.

3. One Government [Canada] was of the view that consideration should be given to the insertion of a second paragraph in draft article 30 which would read as follows:

"This principle does not exclude, in respect of the permanent representative, either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing serious crimes or offences."

##### *(b) Observations of the Special Rapporteur*

4. With respect to the suggestion reflected in paragraph 3 above, the Special Rapporteur fails to see the need for the insertion of a provision stressing the right of personal self-defence, inherent to every individual and recognized in all systems of criminal law of which he is aware, in the absence of any provision, in article 30 or elsewhere in the draft, which could possibly be interpreted as excluding or restricting such right. Furthermore, the questions implied in the suggested second paragraph are covered by article 45, in particular its paragraph 2.

5. For the foregoing considerations, the Special Rapporteur proposes that the article be retained in its present form. Article 30 would therefore read as follows:

#### *Article 30. Personal inviolability*

The persons of the permanent representative and of the members of the diplomatic staff of the permanent mission shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

<sup>98</sup> See above, Section 2, General observations, para. 10.

### Article 31. Inviolability of residence and property

#### (a) *Observations of Governments and international organizations*

1. One Government [Cyprus] stressed the significance it attaches to the provision of article 31.

2. In its editorial suggestions, the Secretariat of the United Nations expressed the view that the text of paragraph 1

should be amended to read "The private residence of the permanent representative and of the members of the diplomatic staff...". The present wording implies that all the persons mentioned have one and the same residence, which may not be the case. (A/CN.4/L.162/Rev.1, section B.)

#### (b) *Observations of the Special Rapporteur*

3. With regard to the editorial suggestion of the United Nations Secretariat reflected in paragraph 2 above, the Special Rapporteur wishes to point out that the text included in the document containing the Secretariat's suggestion is precisely that which appears in paragraph 1 of the article as presently drafted. This must be the result of a typographical mistake and the Special Rapporteur ventures to suggest that, in view of its explanation, the Secretariat's proposed change consists in putting the word "residence" in the plural. (See A/CN.4/L.162/Rev.1/Corr.1.) If his assumption is correct, the Special Rapporteur would agree to such change. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, subject to the terminological change referred to before. Article 31 would, therefore, read as follows:

#### *Article 31. Inviolability of residence and property*

1. The private residences of the permanent representative and of the members of the diplomatic staff of the permanent mission shall enjoy the same inviolability and protection as the premises of the permanent mission.

2. Their papers, correspondence and, except as provided in paragraph 3 of article 32, their property, shall likewise enjoy inviolability.

### Article 32. Immunity from jurisdiction

#### (a) *Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 32 related to the article as a whole and specifically to sub-paragraph (d) of paragraph 1, in the light of paragraph 4 of the Commission's commentary on the article.

#### *Article as a whole*

2. One Government [Cyprus] stressed the significance it attaches to the provision of article 32.

#### *Paragraph 1, sub-paragraph (d)*

3. In paragraph 4 of its commentary on article 32 the Commission observed that "after a lengthy discussion", it had been unable, "owing to a wide divergence of views, to reach any decision on the substance of the provision in sub-paragraph 1 (d)". The Commission further stated that it had decided "to place the provision in brackets and to bring it to the attention of Governments".

4. In the course of the debate in the Sixth Committee a number of representatives supported the provision laid down in paragraph 1 (d) of article 32, as

being a means of protecting the victims of motor accidents. Some representatives considered that the exception provided for in that provision should extend to accidents caused by a vehicle used in the performance of official functions. Certain representatives considered also that provisions should be adopted requiring representatives to international organizations to be insured against liability for accidents caused by vehicles used by them. In this connexion, some representatives were of the opinion that such provisions should be so drafted as not to enable insurance companies to evade their obligations by relying on the immunity of the insured.<sup>97</sup>

5. On the other hand, a number of representatives considered that

The corresponding provisions of the Vienna Convention on Diplomatic Relations constituted a better solution than that offered by the provision in paragraph 1 (d). The opinion was expressed that, although such a provision might be appropriate in a convention on special missions, which were temporary in character, it would be out of place as regards permanent missions. Emphasis was also laid on articles 34, 45 and 50 of the draft as offering adequate guarantees to cover the situation in question.<sup>98</sup>

6. Referring to article 34, some representatives stated that

The problem could be solved by a general waiver. Others, however, considered that paragraph (d) of draft article 32 should be completed by a sentence along the lines of the provision contained in article 34, to the effect that the sending State should use its best endeavours to bring about a just settlement of the claims, but without the necessity for waiving immunity.<sup>99</sup>

7. In its written comments, one Government [Israel], after noting paragraph 4 of the commentary and recognizing the interconnexion between paragraph 1 (d) of article 32 and article 34 of the draft articles, indicated that it "would wish to reserve its position on article 32, paragraph 1 (d) for the time being".

8. A number of Governments expressed support for the retention of the provision contained in sub-paragraph (d) of paragraph 1 [see the comments of Belgium, Finland, Japan, Netherlands, Sweden, Switzerland and United Kingdom]. That provision was deemed to be "reasonable and necessary" [Japan]. It was also said [Finland] that although valid reasons had been given in favour of the alternative described in the Commission's commentary, namely, inclusion or exclusion, the former one seemed to be "more pertinent for the sake of clarity". Reference

<sup>97</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 44.*

<sup>98</sup> *Ibid.*, para. 45.

<sup>99</sup> *Ibid.*, para. 46.

was further made by one Government [Netherlands] to the fact that its delegation to the United Nations Conference on Diplomatic Intercourse and Immunities had already advocated the inclusion of such a provision. In this connexion, it was noted [see comments of Finland and the United Kingdom] that the provision was now contained in article 31, paragraph 2 (d), of the Convention on Special Missions.

9. In that respect, the view was also expressed by one Government [Sweden] that there was

undoubtedly a growing tendency, based on public opinion, to limit the immunity in the case of traffic accidents, a tendency which has found expression *inter alia* in the report of the Council of Europe on the privileges and immunities of international organizations.<sup>100</sup>

The same Government observed that the fact that a corresponding provision was not included in the Convention on Diplomatic Relations could hardly be a decisive argument as the Convention and the draft articles were not quite comparable in this respect; the Convention dealt with immunities accorded by a receiving State, the draft articles with immunities accorded by a host State, and the problems caused by immunities might well be much greater in the latter than in the former State. Furthermore, it considered that, as it had already pointed out, opinions had developed since 1961 in the direction of restricting immunity from jurisdiction, particularly in traffic cases. In its view, "an element of progressive development", as stated in the Commission's commentary on article 26, should be incorporated in article 32.

10. Another Government [Netherlands] indicated that in paragraph 30 of its comments on the draft articles on special missions,<sup>101</sup> it had proposed that, as regards missions *ad hoc*, the rule of no immunity in civil actions for damages arising out of road accidents be extended to official journeys. It had now considered whether it would be appropriate to make such a proposal in the case of the present draft. In its opinion, however, the similarity between permanent missions to States and permanent missions to international organizations

justifies the immunity accorded in this respect under the present draft being wider in scope than that accorded to missions *ad hoc* in the Convention on Special Missions.

11. In the opinion of the same Government,

if the proposed provision was adopted, the question of including in the present draft a provision requiring from diplomats entitled to immunity a third party liability-insurance lost much of its relevance. Moreover, many States already imposed an obligation of this kind.

However, another Government [Japan] was of the view that, in addition to the provision of sub-paragraph (d), provisions be included requiring members of permanent missions to be insured against liability for accident caused by vehicles used by them.

12. Two other Governments favoured the inclusion of a provision concerning insurance as an alternative to the inclusion of sub-paragraph (d). In this connexion one Government [Madagascar] stated the following:

Since experience has shown that it is somewhat unrealistic to rely on the goodwill of States to bring about a just settlement of this type of case within a reasonable period, [...] it would be advisable to concentrate on eliminating the difficulties encountered by victims of traffic accidents in obtaining compensation.

However, the provision in question [sub-paragraph (d)] does not [...] provide an effective means of achieving that goal. How will it be established that the vehicle was being used outside official functions? Will the court hearing the case decide that point? Is the court to accept the version of the facts given by the permanent mission, or can it go beyond that interpretation? Will it have to suspend judgement? What if the vehicle was being used "on duty"? These questions will not be easy to answer, and the delays or disputes which they may engender will bar the way to the desired aim.

It might be better to provide that permanent missions must take out insurance to cover any damage their vehicles might cause to third parties. This would avoid the introduction of one more exception in the context of immunities, while at the same time settling a problem which causes annoyance to host States.

13. Another Government [Australia], after referring to "the difficulty felt by members of the Commission in relation to accidents arising out of the use of motor cars", which appeared "*inter alia* in the Commission's commentary on article 32", expressed the following view:

The advent of the motor car and the frequency of accidents caused by its use have required modifications in traditional legal notions all over the world. In some places, States have gone so far as to exclude all notions of fault in relation to the recovery of compensation for injury caused in such accidents. In other States, modification of traditional notions has not gone so far but various forms of insurance are compulsory, it being a criminal or quasi-criminal offence not to insure against liability for injury caused in such an accident. It may be that a solution to the differences of opinion within the Commission on this matter could be found by resort to provisions requiring representatives to international organizations to be insured against liability for accidents caused by vehicles used by them. If such a solution were adopted, it would of course be necessary also to make provision to ensure that insurance companies would not be free in the exercise of their rights of subrogation to rely on the diplomatic immunity of the insured.

14. Two Governments expressed their opposition to the inclusion of the provision of sub-paragraph (d) in the article. One Government [Yugoslavia] did

not regard it as essential to include in this article the exception provided for in paragraph 1 (d), especially since the application of the functional test is a very complex matter.

In the view of another Government [Belgium], although a clause such as that of sub-paragraph (d) was "certainly very much to the point", the question was whether such a clause

should not have been included in the Convention on Diplomatic Relations; for, while it would be wrong to give permanent missions more privileges than are prescribed for diplomatic missions, it is surely unfair to adapt the status which the latter enjoy by means of accretions that would only operate to the detriment of the former.

15. The secretariat of UNESCO took a position similar to that described in the preceding paragraph. In its comments it was stated that:

<sup>100</sup> Council of Europe, *Privileges and immunities of international organizations: Resolution (69)29 adopted by the Committee of Ministers of the Council of Europe on 26 September 1969, and Explanatory Report* (Strasbourg, 1970).

<sup>101</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, pp. 388 *et seq.*, document A/6709/Rev.1, annex I.

In article 32, I consider that paragraph 1 (d), which already appears in brackets, should be deleted completely. Such a provision would constitute an exception to immunity from civil jurisdiction and might give rise to other exceptions that would not be desirable. The problem of judicial action arising out of a third-party insurance policy does not seem relevant, since in most States the victim of an automobile accident would have a direct claim against the insurer and that claim could be enforced even if the policy-holder, having immunity from jurisdiction, could not be sued. I think that, as stated in the commentary (para. 4), "the Vienna precedent should be followed" and that the principles set forth in draft articles 34 and 45 (not article 44, as wrongly stated in the French version of the penultimate sentence of paragraph 4 of the commentary) [...] should be adhered to.

16. As regards the scope of sub-paragraph (d), one Government [Netherlands] recommended that "aircraft and ships be included [...]" since these too may cause considerable damage".

17. As to the wording of sub-paragraph (d), one Government [Belgium] took the view that the term "official functions" could be broadly interpreted and ought to be clarified.

#### (b) *Observations of the Special Rapporteur*

18. The Special Rapporteur wishes to note at the outset that, with the exception of the provision contained in sub-paragraph (d) of paragraph 1 to which reference will be made below, the text of article 32 was not made the subject of comments by Governments or international organizations. As he himself has no observations to make on the provisions of the article other than that contained in sub-paragraph (d) of paragraph 1, he proposes that the text of those provisions be retained in its present form.

19. As regards the provision of sub-paragraph (d) of paragraph 1, the Special Rapporteur wishes to refer to paragraph 4 of the Commission's commentary on the article which states that "after a lengthy discussion, the Commission was unable, owing to a wide divergence of views, to reach any decision on the substance" of that provision. The comments made by Governments and international organizations on the question, as systematically presented in the preceding section, confirm the existence of the divergence referred to by the Commission. The views expressed in the Sixth Committee and in written comments evidence three distinct approaches to the question: (a) in favour of the retention of the provision; (b) opposed to its retention; (c) in favour of an alternative provision concerning insurance.

20. In relation to the first approach, reference was made, *inter alia*, to the following questions: whether the provision should extend to the use of vehicles in the performance of official functions and, in this connexion, whether the term "official functions" ought not to be clarified; whether the provision should be complemented with provisions requiring the taking out of insurance and in this connexion how should such provisions be drafted so as not to enable insurance companies to evade their obligations; whether the provision should be completed by a sentence along the lines of the provision contained in

article 34; and whether the provision should be extended to cover aircraft and ships.

21. The arguments advanced in connexion with the three approaches referred to above reproduce in general those which were made in the course of the discussion in the Commission, some of which are reflected in paragraph 4 of the Commission's commentary on the article. In these circumstances, the Special Rapporteur considers that the comments of Governments and international organizations are not sufficient in themselves to give to the Commission any clear directive as to the manner in which the question should be finally resolved.

22. As for himself, the Special Rapporteur wishes to recall the view he expressed during the discussion held in the Commission, to the effect that "considering the provisions of articles 33 and 44, article 31 should be retained without the proposed addition [of sub-paragraph (d) of paragraph 1]".<sup>102</sup> The Special Rapporteur remains of the same opinion.

23. In the light of the foregoing, the Special Rapporteur deems it appropriate to include in the text of article 32 with which he must provide the Commission in the present report, the provision of sub-paragraph (d) of paragraph 1 in the same manner in which it was submitted by the Commission to Governments and international organizations, namely, within brackets. Subject to the Commission's final decision on the bracketed provision, article 32 would, therefore, read as follows:

#### *Article 32. Immunity from jurisdiction*

1. The permanent representative and the members of the diplomatic staff of the permanent mission shall enjoy immunity from the criminal jurisdiction of the host State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the host State unless the person in question holds it on behalf of the sending State for the purposes of the permanent mission;

(b) An action relating to succession in which the person in question is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the person in question in the host State outside his official functions;

[(d) An action for damages arising out of an accident caused by a vehicle used outside the official functions of the person in question.]

2. The permanent representative and the members of the diplomatic staff of the permanent mission are not obliged to give evidence as witnesses.

3. No measures of execution may be taken in respect of the permanent representative or a member of the diplomatic staff of the permanent mission except in cases coming under sub-paragraphs (a), (b) [and] (c) [and (d)] of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of the permanent representative or of a member of the diplomatic staff of the permanent mission from the jurisdiction of the host State does not exempt him from the jurisdiction of the sending State.

<sup>102</sup> *Ibid.*, 1969, vol. I, p. 27, 995th meeting, para. 70.

### Article 33. Waiver of immunity

#### (a) *Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 33 related to the nature of the principle of the waiver of immunity embodied in the article and specifically to paragraphs 1 and 3 of the article.

#### *Nature of the principle of the waiver of immunity*

2. The Government of Switzerland and the secretariats of two international organizations [ITU and IBRD] addressed themselves to this question in comments covering either articles 33 or 34, or both, the latter article being that which establishes in principle a duty to waive immunity in respect to civil claims. Since in the draft as presently organized, articles 33 and 34 state, respectively, the general rule and the exception to it, the Special Rapporteur has deemed it appropriate to include those comments, which are of a general nature, under article 33. The Government of Switzerland expressed regret

that article 34 of the text should lag behind the Conventions relating to international organizations now in force, which specify that the sending State "has the right" and "is under a duty" to waive immunity from jurisdiction, without limiting the "duty" to the case of civil immunity. It is generally agreed that the provision authorizing the sending State to waive the diplomatic immunity of a diplomatic agent contained in article 32 of the Convention on Diplomatic Relations is virtually never applied. The sanction in criminal matters is usually a request for recall or a declaration of *persona non grata*. The latter institution is not provided for in the draft articles, for the same reasons which rule out a genuine *agrément* procedure. Recall is possible in the case of article 45, paragraph 2, [...] which is not fully satisfactory.

It further expressed the view that

one of the reasons which led to the granting of what is in practice total immunity to diplomatic agents is the fact that, as an intermediary between the sending State and the receiving State, the diplomatic agent may be liable simply through the normal exercise of his functions, to arouse the resentment of the receiving State. In the case of a permanent representative, such a possibility is more remote, for the representative's activity in the organization has generally nothing to do with the host State. It would therefore be justifiable to specify not only a right but, as in the existing agreements with and concerning international organizations, a "duty" to waive immunity in cases other than those mentioned in article 34.

3. The secretariat of ITU stated the following:

We are in the process of negotiating a Headquarters Agreement with Switzerland to replace the exchange of letters of 1948 whereby we were granted the benefits of the Agreement between it and the United Nations. It may be of interest to know that the Confederation has requested that the following article be included in the new Agreement:

*"Article 13—Objet des privilèges et immunités accordés aux représentants"*

*"Les privilèges et immunités sont accordés aux représentants des membres de l'Union non à leur avantage personnel, mais dans le but d'assurer en toute indépendance l'exercice de leurs fonctions en rapport avec l'Union. Par conséquent, un membre de l'Union a non seulement le droit, mais le devoir de lever l'immunité de son représentant dans tous*

*les cas où, à son avis, l'immunité entraverait l'action de la justice et où elle peut être levée sans compromettre les fins pour lesquelles elle avait été accordée."*

[Provisional translation:]

*"Article 13—Purpose of the privileges and immunities accorded to representatives"*

"Privileges and immunities are accorded to the representatives of members of the Union, not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connexion with the Union. Consequently, a member not only has the right but is under a duty to waive the immunity of its representatives in any case where, in the opinion of the member, the immunity would impede the course of justice, and where it can be waived without prejudice to the purpose for which the immunity is accorded."

4. The secretariat of IBRD, after referring to paragraphs 1 and 2 of the Commission's commentary to the present article, expressed regret that the "commendable" provision contained in the second sentence of article IV, section 14 of the Convention on the Privileges and Immunities of the United Nations, which is quoted in paragraph 1 of said commentary and reproduced in the article referred to by the secretariat of ITU (see preceding paragraph) "only appears in weakened form in article 34".

#### *Paragraph 1*

5. One Government [Israel] suggested that

in paragraph 1, in the place of the phrase: "The immunity from jurisdiction of the permanent representative or members of the diplomatic staff of the permanent mission and persons enjoying immunity under article 40", there should be substituted the following: "The immunity from jurisdiction of the permanent representative or members of the diplomatic staff of the permanent mission, and of persons enjoying immunity under article 40".

6. In its editorial suggestions, the Secretariat of the United Nations expressed the view that the text should be amended to read:

The immunity from jurisdiction of the permanent representative and members of the diplomatic staff of the permanent mission and of persons enjoying immunity under article 40. . . .

In the Secretariat's view, as

three classes of persons are mentioned, there seems to be no reason for using the word "or" between the first and second class, but "and" between the second and third. The change proposed brings the wording closer to that of article 32, paragraph 1 of the Convention on Diplomatic Relations, which says "and of persons enjoying immunity . . .". (A/CN.4/L.162/Rev.1, section B.)

#### *Paragraph 3*

7. In the view of the secretariat of UNESCO, there seemed to be

every justification for providing that, in the situation covered by paragraph 3, the person concerned "shall [be precluded] from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim". However, [...] this should apply to appeals as well as counter-claims, as is generally provided by the makers of diplomatic law; for it is impossible to see how a person enjoying a privileged status who had obtained a judgement could be allowed to block his opponent's appeal by relying on his immunity from jurisdiction.



(b) *Observations of the Special Rapporteur*

8. With regard to the question whether the provision concerning waiver of immunity should specify not only a "right" but also a "duty" in cases other than those mentioned in article 34, the Special Rapporteur notes the arguments advanced in particular by the Government of Switzerland. In this connexion he wishes to recall that, although section 14 (article IV) of the Convention on the Privileges and Immunities of the United Nations and section 16 (article V) of the Convention on the Privileges and Immunities of the Specialized Agencies refer both to a "right" and a "duty", only the notion of the waiver of immunity as a "right" was reflected in the relevant provisions of the Vienna Conventions on Diplomatic and Consular Relations (articles 32 and 45, respectively), and the Convention on Special Missions (article 41). The Special Rapporteur wishes further to recall that in the matter of privileges and immunities, the Commission's basic approach to the present draft, namely, the assimilation of permanent missions to diplomatic missions, has been widely supported by Governments and international organizations, including, in no equivocal terms, the Government of Switzerland. The Special Rapporteur wishes also to draw attention to the incorporation in the present draft, as a separate article (article 34), of a provision concerning the "duty" to waive immunity in respect to civil claims, and to the accompanying explanation given in paragraph 2 of the Commission's commentary on said article 34. In the light of the foregoing, the Special Rapporteur is of the view that there is no compelling reason to depart from the system embodied in the conventional instruments on diplomatic law by including in article 33 a reference to "duty".

9. As regards the drafting suggestions concerning paragraph 1 of the article, the Special Rapporteur agrees to the replacement of the word "or" by "and", between "representative" and "members", as well as to the inclusion of the word "of" before "persons" (without a comma to precede "of"), since, in his view, those changes represent a terminological improvement of the text.

10. As regards the comment of the secretariat of UNESCO reflected in paragraph 7 above, the Special Rapporteur considers that the contention to the effect that "it is impossible to see how a person enjoying a privileged status who had obtained a judgement could be allowed to block his opponent's appeal by relying on his immunity from jurisdiction" has no basis in the text of article 33 as presently worded. In this connexion, the Special Rapporteur refers to the language of paragraph 4 of the article which explicitly states that it is "in respect of the execution of the judgement" that "waiver of immunity from jurisdiction [. . .] shall not be held to imply waiver of immunity". In view of the specific reference thus made it must be concluded that only at the stage of "execution of the judgement" could a person rely on his immunity from jurisdiction, since a separate waiver is necessary in order that a judgement may be executed against the privileged person. The stage at which a judgement can be "executed" necessarily represents the culmination of the judicial process issuing from the presentation of the

original claim, of which appeal is but one of the possible instances. If the possibility for appeal still exists the judgement of a lower court cannot be deemed to be capable of "execution". The issue is different as regards a counter-claim, which implies a judicial process of its own, whether it be joined or not to that issuing from the original claim. In these circumstances, the Special Rapporteur is of the view that the suggested addition of a reference to "appeals" would be superfluous.

11. For the foregoing reasons, the Special Rapporteur proposes that the article be retained in its present form subject to the drafting changes referred to in paragraph 9 above. Article 33 would, therefore, read as follows:

*Article 33. Waiver of immunity*

1. The immunity from jurisdiction of the permanent representative and members of the diplomatic staff of the permanent mission and of persons enjoying immunity under article 40 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by the permanent representative, by a member of the diplomatic staff of the permanent mission or by a person enjoying immunity from jurisdiction under article 40 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

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

*Article 34. Settlement of civil claims*(a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee some representatives regarded the provisions of article 34 as judicious and necessary. Others, while agreeing that they were desirable in themselves, nevertheless considered that they might not be appropriate for a legal text, since the sending State's obligation under the article depended very largely on its own subjective criteria. In this connexion, the suggestion was made that in the last sentence, the expression "it shall use its best endeavours to bring about" should be replaced by the words "it shall bring about".<sup>103</sup>

2. In its written comments, one Government [Belgium] stated that

This article, which reproduces the operative part of resolution II (consideration of civil claims) annexed to the Convention on Diplomatic Relations, [104] adds nothing more than the recommendation itself, since in the final analysis it rests on the discretion and goodwill of the sending State.

3. Five other Governments expressed support for the provision of the article. The Government of Switzerland regarded it

<sup>103</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 47.*

<sup>104</sup> *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities, vol. II (United Nations publication, Sales No. 62.XI.1), p. 90.*



as an important advance that resolution II accompanying the Convention on Diplomatic Relations has been embodied in the text of article 34 and that a clear obligation is now laid on the sending State.

Another Government [Yugoslavia], in commenting on article 32, considered that the provisions of article 34 "satisfactorily safeguards the interests of the host State and the exercise of the functions of the permanent representative". A third Government [United Kingdom] indicated its support for "the inclusion of this provision in the body of the convention itself as a progressive step which would help to reassure parliamentary and public opinion". Other Governments [Israel, Japan] expressed their hope that the article should be retained in the final text.

4. In the view of UNESCO, the importance of the principle set forth in the article "should not be underestimated".

#### *(b) Observations of the Special Rapporteur*

5. The Special Rapporteur observes that most of the comments of Governments and international organizations were in support of the Commission's decision to embody the provision in an article of the draft. As regards the suggestion made in the Sixth Committee, reflected in paragraph 1 above, the Special Rapporteur wishes to point out that it was precisely on the basis of that decision that the provision was couched in the language of a legal convention and not in that of a recommendation, by using the word "shall" instead of "should". In this connexion, he fails to understand how, in the presence of the clear obligation thus established, it can still be argued that the provision "adds nothing more than the recommendation itself, since [...] it rests on the discretion and good will of the sending State". Further, the Special Rapporteur is unable to agree with the suggested deletion of the words "use its best endeavours". In his view, such words, which appear both in resolution II adopted by the United Nations Conference on Diplomatic Intercourse and Immunities and in General Assembly resolution 2531 (XXIV) are not the determinant of the obligatory character of the provision but rather of the scope of the obligation. The Special Rapporteur considers that the scope thus determined is the appropriate one in the context of the provision: no obligation could be imposed on the sending State alone "to bring about a just settlement" as the result thus sought is of necessity dependent on the endeavours of at least the opposing party in the claim in question.

6. For the foregoing considerations, the Special Rapporteur proposes that the article be retained in its present form. Article 34 would, therefore, read as follows:

#### *Article 34. Settlement of civil claims*

The sending State shall waive the immunity of any of the persons mentioned in paragraph 1 of article 33 in respect of civil claims in the host State when this can be done without impeding the performance of the functions of the permanent mission. If the sending State does not waive immunity, it shall use its best endeavours to bring about a just settlement of such claims.

#### **Article 35. Exemption from social security legislation**

##### *(a) Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 35 concerned the article as a whole and, specifically, paragraphs 1, 2 (first sentence and sub-paragraph *b*) and 3 of the article and paragraph 5 of the article in the light of the question raised in paragraph 3 of the Commission's commentary on the article.

##### *Article as a whole*

2. The secretariat of the IAEA stated the following:

*Article 35* provides for exemption of the permanent representative and the diplomatic staff of the permanent mission from social security provisions of the "host State", both as employers and employees. However, the exemption of the employer of the permanent representative and the diplomatic staff has not been secured in the article.

3. One Government [Canada] although observing that the article "would seem to be satisfactory", nevertheless expressed the view that

It might be necessary to make it clear that the exemption from the social security legislation of the receiving State conferred by the article does not include an exemption from social security taxes of an indirect nature and is thus not in conflict with the intent of sub-paragraph (a) of article 36 which permits the receiving State to impose indirect taxes.

##### *Paragraph 1*

4. In its editorial suggestions the Secretariat of the United Nations expressed the view that "the last two lines of paragraph 1 should be amended to read 'be exempt from the social security provisions in force in the host State' ". While recalling that the present wording is taken from article 33, paragraph 1 of the Convention on Diplomatic Relations and appears also in article 32, paragraph 1 of the Convention on Special Missions, the Secretariat nevertheless considered that wording to be wrong, since it means that the persons mentioned shall be exempt from social security provisions of the kind specified, which, quite incidentally, may be in force in the host State. This is not the meaning intended. (A/CN.4/L.162/Rev.1, section B.)

##### *Paragraph 2*

5. In the opinion of the Government of Switzerland, referring to the use of the expression "persons who are in the sole private employ", in the opening sentence of the paragraph, it seemed that

The purpose of using the expression "private staff" of members of the mission in the Convention on Special Missions, instead of the expression "private servants" which had been used in the Convention on Diplomatic Relations, was to take account of the differences between permanent missions and special missions, the latter being of a temporary nature, with the result that their members often do not employ servants. In the present draft, it would seem preferable to keep to the wording employed in the Vienna Convention.

6. In its editorial suggestions (A/CN.4/L.162/Rev.1, section B), the Secretariat of the United Nations expressed

the view that in sub-paragraph (b) the words "which may be" should be deleted, for the reasons given in connexion with the similar suggestion made on paragraph 1 of the article.<sup>105</sup>

### *Paragraph 3*

7. In its editorial suggestions (A/CN.4/L.162/Rev.1, section B, the Secretariat of the United Nations expressed the view that, in paragraph 3 "the words 'who employ' should be replaced by 'if they employ', since all permanent representatives and members of the diplomatic staff may not employ non-exempted persons". The Secretariat referred to the corresponding passage in the Convention on Diplomatic Relations (article 33, para. 3) which reads: "A diplomatic agent who employs [...]" which in the Secretariat's view makes it clear that not all diplomatic agents do.

### *Paragraph 5 and the question raised in paragraph 4 of the Commission's commentary*

8. In paragraph 3 of its commentary on the article, the Commission stated that it

intends to consider, in the light of the comments to be received from Governments, whether paragraph 5 is necessary in view of the provisions of articles 4 and 5 of the present draft.

9. Three Governments addressed themselves in their written comments to the question thus raised. One Government [Netherlands] stated that its answer was in the negative. Another Government [Israel] was of the view that paragraph 5 "adds nothing to the provisions of articles 4 and 5, and that it could with advantage be omitted". A third Government [Sweden] likewise considered that

Since the general provisions in articles 4 and 5 apparently cover the special provision in paragraph 5 of article 35, that paragraph could accordingly be omitted.

### *(b) Observations of the Special Rapporteur*

10. As regards the comments made by IAEA reflected in paragraph 2 above, the Special Rapporteur wishes to point out that the IAEA statement to the effect that "Article 35 provides for exemption of permanent representative and the diplomatic staff [...] both as employers and employees" cannot be understood in an absolute sense in view of the provisions of paragraph 3 of the article according to which, when acting as employers in the circumstances specified therein "the permanent representative and the members of the diplomatic staff [...] shall observe the obligations which the social security provisions of the host State impose upon employers". Also, the Special Rapporteur fails to see how, as it is contended by IAEA, the statement securing the exemption of the permanent representative and the diplomatic staff "both as employer and employees" necessarily requires that a corresponding statement be made securing the exemption "of the employer of the permanent representative and the diplomatic staff". Be it as it may, the

Special Rapporteur wishes nevertheless to point out that a second statement along the lines suggested by IAEA appears to be out of place in the present draft. In effect, keeping within the frame of the IAEA comments, the Special Rapporteur considers that the only "employer" of the permanent representative and the diplomatic staff is the sending State, since the provisions of article 46 on professional activity exclude the possibility of the existence of other "employers" for such persons. In these circumstances, the Special Rapporteur does not consider that, given the basic role which attaches to the principle of the immunity of the State in the law of diplomatic relations, there is need to make a specific reference to such immunity in the context of the provisions on exemption from the social security legislation in the present draft.

11. As regards the comment reflected in paragraph 3 above, the Special Rapporteur is of the view that the provision of sub-paragraph (a) of article 36, which is of a general character, covers the specific case of indirect social security taxes. However, if the Commission so desires, an appropriate cross-reference on the point could be made in the Commission's commentary to the final text of either article 35 or article 36.

12. In relation to the editorial suggestions of the Secretariat of the United Nations concerning paragraph 1, the Special Rapporteur agrees that the change suggested by the Secretariat, namely, to add "the" before "social" and to delete "which may be" would represent a terminological improvement of the text. He therefore agrees to its inclusion.

13. With respect to the comment of the Government of Switzerland reflected in paragraph 5 above, the Special Rapporteur wishes to make reference to paragraph 2 of the Commission's commentary on the article which explains the change in terminology for reasons, which the Special Rapporteur considers valid, other than those having to do with the differences between missions on account of the "temporary" or "permanent" nature of the mission concerned.

14. On the editorial suggestion of the United Nations Secretariat concerning paragraph 2, the Special Rapporteur takes a similar view to the one he expressed in paragraph 12 above.

15. The Special Rapporteur agrees with the explanation of the United Nations Secretariat reflected in paragraph 7 above, regarding the meaning of the words "who employ" in paragraph 3 of the article. However, he considers that the same reasons apply in the case of the Secretariat's amended version "if they employ". In the view of the Special Rapporteur, what is important in this regard and appears to be the ground for the Secretariat's suggestion, is to have the wording bring out the element of "actual employment". He considers that this could be achieved by replacing the words "who employ" by "when they employ", a change which he therefore proposes to make.

16. The Special Rapporteur expresses his agreement with the comments of Governments reflected in paragraph 9 above to the effect that paragraph 5 of the article

<sup>105</sup> See para. 4 above.

is unnecessary in view of the provisions of articles 4 and 5 of the present draft. He therefore proposes its deletion.

17. In the light of the foregoing considerations, the Special Rapporteur proposes the following text for article 35:

**Article 35. Exemption from social security legislation**

1. Subject to the provisions of paragraph 3 of this article, the permanent representative and the members of the diplomatic staff of the permanent mission shall with respect to services rendered for the sending State be exempt from the social security provisions in force in the host State.

2. The exemption provided for in paragraph 1 of this article shall also apply to persons who are in the sole private employ of the permanent representative or of a member of the diplomatic staff of the permanent mission, on condition:

(a) That such employed persons are not nationals of or permanently resident in the host State; and

(b) That they are covered by the social security provisions in force in the sending State or a third State.

3. The permanent representative and the members of the diplomatic staff of the permanent mission when they employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the host State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the host State provided that such participation is permitted by that State.

**Article 36. Exemption from dues and taxes**

*(a) Observations of Governments and international organizations*

1. The comments made by governments and international organizations in connexion with article 36 related to the opening sentence and sub-paragraphs (a) to (e) of the article, sub-paragraph (f) of the article and the related question raised in paragraph (5) of the Commission's commentary to the article and paragraph 4 of the same commentary.

*Opening sentence*

2. One Government [Canada] suggested that

The drafting committee might wish to rephrase the opening sentence so as to make it clear that the phrase "personal or real, national, regional or municipal" applies to "dues" as well as to "taxes".

*Sub-paragraphs (a) to (f)*

3. The secretariat of IAEA, after observing that in sub-paragraphs (b), (c) and (d) of article 36, the exemptions are specifically those from dues and taxes of the "host State", raised the question whether "the omission of such specification in sub-paragraphs (a), (e) and (f) mean that those particular exemptions are from dues and taxes of any State?"

*Sub-paragraph (a)*

4. One Government [Canada], although considering sub-paragraph (a) to be acceptable nevertheless suggested that "the phrase 'Indirect taxes incorporated in the price of goods or services, whether invoiced separately or not' could be used as an alternative".

*Sub-paragraph (b)*

5. One Government [Canada] considered that

The phrase "unless the person concerned holds it on behalf of the sending State for the purposes of the mission" could, to avoid any undesirable extension of the exemption, be deleted and replaced by the words "subject to the provisions of article 26".

6. Another Government [Finland], on the basis of its comments on article 26<sup>108</sup> was of the view that

Article 36 (b) should also provide that its provision shall apply to the [...] shares [of the title-holder in housing corporations] which cannot be considered as real property.

*Sub-paragraph (d)*

7. One Government [Canada] suggested that

the phrase "and capital taxes on investments made in commercial undertakings in the host State", which is almost identical to the corresponding provision in sub-paragraph (d) of article 34 of the Convention on Diplomatic Relations, is less satisfactory than the wording of sub-paragraph (d) of article 49 of the Convention on Consular Relations which reads, "dues and taxes on private income, including capital gains, having its source in the receiving [host] State and capital taxes relating to investments made in commercial or financial undertakings in the receiving [host] State;".

*Sub-paragraph (f) and the related question raised in paragraph 5 of the Commission's commentary on article 36*

8. In the course of the debate in the Sixth Committee, the provisions of sub-paragraph (f) were considered "too specific".<sup>107</sup>

9. In its written comments, one Government [Canada] indicated that it would prefer to have the phrase "with respect to immovable property" deleted.

10. In paragraph 5 of its commentary on article 36 the Commission stated:

(5) The final phrase of paragraph (f) may give rise to difficulties of interpretation mainly because it states an exception to a rule which is itself an exception. It is, however, based on the corresponding provision (art. 34) of the Vienna Convention on Diplomatic Relations. The Commission would be interested to learn whether Governments have found any practical difficulties in applying that provision.

11. Three Governments responded to the question thus raised. One Government [Netherlands] pointed out that in its country

registration fees, paid on the transfer to the sending State of immovable property intended for official use, are refunded.

<sup>108</sup> See above, Article 26, para. 6 of the observations.

<sup>107</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 48.*

Documents signed solely by members of foreign diplomatic missions are exempt from stamp duty. This practice does not give rise to difficulties.

The Government of Switzerland indicated that in its country

although the Convention on Diplomatic Relations rule corresponding to sub-paragraph (f) is formulated as an exception to an exception, its application has caused no difficulty.

Another Government [Sweden] replied that it was not aware of any difficulty in applying paragraph (f).

*Paragraph 4 of the Commission's commentary on article 36*

12. In its written comments, the secretariat of UNESCO stated the following:

In paragraph 4 of the commentary on article 36, the statement about UNESCO does not reflect quite accurately what was stated in the reply contained in my letter of 2 March 1965.\*

\* The relevant paragraph of the letter reads as follows:

"22. The taxation system applied to permanent delegations is in principle the same as that enjoyed by embassies.

"Delegations pay only the taxes for services (scavenging, sewerage, garbage collection) and real property tax (*contribution foncière*) when the permanent delegate is the owner of a building.

"Permanent delegates are exempt from tax on movable property (*contribution mobilière*) (a tax imposed on residents of France, according to the residential premises they rent or occupy) in respect of their principal residence but not of any secondary residence."

*(b) Observations of the Special Rapporteur*

13. As regards the suggestion reflected in paragraph 2 above, the Special Rapporteur is of the opinion that the present drafting, particularly in view of the use of the word "and" between "dues" and "taxes" and of a comma after the word "taxes", is sufficient to make it clear that the phrase "personal or real, national, regional or municipal" applies both to "dues" as well as to "taxes". In his view, if that phrase had been meant to apply only to taxes, another wording would have been more properly used than the present one.

14. With respect to the comment made by IAEA reflected in paragraph 3 above, the Special Rapporteur wishes to point out at the outset that sub-paragraphs (a) to (f) do not deal with "exemptions" as asserted by IAEA but rather with "exceptions" to the exemption provided for in the opening sentence of the article. Furthermore, he is unable to agree with the IAEA's contention that as regards sub-paragraphs (b) and (d) the alleged exemptions are "specifically those from dues and taxes of the 'host State'". The reference to the "host State" in those two sub-paragraphs is made not in relation to its "dues and taxes" but rather to the situs of the private immovable property and of the source of the private income. The convention of IAEA regarding specification would, therefore, be applicable only to sub-paragraph (c). In these circumstances, the question as raised by IAEA in the context of article 36 does not seem to require any further comment.

15. The Special Rapporteur takes the view that the provision of sub-paragraph (a), which is general in character, applies irrespective of the forms that may be used for recording the taxes referred to therein, making it

thus unnecessary to include in its text a specific reference to "whether [they are] invoiced separately or not" as suggested in the comment reflected in paragraph 4 above.

16. As regards the comment concerning sub-paragraph (b) of the article, reflected in paragraph 5 above, the Special Rapporteur wishes to point out that the "premises of the permanent mission" to which the exemption from taxation provided for in article 26 applies, have been defined in sub-paragraph (k) *bis* of article 1 on the use of terms in a manner corresponding in general to the expression in sub-paragraph (b) of article 36 which it is suggested to have replaced. In the view of the Special Rapporteur, this latter expression might even be thought to be more restrictive than that used in sub-paragraph (k) *bis* of article 1 in so far as it includes the words "on behalf of the sending State". The Special Rapporteur wishes also to recall that the provision of sub-paragraph (b) of article 36 reproduces, with the necessary drafting changes, the provision of article 34 of the Vienna Convention on Diplomatic Relations. In view of the existence in that Convention of provisions (article 1, sub-paragraph (i) and article 23) comparable to those of article 1, sub-paragraph (k) *bis*, and article 26 of the present draft, the adoption of the proposed change in this draft would not only give rise to serious problems of interpretation in the context of the Convention on Diplomatic Relations but would constitute an unwarranted departure from the Vienna diplomatic precedent.

17. With regard to the comment referred to in paragraph 6 above, concerning sub-paragraph (b) of the article, the Special Rapporteur observes that the provision of sub-paragraph (b) being general in character, the suggestion made, which relates to a very concrete situation, might be more appropriately reflected in the Commission's commentary to the final text of the article than in the text of the article itself.

18. With regard to the comment reflected in paragraph 7 above, concerning sub-paragraph (d) of the article, the Special Rapporteur wishes to point out that the complete text of the provision of sub-paragraph (d) as well as that of the corresponding article of the Convention on Diplomatic Relations (article 34) include also the phrase "dues and taxes on private income having its source in the host [receiving] State". Therefore, the differences between these texts and that of sub-paragraph (d) of article 49 of the Vienna Convention on Consular Relations consist in the use by the latter of the words "relating to" instead of "on" before "investments", and the addition of the words "including capital gains", and "or financial" after "private income", and "commercial", respectively. The Special Rapporteur does not consider that those terminological differences amount to a difference in substance between the two texts. In those circumstances, he sees no compelling reason to depart from the Vienna diplomatic precedent.

19. With regard to the comment concerning sub-paragraph (f) of the article, reflected in paragraph 9 above, the Special Rapporteur likewise finds that no reason other than preference is given in support of the suggested departure from the Vienna diplomatic precedent. The

Special Rapporteur's own preference, however, based on the Commission's general approach to the subject, is for the retention of the provision in its present form.

20. As the Governments which referred to the question indicated the existence of no practical difficulties in applying the provision of paragraph (f) of article 34 of the Convention on Diplomatic Relations, the Special Rapporteur takes the view that the final phrase of the corresponding provision (paragraph (f) of article 36) in the present draft should be maintained.

21. With regard to the comment of UNESCO reproduced in paragraph 12 above, the Special Rapporteur wishes to point out that the text of the Commission's commentary, which was largely based on the text of the Special Rapporteur's own commentary as included in his fourth report, has as its source the Study by the Secretariat.<sup>108</sup> Since the secretariat of UNESCO disagrees with the information given in that document as regards UNESCO, the Special Rapporteur considers that the comment made by UNESCO should be taken into account if and when it is decided to include the corresponding passage in the commentary to the final text of the article.

22. For the foregoing considerations the Special Rapporteur proposes that the article be retained in its present form. Article 36 would, therefore, read as follows:

**Article 36. Exemption from dues and taxes**

The permanent representative and the members of the diplomatic staff of the permanent mission shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

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

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

(c) Estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 42;

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

(e) Charges levied for specific services rendered;

(f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 26.

**Article 37. Exemption from personal services**

No comments were made by Governments or international organizations concerning article 37. As for himself, the Special Rapporteur has no observations to make on the text of the article. He, therefore, proposes that the article be retained in its present form. Article 37 would then read as follows:

**Article 37. Exemption from personal services**

The host State shall exempt the permanent representative and the members of the diplomatic staff of the permanent mission from all personal services, from all public service of any kind whatsoever, and

from military obligations such as those connected with requisitioning, military contributions and billeting.

**Article 38. Exemption from customs duties and inspection**

**(a) Observations of Governments and international organizations**

1. The comments made by Governments and international organizations in connexion with article 38 related to paragraphs 1, sub-paragraph (b), and 2 of the article, and paragraph 5 of the Commission's commentary on the article.

*Paragraph 1, sub-paragraph (b)*

2. Two Governments and the Secretariat of the United Nations commented on the use of the word "his". In its editorial suggestions (A/CN.4/L.162/Rev.1, section B), the Secretariat of the United Nations expressed the view that

It is by no means clear that the words "or members of his family forming part of his household" apply to "the permanent representative"; they may easily be taken as applying only to "a member of the diplomatic staff". This difficulty does not arise in the corresponding article 36, paragraph 1 (b), of the Convention on Diplomatic Relations, because only one person and his family are mentioned.

The Secretariat of the United Nations took the view that

The text could be amended to read "... or of members of the family of such representative or member forming part of his household, including articles intended for his establishment".

One Government [Canada] indicated its presumption that "the word 'his' refers both to the permanent representative and to any member of the diplomatic staff". Another Government [Israel] suggested that "'their families' be substituted for 'his family', 'their households' for 'his household' and 'their establishments' for 'his establishment'".

*Paragraph 2*

3. In its editorial suggestions (A/CN.4/L.162/Rev.1, section B), the Secretariat of the United Nations expressed the view that

In the first sentence of paragraph 2, the words "or a member" should be replaced by "*and of the members*"; the baggage is exempt in both cases, not in one case or the other. See article 103, paragraph 2. [Also that] at the beginning of the last sentence, the word "Such" should be deleted; it has no proper antecedent, since what is referred to in the previous sentence is not inspection, but exemption from inspection. The sentence should begin "*In such cases, inspection shall be . . .*" as in article 103, paragraph 2.

The Secretariat noted that the word "Such" appears in the corresponding provision of the Convention on Diplomatic Relations (article 36, para. 2), but that the Convention on Special Missions uses the expression "In such cases" (article 35, para. 2).

*Paragraph 5 of the Commission's commentary on article 38*

4. In its written comments, the secretariat of UNESCO stated the following:

<sup>108</sup> See foot-note 47 above.

In paragraph 5 of the commentary on article 38, the last sentence should state that "other delegates or members of delegations may import . . ." and should add that they may also temporarily import motor-cars free of duty, under customs certificates without deposits (see my letter of 2 March 1965).\*

\* The relevant paragraph of this letter reads as follows:

"23. Only permanent delegates accredited to the Organization with the rank of ambassador or minister plenipotentiary are assimilated to heads of diplomatic missions (article 18, para. 3, of the Headquarters Agreement). In this capacity they may import goods for their official use and for that of the delegation free of duty.

"Other delegates or members of delegations are assimilated to members of a diplomatic mission accredited to the French Government; they may import free of duty their furniture and personal effects at the time of their installation in France and may temporarily import motor-cars free of duty, under customs certificates without deposits (article 22, sub-paragraphs (g) and (h), of the Headquarters Agreement)."

#### (b) *Observations of the Special Rapporteur*

5. As regards the drafting suggestions concerning sub-paragraph (b) of paragraph 1 referred to in paragraph 2 above, the Special Rapporteur having in mind the information given in paragraphs 3 and 4 of the Commission's commentary to the article, wishes to draw attention to the provision of paragraph 1 of article 40 of the present draft according to which "the members of the family [ . . . ] enjoy the privileges and immunities specified in articles 30 to 38". He wishes also to point out that as regards these latter articles (30 to 38) only the last (article 38) makes specific reference to "members of the family". In these circumstances he takes the view that the phrase "or members of his family forming part of his household" in sub-paragraph (b) of paragraph 1 of article 38 is unnecessary and could with profit be deleted, a modification which would dispose of the drafting problems referred to in paragraph 2 above.

6. With respect to the editorial suggestions made by the Secretariat of the United Nations concerning paragraph 2, the Special Rapporteur is unable to agree with the Secretariat's contention that, as presently drafted the first sentence reads to the effect that the baggage is exempt "in one case or the other". In his view, that sentence reads rather to the effect that the baggage is exempt, whether it is that of the permanent representative or that of the member of the diplomatic staff. The Secretariat's amended version may give the impression that only that baggage is exempt which is at the same time "of the permanent representative and of the members of the diplomatic staff".

7. As regards the Secretariat's suggested replacement of the word "Such" by "In such cases" in the second sentence of paragraph 2, the Special Rapporteur considers that the use of the words "In such cases" at the beginning of that sentence would make the phrase more elegant and in conformity with the text of the corresponding provision of the Convention on Special Missions, arrived at after thorough discussion. He therefore agrees to its inclusion.

8. With respect to the comment made by UNESCO concerning paragraph 5 of the Commission's commentary to the article, the Special Rapporteur refers to his observations on a similar comment made by UNESCO in connexion with article 36. The comments of UNESCO should be taken into account if and when it is decided to

include the corresponding passage in the commentary to the final text of the article.

9. In the light of the foregoing considerations the Special Rapporteur proposes that the article be retained in its present form, with the changes referred to in paragraphs 5 and 7 above. Article 38 would, therefore, read as follows:

#### *Article 38. Exemption from customs duties and inspection*

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

(a) Articles for the official use of the permanent mission;

(b) Articles for the personal use of the permanent representative or a member of the diplomatic staff of the permanent mission, including articles intended for his establishment.

2. The personal baggage of the permanent representative or a member of the diplomatic staff of the permanent mission shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. In such cases, inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

#### *Article 39. Exemption from laws concerning acquisition of nationality*

##### (a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee at the twenty-fourth session of the General Assembly a number of representatives agreed that

the subject-matter of article 39 should be dealt with in the draft articles themselves and not be relegated to an optional protocol. Some representatives supported the provisions of the article as useful and as marking a real advance in the definition of the legal status of permanent missions. Other representatives considered, however, that the article required further refinement and expressed doubts as to whether it was compatible with legislation which allowed persons to avoid the application of nationality laws by an act of personal will (option or repudiation).<sup>109</sup>

2. In their written comments, three Governments addressed themselves to the question whether the provision of article 39 should be dealt with in the draft articles or in an optional protocol. One Government [Israel] referred to the remarks of its representative at the 1106th meeting of the Sixth Committee. Those remarks are reflected in the first sentence of the summary of the debate held in the Sixth Committee on article 39, included in the preceding paragraph. The remaining two Governments took a different position on the question.

3. The Government of Switzerland stated that it cannot agree with the views of the International Law Commission on article 39. Switzerland approves *per se* of the rule that the child of a

<sup>109</sup> Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 49.

member of the permanent mission may not acquire the nationality of the host State by the operation of *jus soli*. However, the rule laid down in article 39 is wider in scope: it covers all provisions for the automatic acquisition of the nationality of the host State, whether or not they make such acquisition dependent on residence in that State.

For the reasons which guided the Vienna Conferences of 1961 and 1963, the Swiss Government recommends that this provision should be dealt with in a separate protocol.

Another Government [United Kingdom] pointed out that certain States, including its own,

have not ratified the Optional Protocol concerning Acquisition of Nationality adopted with the Vienna Convention on Diplomatic Relations in 1961. It would be preferable once again to include this provision in an optional protocol.

4. In its editorial suggestions (A/CN.4/L.162/Rev.1, section B), the Secretariat of the United Nations expressed the view that

The first line should be amended to read "Members of the permanent mission *who are not* nationals . . .", which is the simplest and clearest way of expressing this idea in English, and is closer to the French and Spanish texts. The words "not being nationals" may suggest the meaning "because they are not nationals" which is not intended here.

#### (b) *Observations of the Special Rapporteur*

5. As regards the question whether the provision of article 39 should form an integral part of the draft articles themselves or be dealt with rather in a separate protocol, the Special Rapporteur notes the arguments advanced by two Governments in favour of the latter alternative. However, he remains convinced of the soundness of the Commission's approach, as reflected in paragraph 3 of its commentary to the article.

6. The Special Rapporteur is in agreement with the editorial suggestion of the United Nations Secretariat reproduced in paragraph 4 above.

7. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, subject to the change in drafting referred to in the preceding paragraph. Article 39 would, therefore, read as follows:

#### **Article 39. Exemption from laws concerning acquisition of nationality**

Members of the permanent mission who are not nationals of the host State, and members of their families forming part of their household, shall not, solely by the operation of the law of the host State, acquire the nationality of that State.

#### **Article 40. Privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff**

##### (a) *Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 40 related

to the article as a whole and to the concrete provisions of the four paragraphs of the article.

#### *Article as a whole*

2. In the course of the debate in the Sixth Committee, the view was expressed that

it was desirable to state that the privileges and immunities granted must be used for the sole purpose of assisting the persons enjoying them in the performance of their duties, and that any possibility of using such privileges or immunities for lucrative or other purposes extraneous to the requirements of the mission as such should be excluded.<sup>110</sup>

#### *Paragraph 1*

3. In its written comments, one Government [Canada] noted that in paragraph 1 of the article "the phrase 'or permanently resident in the host State' does not appear". In its opinion, the words "or permanently resident in" should be inserted after the words "if they are not nationals of".

#### *Paragraphs 2 and 3*

4. One Government [United Kingdom] stated that it "was not convinced of the justification for the privileges and immunities conferred by paragraph 2".

5. The secretariat of UNESCO stated the following:

[...] in article 40, paragraphs 2 and 3 [...] persons who are permanently resident in the host State are placed on the same footing as nationals of that State, which means that they are deprived of the essentials of diplomatic status. [...]

These provisions are regrettable. Such assimilation will enable States to refuse, or even to withdraw, privileges and immunities which have hitherto been granted. Moreover, permanent residence is not a concept which has a uniform interpretation (length of stay before taking up the post, conditions of stay, activity carried on, etc.); States might consider that a previous stay of one year, for example, could confer the status of permanent resident, within the meaning and for the purposes of the application of these provisions.

The Headquarters Agreement between France and UNESCO, dated 2 July 1954, has no clause of this nature; only the possession of French nationality places a restriction on certain privileges and immunities. Nevertheless, the French authorities, basing themselves on the provisions of the Vienna Convention on Diplomatic Relations (articles 37 and 38, which correspond to draft articles 40 and 41), did show a desire to place UNESCO officials who were considered to be permanent residents (one year's previous residence was sufficient for this) on the same footing as their French colleagues.

6. In its editorial suggestions the Secretariat of the United Nations took the view that, at the end of paragraph 3, the word "contained" should be replaced by "provided for". The Secretariat explained that this change would bring the wording into line with paragraph 2 of article 35 to which paragraph 3 of article 40 refers (A/CN.4/L.162/Rev.1, section B).

#### *Paragraph 4*

7. One Government [United Kingdom] held the view that "the private staff" referred to in paragraph 4 should not be accorded tax exemption.

<sup>110</sup> *Ibid.*, para. 50.



8. As regards the expression "private staff", the Government of Switzerland referred to its comment concerning article 35.<sup>111</sup>

(b) *Observations of the Special Rapporteur*

9. The Special Rapporteur notes that in the comment made in the Sixth Committee which is summarized above in paragraph 2 the expression "in the performance of their duties" is used. He therefore assumes that the comment referred exclusively to the members of the administrative and technical staff, to the members of the service staff and to the private staff, dealt with in paragraphs 2, 3 and 4 of article 40 and that it did not concern the members of the family dealt with in paragraphs 1 and 2. If that assumption is correct, he believes that the text of article 40 to a great extent meets the point made in the Sixth Committee. In effect paragraph 2 expressly states that the immunity of the members of the administrative and technical staff from the civil and administrative jurisdiction of the host State "shall not extend to acts performed outside the course of their duties". The immunity granted to the service staff in paragraph 3 is limited to acts "performed in the course of their duties". Under paragraph 4 the host State is only obliged to grant to the private staff exemption from dues and taxes on the emoluments they receive by reason of their employment.

10. The Special Rapporteur is of the opinion that the adoption of the suggestion reflected in paragraph 3 above would constitute a serious departure from the corresponding provision of the Vienna Convention on Diplomatic Relations and that such a departure has not been justified in the present case.

11. As regards the comments made by one Government and by UNESCO concerning paragraphs 2 and 3, reflected in paragraphs 4 and 5 above, the Special Rapporteur observes that in so far as they imply deletion of the provision, in the first case, or expansion of its scope, in the second case, both are also at variance with the corresponding provisions of the Convention on Diplomatic Relations. Moreover, the position of UNESCO under the Headquarters Agreement with France is entirely safeguarded by article 4 of the present draft articles.

12. The Special Rapporteur is in agreement with the editorial suggestion of the United Nations Secretariat reproduced in paragraph 6 above.

13. With respect to the view reflected in paragraph 7 above, concerning paragraph 4 of the article, the Special Rapporteur, while pointing out that the text of paragraph 4 refers to "private staff" and not to "private servants", is of the view that such a suggestion constitutes an unwarranted departure from the corresponding provision of the Vienna diplomatic precedent. As regards the comment referred to in paragraph 8 above, the Special Rapporteur recalls his observations thereon in the context of article 35.<sup>112</sup>

14. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, subject to the drafting change referred to in paragraph 12 above. Article 40 would, therefore, read as follows:

**Article 40. Privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff**

1. The members of the family of the permanent representative forming part of his household and the members of the family of a member of the diplomatic staff of the permanent mission forming part of his household shall, if they are not nationals of the host State, enjoy the privileges and immunities specified in articles 30 to 38.

2. Members of the administrative and technical staff of the permanent mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 30 to 37, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 32 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1 of article 38, in respect of articles imported at the time of first installation.

3. Members of the service staff of the permanent mission who are not nationals of or permanently resident in the host State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption provided for in article 35.

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

**Article 41. Nationals of the host State and persons permanently resident in the host State**

(a) *Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 41 related to expressions common to both paragraphs of the article, and to each of those paragraphs.

2. The secretariat of UNESCO expressed concern at the expression "permanently resident in" appearing in paragraphs 1 and 2 of article 41. Its comments on the matter have been reproduced under article 40.<sup>113</sup>

*Paragraph 1*

3. In the course of the debate in the Sixth Committee it was pointed out that

paragraph 1 of article 41 contained a drafting mistake which had appeared in the French text of the 1961 Vienna Convention on Diplomatic Relations, but had been corrected in the 1963 Vienna Convention on Consular Relations. It should be stated in the French

<sup>111</sup> See above, Article 35, para. 5 of the observations.

<sup>112</sup> *Ibid.*, para. 13.

<sup>113</sup> See above, Article 40, para. 5 of the observations.



text that the persons concerned "*ne bénéficient que de l'immunité de juridiction et de l'inviolabilité pour les actes officiels accomplis dans l'exercice de leurs fonctions*".<sup>114</sup>

4. In their written comments two Governments made similar remarks concerning the text of paragraph 1. Those remarks were as follows:

The word "only" should be replaced after "shall enjoy" instead of before "in respect" (cf. the English text of article 38 of the Vienna Convention on Diplomatic Relations and article 40 of the Convention on Special Missions) [United Kingdom].

Article 41, paragraph 1, perpetuates a drafting error which occurred in the French text of that Convention [on Diplomatic Relations] but which was corrected in article 71 of the Convention on Consular Relations; the paragraph in question should accordingly read: "[...] shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts [...]" [Belgium].

5. In its editorial suggestions, the Secretariat of the United Nations included the following passage concerning paragraph 1:

In the fourth line the words "who are nationals" should be replaced by "if they are nationals". The corresponding passage of the Convention on Diplomatic Relations (article 38, para. 1) reads "a diplomatic agent who is a national..." which makes it clear that all diplomatic agents are not (A/CN.4/L.162/Rev.1, section B).

## Paragraph 2

6. The Government of Switzerland referred to the comments it made in the context of article 35 concerning the expression "private staff".<sup>115</sup>

### (b) Observations of the Special Rapporteur

7. As regards the comments of the secretariat of UNESCO referred to in paragraph 2 above, the Special Rapporteur wishes to recall his observations thereon in the context of article 40.<sup>116</sup>

8. The Special Rapporteur considers that the comments reflected in paragraphs 3 and 4 above, concerning paragraph 1 of the article, are well founded. Indeed, there is a serious lacuna in the present drafting of paragraph 1. The paragraph deals only with the immunity from jurisdiction and the inviolability of the persons referred to therein and does not state whether those persons enjoy any other privileges and immunities. No such lacuna exists in the English texts of the corresponding provisions of the Vienna Convention on Diplomatic Relations (article 38, para. 1), the Vienna Convention on Consular Relations (article 71, para. 1) and the Convention on Special Missions (article 40, para. 1), since, in those provisions, the word "only" is placed after "shall enjoy". He therefore proposes that it be so placed in the English text of paragraph 1 of article 41 of the present draft and that the corresponding changes should be made in the French, Spanish and Russian texts of the paragraph.

9. With respect to the editorial suggestion of the United Nations Secretariat reproduced in paragraph 5 above, the

Special Rapporteur fails to understand why if, as asserted by the Secretariat, the words "who is a national" used in the singular in paragraph 1 of article 38 of the Convention on Diplomatic Relations make it "clear that all diplomatic agents are not", the words "who are nationals" used in the plural in paragraph 1 of article 41 of the present draft should not lead to the same conclusion. In this connexion the Special Rapporteur wishes to note that the proposed replacement of the words "who are nationals" by "if they are nationals" has been made in reference to paragraph 1 of the present article only, even though the words "who are nationals" also appear in paragraph 2 of both the present article and article 38 of the Convention on Diplomatic Relations. In these circumstances and having in mind that the use of the words "who are nationals" in paragraph 1 of article 41 is due to the plurality of subjects to which they refer, unlike the case of paragraph 1 of article 38 of the Vienna Convention, the Special Rapporteur does not find enough justification to make him support the suggested change.

10. As regards the comments of the Government of Switzerland referred to in paragraph 6 above, the Special Rapporteur recalls his observations thereon in the context of article 35.<sup>117</sup>

11. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, subject to the drafting changes referred to in paragraph 8 above. Article 41 would, therefore, read as follows:

### **Article 41. Nationals of the host State and persons permanently resident in the host State**

1. Except in so far as additional privileges and immunities may be granted by the host State, the permanent representative and any member of the diplomatic staff of the permanent mission who are nationals of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of their functions.

2. Other members of the staff of the permanent mission and persons on the private staff who are nationals of or permanently resident in the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those members and persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

### **Article 42. Duration of privileges and immunities**

#### **(a) Observations of Governments and international organizations**

1. The comments made by Governments and international organizations in connexion with article 42 related to all the paragraphs of the article and to the question raised in paragraph 2 of the Commission's commentary on the article.

#### **Paragraph 1**

2. One Government [Israel] noted in its written comments that:

<sup>114</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 51.*

<sup>115</sup> See above, Article 35, para. 5 of the observations.

<sup>116</sup> See above, Article 40, para. 11 of the observations.

<sup>117</sup> See above, Article 35, para. 13 of the observations.

The Vienna Convention on Diplomatic Relations [article 39, paragraph 1] reads: "from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed". On the other hand the present text reads: "from the moment when his appointment is notified to the host State". No reason for this change is given in the commentary, and [that Government] feels that the earlier text is preferable as being more precise.

### 3. Another Government [Canada] suggested that:

Article 42, paragraph 1 should be amended; according to the present text, a person could be entitled to privileges and immunities from the moment his appointment is notified to the host State by either the organization or the sending State. This paragraph creates an artificial relationship between the host State and the sending State. Consequently, we consider that only notification by the organization should be relevant.

4. In its editorial suggestions the Secretariat of the United Nations expressed the view that in the fourth line of paragraph 1 it would be better to say "if *he is* already in its territory" instead of "if already in its territory" (A/CN.4/L.162/Rev.1, section B).

### Paragraph 2

5. With respect to the omission in paragraph 2 of the expression "but shall subsist until that time, even in case of armed conflict", which appears in paragraph 2 of article 39 of the Vienna Convention on Diplomatic Relations, one Government [Yugoslavia] expressed the following view in its written comments:

As regards the duration of privileges and immunities, the incorporation in their entirety of the basic provisions of article 39 of the Convention on Diplomatic Relations would be justified. The reason is that, as experience has shown, representatives of States, especially those accredited to international organizations, occasionally find themselves in a situation where they cannot perform their normal functions, not only in the case of armed conflict, but also in the case of a grave deterioration in international relations.

6. The Secretariat of the United Nations made the following editorial suggestions concerning paragraph 2 of article 42:

At the end of the first sentence of paragraph 2, it would be better to say "or on the expiry". See paragraph 3 of this article. In the last line of paragraph 2 the words "continue to" are redundant and should be deleted. These words are taken from paragraph 2 of article 39 of the Convention on Diplomatic Relations. Their *raison d'être* there is the phrase "but shall subsist until that time, even in case of armed conflict", which appears at the end of the first sentence of the paragraph. That phrase is not reproduced in paragraph 2 of article 42 (A/CN.4/L.162/Rev.1, section B).

### Paragraphs 2 and 3

7. In the course of the debate in the Sixth Committee, the use of the expression "a reasonable period" in paragraph 2 of article 42 "was criticized on the basis that it was not clear what interpretation should be given to it".<sup>118</sup> A similar view was expressed by a Government [Madagascar] in its written comments.

8. The Secretariat of the United Nations noted in its editorial suggestions that

Although the expression "the country" in paragraphs 2 and 3 is taken from article 39 of the Vienna Convention [on Diplomatic Relations], it would be preferable to replace it by "the territory of the host State" which appears in article 108 [of the present draft] (A/CN.4/L.162/Rev.1, section B).

### Paragraph 4

9. One Government [Canada] stated in its written comments that

It is understood that the movable property of a member of the permanent mission or a member of his family referred to in paragraph 4 does not include "property of an investment nature".

10. The Secretariat of the United Nations made the following editorial suggestion:

For the sake of uniformity and conciseness the last sentence of paragraph 4 should be amended to bring it into line with article 109, paragraph 2. It would then read "Estate, succession and inheritance duties shall not be levied on movable property *which is in the host State solely because* of the presence there of the deceased as a member of the permanent mission or of the family of a member of the permanent mission".

The Secretariat noted that

As presently drafted, that sentence is taken from the corresponding provision of the Convention on Diplomatic Relations (article 39, para. 4). On the other hand, the Convention on Special Missions uses the formula "which is in the receiving State solely because" (article 44, para. 2). (A/CN.4/L.162/Rev.1, section B.)

### *The question raised in paragraph 2 of the Commission's commentary on article 42*

11. In paragraph 2 of its commentary on article 42 the Commission noted that paragraphs 1 and 2 of the article relate to persons who enjoy privileges and immunities in their official capacity. It added:

For those who do not enjoy privileges and immunities in their official capacity other dates may apply, viz. the dates of commencement and termination of the relationship which constitutes the grounds for the entitlement. The Commission noted that the Vienna Convention on Diplomatic Relations did not contain any specific provisions on the question, whereas the Vienna Convention on Consular Relations did so in article 53. The Commission wished to invite the views of governments as to whether it was desirable to include a provision on these lines.

12. Four Governments responded to the Commission's invitation. One Government [Sweden] considered that,

*Prima facie* it would seem preferable to have a special provision on the matter. The fact that the more recent of the two [Vienna] Conventions contains such a provision might perhaps also be taken as an indication that experience has shown it to be desirable.

Another Government [Finland] took the view that

It would perhaps be well-founded to include also provisions regarding the commencement and termination of privileges and immunities received on other grounds than the official post, for example, through family membership, in the same way as has been done in the Convention on Consular Relations.

Two other Governments [Madagascar and Netherlands] likewise expressed support for the inclusion of such a provision.

<sup>118</sup> Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 52.

(b) *Observations of the Special Rapporteur*

13. With respect to the comments quoted in paragraph 2 above, the Special Rapporteur observes that the expression "notified to the Ministry of Foreign Affairs [of the receiving State] or such other ministry as may be agreed" is used in article 39 of the Vienna Convention on Diplomatic Relations because the same expression appears in article 10 of that Convention, relating to notifications. Since that expression does not appear in the article on notifications in the present draft—article 17—it would not seem logical to use it in article 42.

14. With respect to the comments quoted in paragraph 3 above, the Special Rapporteur believes that the present text is in conformity with the provisions of paragraphs 3 and 4 of article 17 of the present draft. In this connexion, the Special Rapporteur wishes to point out that as regards notifications under article 17 the obligation of the sending State is in relation to the organization; with respect to the host State, the sending State is granted a right. Further, that the organization has the obligation to transmit to the host State the notifications provided for in the article, received from the sending State. It is clear, therefore, that under article 17, the host State is, in all cases, the ultimate recipient of the notifications emanating from the sending State. In these circumstances, the provision of paragraph 1 of article 42, in so far as it specifically covers the right of the receiving State to make the notification of appointment directly to the host State, would ensure that the enjoyment of privileges and immunities would not be affected by delays in the transmission to the host State, by the organization, of the notification in question.

15. The Special Rapporteur is in agreement with the editorial suggestion of the United Nations Secretariat reflected in paragraph 4 above.

16. The comments quoted in paragraph 5 above relate to the question of the possible effects of exceptional situations<sup>119</sup>—a question which is dealt with elsewhere in the present report.<sup>120</sup>

17. The Special Rapporteur is in agreement with the editorial suggestions of the United Nations Secretariat reproduced in paragraph 6 above.

18. As regards the criticism of the use of the expression "a reasonable period", recorded in paragraph 7 above, the Special Rapporteur considers that the observations he made in the context of article 23<sup>121</sup> are equally applicable in the case of expressions such as "reasonable" or "normally", the latter found also in paragraph 2 of the article. The Special Rapporteur wishes also to recall that similar expressions are found in article 39 of the Convention on Diplomatic Relations; however, no comments were made by Governments drawing attention to difficulties encountered by them in practice as regards the

application of the provision of the Vienna Diplomatic precedent.

19. The Special Rapporteur expresses his agreement with the editorial suggestion of the United Nations Secretariat reflected in paragraph 8 above to replace the expression "the country" by "the territory of the host State" in paragraphs 2 and 3 of the article. However, he wishes to point out that the expression "the country" appears also in paragraph 4 of the article. The Special Rapporteur appreciates the shades of meaning of that expression as it is used in paragraph 4 and both in paragraphs 2 and 3, and understands, therefore, why the Secretariat refrained from making its suggestion applicable also to paragraph 4. Nevertheless, for the sake of consistency and uniformity particularly as regards paragraphs of the same article, the Special Rapporteur considers that the expression "the country" in paragraph 4 should likewise be replaced. As the expression "host State" appears already three times in paragraph 4, he is of the view that the words "its territory" be substituted for "the country" in that paragraph.

20. With respect to the comment referred to in paragraph 9 above, the Special Rapporteur observes that no indication was given as to what is meant by the expression "property of an investment nature". He is, therefore, not in a position to give a reply in the abstract to the question whether such property is "movable property" in the sense of paragraph 4 of the article.

21. The Special Rapporteur notes the explanation of the United Nations Secretariat that its suggested formula for paragraph 4 of the article, quoted in paragraph 10 above, is, with the requisite adaptation, the same used in article 44, paragraph 2 of the Convention on Special Missions. In this connexion, the Special Rapporteur wishes to indicate that he appreciates the difficulties created by the wording of the second sentence of paragraph 4 of article 39 of the Vienna Convention on Diplomatic Relations, on which article 42 of the present draft is based, which prompted the use of a different formula in the corresponding provision of the Convention on Special Missions. However, he is not entirely convinced that the use of this latter formula would render the meaning of paragraph 4 of article 42 any clearer than it is as presently drafted. He therefore submits for the consideration of the Commission, the following wording for the second sentence of paragraph 4 of the article:

Estate, succession and inheritance duties shall not be levied on movable property which, at the time of the death of a member of the permanent mission or of a member of the family of a member of the permanent mission, was in the host State solely because of the presence there of the deceased.

22. In view of the comments reflected above in paragraph 12, the Special Rapporteur has deemed it appropriate to submit for the Commission's consideration the text for a new provision on the question referred to by the Commission in paragraph 2 of its commentary on article 42, based on the corresponding provision (paragraph 2 of article 53) of the Vienna Convention on Consular Relations. The new provision has been inserted as paragraph 2 of the text proposed below by the Special

<sup>119</sup> *Yearbook of the International Law Commission, 1969*, vol. II, p. 206, document A/7610/Rev.1, para. 18.

<sup>120</sup> See above, p. 15, document A/CN.4/241 and Add.1 and 2, paras. 30-31.

<sup>121</sup> See above, Article 23, para. 8 of the observations.

Rapporteur for article 42. As a result of that insertion the provisions of the first sentence of the former paragraph 2 of article 42 have been redrafted in the light of paragraph 3 of article 53 of the Vienna Convention and constitute the new paragraph 3 of the text of article 42. The provisions of the second sentence of the former paragraph 2 form the new paragraph 4. For the sake of clarity and in order to follow the wording of article 53 of the Convention on Consular Relations, the Special Rapporteur suggests that, in those latter provisions the words "from jurisdiction" should be added after "immunity" and the words "without limitation of time" after "shall subsist". These suggestions are included between brackets in the text proposed below. The former paragraphs 3 and 4 of article 42 have been renumbered 5 and 6 in the text proposed below. Finally, the word "person" in paragraph 1 of the article has been replaced by "member of the permanent mission".

23. In view of the foregoing the Special Rapporteur proposes the following text for article 42:

**Article 42. Duration of privileges and immunities**

1. Every member of the permanent mission entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State on proceeding to take up his post or, if he is already in its territory, from the moment when his appointment is notified to the host State by the Organization or by the sending State.

2. Members of the family of a member of the permanent mission forming part of his household and members of his private staff shall receive the privileges and immunities to which they are entitled from the date from which he enjoys privileges and immunities in accordance with paragraph 1 of this article or from the date of their entry into the territory of the host State or from the date of their becoming a member of such family or private staff, whichever is the latest.

3. When the functions of a member of the permanent mission have come to an end, his privileges and immunities and those of a member of his family forming part of his household or a member of his private staff shall normally cease at the moment when the person concerned leaves the territory of the host State or on the expiry of a reasonable period in which to do so, whichever is sooner. In the case of the persons referred to in paragraph 2 of this article, their privileges and immunities shall come to an end when they cease to belong to the household or to the private staff of a member of the permanent mission provided, however, that if such persons intend leaving the territory of the host State within a reasonable period thereafter, their privileges and immunities shall subsist until the time of their departure.

4. However, with respect to acts performed by a member of the permanent mission in the exercise of his functions, immunity [from jurisdiction] shall subsist [without limitation of time].

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

6. In the event of the death of a member of the permanent mission not a national of or permanently resident in the host State or of a member of his family forming part of his household, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in its territory, the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property which, at the time of the death of a member of the permanent mission or of a member of the family of a member of the permanent mission, was in the host State solely because of the presence there of the deceased.

**Article 43. Transit through the territory of a third State**

**(a) Observations by Governments and international organizations**

1. The comments made by Governments and international organizations in connexion with article 43 related to the article as a whole and specifically to paragraphs 1, 2 and 4 of the article.

**Article as a whole**

2. In its written comments, one Government [Sweden] observed that

The immunities to be accorded by a third State under this article are made dependent on the condition that the person enjoying them was granted by that State, "a passport visa if such visa was necessary". During the discussion in the Commission the question was raised of deleting that condition, and arguments were presented for and against the requirement of a visa. A case could be made for the omission of the said requirement, in the cases where the transit country is a member of the organization. It is questionable, however, whether this would be realistic. States may not wish to dispense with their option of requiring transit visa as a condition for an obligation to guarantee unimpeded and inviolable transit.

**Paragraph 1**

3. One Government [Israel] suggested that the last sentence of paragraph 1 of the article be reworded as follows:

The same shall apply only in the case of any members of the family of the permanent representative or members of the diplomatic staff of the permanent mission enjoying privileges and immunities who are accompanying them or travelling separately to join them or to return to their own country.

In its view "the substitution of 'any members' for 'the members' would bring the text into line with that of article 40 of the Vienna Convention on Diplomatic Relations".

**Paragraph 2**

4. In its editorial suggestions, the Secretariat of the United Nations expressed the view that

The words "and of members" should be replaced by "or of members" since the sentence is negative. As it stands, the paragraph means that third States may not hinder both the members and their families, which implies that they may hinder either one of them without the other.

The Secretariat pointed out that the expression "and of members" is taken from the Convention on Diplomatic Relations (article 40, para. 2). The expression "or of members" appears in the Convention on Special Missions (article 42, para. 2). (A/CN.4/L.162/Rev.1, section B).

**Paragraph 4**

5. The Secretariat of the United Nations also suggested that in paragraph 4 "the words 'whose presence' should be replaced by 'when their presence' since the presence of the persons and objects mentioned is not always due to *force majeure*". The Secretariat observed that "the expres-

sion 'whose presence' appears in the Convention on Diplomatic Relations (article 40, para. 4). The Convention on Special Missions uses the expression 'when the use of the territory' (article 42, para. 5)" (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

6. As regards the comments reflected in paragraph 2 above, the Special Rapporteur recalls the view he expressed during the discussion in the Commission to the effect that

There was perhaps a case in positive international law, by virtue of Articles 104 and 105 of the United Nations Charter, for imposing on third States the obligation to permit transit. Since the question belonged to the progressive development of international law, it was for the Commission to decide whether a positive obligation existed, or whether international law did not yet impose it.<sup>122</sup>

As the commission's position on the question has been reflected in the text of the article as presently drafted, in the light of the explanations given in paragraph 4 of its commentary to the article, the Special Rapporteur defers to the Commission's decision, also in so far as it relates to the exceptional situation of members of the permanent mission who are nationals of a land-locked State, with which the comments referred to in paragraph 2 above generally concur.

7. With respect to the suggested rewording of the last sentence of paragraph 1, reflected in paragraph 3, above, the Special Rapporteur agrees with the contention that "the substitution of 'any members' for 'the members' would bring the text into line with that of article 40 of the Vienna Convention on Diplomatic Relations". However, he is of the view that such contention supports only the change to which it relates and not the remaining changes which the suggested rewording introduces to the Vienna diplomatic precedent. The Special Rapporteur wishes to point out that with the exception of the word "the" the last sentence of paragraph 1 of article 43 textually reproduces, with the requisite adaptations, the provisions of the corresponding article (article 40) of the Convention on Diplomatic Relations. Also, that paragraph 1 of article 42 of the Convention on Special Missions follows the Vienna diplomatic precedent as regards the placing of the members of the phrase constituting the last sentence. In the opinion of the Special Rapporteur the suggested rewording may give the impression that the requirement of "enjoying privileges and immunities" concerns the members of the diplomatic staff and not the members of the family. Also, the use of the word "them" instead of "his" may be interpreted as implying that the members of the family must accompany, or travel separately to join, both the permanent representative and the members of the diplomatic staff in order to be covered by the provision of article 43. The Special Rapporteur recognizes that as presently drafted, the last sentence of paragraph 1 may not be the most felicitous text. Nevertheless, he believes that it brings forth the meaning intended in more clear and unambiguous terms than does the suggested reword-

ing. He would, however, have no objection to the replacement of the present text by one corresponding to the text used in the last sentence of paragraph 1 of article 42 of the Convention on Special Missions, substituting "one of the persons" for "the person".

8. The Special Rapporteur finds merit in the editorial suggestions of the United Nations Secretariat concerning paragraphs 2 and 4 of the article, reflected in paragraphs 4 and 5 above.

9. In the light of the foregoing, the Special Rapporteur proposes the following amended text for article 43:

**Article 43. Transit through the territory of a third State**

1. If the permanent representative or a member of the diplomatic staff of the permanent mission passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying one of the persons referred to in this paragraph, whether travelling with him or travelling separately to join him or to return to their country.

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

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the host State. They shall accord to the couriers of the permanent mission who have been granted a passport visa if such visa was necessary, and to the bags of the permanent mission in transit the same inviolability and protection as the host State is bound to accord.

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

**Article 44. Non-discrimination**

(a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee a number of representatives agreed that article 44

should be removed to the end of the whole draft. Some representatives supported the provisions of the article and the view expressed in paragraph 4 of the Commission's commentary that the privileges and immunities granted should not be subject to particular conditions imposed, on a basis of reciprocity, upon the diplomatic missions of particular States. Other representatives, however, considered that, in examining certain exceptional circumstances, such as the participation in an organization of States that were not recognized, it would be found that the rule had sometimes been varied on grounds of the lack of reciprocity.<sup>123</sup>

2. In its written comments, one Government [Yugoslavia] indicated that it regarded

<sup>122</sup> *Yearbook of the International Law Commission, 1969, vol. I, p. 36, 997th meeting, para. 15.*

<sup>123</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 53.*

the introduction of the principle of non-discrimination as being of vital importance for the draft articles as a whole. To ensure the scrupulous application of the principle in practice, the draft should provide for the protection of the State sending the permanent mission against discrimination by the host State such as could result, for example, from the absence of diplomatic relations.

In this connexion, it pointed out that

The host State has already been given special protection in draft article 45, and there is no reason for making the observance of the principle of non-discrimination subject to special conditions.

3. Another Government [Belgium], however, considered that this article on non-discrimination was "unacceptable", unless provision was made for the principle of reciprocity. In its view, it was

hardly admissible that the permanent mission of a sending State should be able to enjoy a more favourable status than the same State's diplomatic mission although, of course, the advantages deriving from the status of representative of a State under the statutory rules of the organization must in any event be safeguarded. However, while the status of representative of a State as such must be determined in accordance with those rules, diplomatic status is a matter involving relations between the host State and the sending State.

4. In the course of the debate in the Sixth Committee a rewording of the text was suggested, as follows: "In the application of the provisions of the present articles, there shall be no discrimination against any State".<sup>124</sup>

5. The same rewording as suggested in the Sixth Committee was proposed by one Government [Netherlands] in its written comments on the article.

6. Another Government [Israel] noted that article 44

is worded in the passive: "no discrimination shall be made". The corresponding passage in article 47, paragraph 1, of the Vienna Convention on Diplomatic Relations is worded in the active: "the receiving State shall not discriminate". Paragraph 6 of the commentary explains this difference by the fact that in the case of the present articles the obligation applies not merely to the host State, but also to the Organization. The Government [. . .] considers that it would be better if this were made explicit, and suggests redrafting the article along the following lines: "In the application of the provisions of the present articles, no discrimination shall be made as between States by the host State or the Organization."

#### (b) *Observations of the Special Rapporteur*

7. As regards the question of the placement of the article mentioned during the debate in the Sixth Committee, the Special Rapporteur wishes to refer to his observations on the contents and title of part I.<sup>125</sup>

8. With respect to the question of reciprocity the Special Rapporteur wishes merely to refer to the Commission's commentary on article 44 (paras. 4 and 5). That commentary clearly explains why the rules on reciprocity applicable to bilateral diplomacy have no relevancy in multilateral diplomacy.

9. The observations (quoted in para. 2 above) on the necessity to protect the sending State against discrimina-

tion resulting from the absence of diplomatic relations concern the question of the possible effects of exceptional situations, which is examined elsewhere in the present report.<sup>126</sup>

10. As regards the suggestion for a change in the text, made in the comments referred to in paragraph 6 above, the Special Rapporteur observes that the amended version would not cover third States. He wishes to recall in this connexion that the Commission pointed out in paragraph 6 of its commentary on the article that the article is formulated in such broad terms as to make its field of application cover all the obligations provided for in the draft, whether assumed by the host State, the Organization or third States.<sup>127</sup>

11. There appears to be no substantial difference between the present text of article 44 and the rewording suggested in the Sixth Committee. The Special Rapporteur notes, however, that the present text uses the language appearing in paragraph 1 of article 49 of the Convention on Special Missions. In order to facilitate the task of those who will be called upon to interpret both that Convention and the instrument embodying the present articles, the Special Rapporteur suggests that no rewording should be made of the text of article 44.

12. In view of the foregoing, the Special Rapporteur proposes the retention of the article in its present form. Article 44 would, therefore, read as follows:

#### *Article 44. Non-discrimination*

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

### SECTION 3. CONDUCT OF THE PERMANENT MISSION AND ITS MEMBERS

#### *Article 45. Respect for the laws and regulations of the host State*

##### (a) *Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 45 related to the article as a whole and to each of the three paragraphs of the article.

##### *Article as a whole*

2. In the course of the debate in the Sixth Committee it was pointed out in general that article 45 "was the result of a compromise and had the merits and defects of a compromise".<sup>128</sup>

##### *Paragraph 1*

3. Also in the course of the debate in the Sixth Committee the opinion was expressed that

<sup>124</sup> *Ibid.*

<sup>127</sup> Italics supplied by the Special Rapporteur.

<sup>128</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 54.*

<sup>125</sup> *Ibid.*

<sup>126</sup> See above, p. 15, document A/CN.4/241 and Add.1 and 2, paras. 30-31.

The rule in paragraph 1 might be misinterpreted to mean that failure by a member of the permanent mission to respect the laws and regulations of the host State would absolve that State from the obligation to respect the immunity which he enjoyed.<sup>129</sup>

### Paragraph 2

4. In the course of the debate in the Sixth Committee the question was raised whether, in the absence of the *persona non grata* procedure, and since the functions of a representative to an international organization were defined to a large extent by the draft articles themselves,

the sending State ought not to be obliged to recall a representative in case of a gross breach on his part of the obligations imposed on him by the draft articles.<sup>130</sup>

Surprise was voiced that the draft articles

did not contain a provision for the possible expulsion of persons enjoying immunity, several examples of which could be found in existing agreements. The suggestion was also made that a careful search be made for another formula to replace the adjective "manifest" which might be the subject of a real dispute.<sup>131</sup>

5. In its written comments the Government of Switzerland indicated that it appreciated "the intention of the Commission in inserting in article 45 a paragraph on the recall of members of the permanent mission". Another Government [Israel] also stated that it appreciated "the problems with which the International Law Commission is endeavouring to grapple" and considered that

there is no objection in principle to recognizing that under the circumstances envisaged the host State should have the right to request the sending State to take appropriate steps. Any dispute arising out of such a request would be dealt with under the provisions of article 50.

6. In the opinion of one Government [Sweden] it was "open to doubt whether the paragraph would fulfil" the expectation referred to in paragraph 3 of the commentary to the article. In its view several questions might be raised such as:

What happens if the host State asserts and the sending State denies that the person has committed a "grave and manifest violation of the criminal law of the host State"? Does the person have to leave or could he stay? Is it reasonable to provide that only in case of grave and manifest violation of the criminal law the host State is entitled to demand his recall? What will happen if the person concerned, in violation of paragraph 1 of article 45, makes political propaganda involving the host State or, in violation of article 46, exercises a professional or commercial activity? Are these provisions without a sanction?

Similarly, another Government [Australia], after pointing out that the draft articles contain no provision for the declaration by the host State of an unwelcome representative to the international organization as *persona non grata*, observed that

This omission is apparently intended to safeguard the independent exercise of their functions by representatives to the international organizations and to isolate them from the exercise of pressures by the host State. This, of course, must be a primary object: but the ambit of the functions of a representative to an international organization is defined to a large extent by the terms of the draft

articles themselves and a question arises whether the sending State ought not be obliged to recall a representative (or whether indeed a host State, after consultation with the organization, should not have the right to expel a representative) in the case of a gross breach by the representative of the obligations imposed on him by the articles—for example, in the case of breach by a representative to an international organization of his duty not to interfere in the internal affairs of the host State. The draft articles do not adopt this approach but oblige the sending State to recall a representative or otherwise deal with him only in the case of a grave and manifest violation of the criminal law of the host State. Furthermore, what is a grave violation of the criminal law may be the subject of general agreement; but whether in any particular case, a violation of that law is manifest may be the subject of real dispute. Accordingly, if this provision is to be retained, perhaps some other formula should be chosen.

7. One Government [United Kingdom] took the view that "when possible, Governments should be encouraged to waive immunity rather than simply recall the person concerned". Another Government [Belgium], considering that paragraph 2 of the article did not "go far enough", took the view that "the host State should be able to declare [the person enjoying privileges and immunities] *persona non grata*". Another Government [Netherlands], considering that the position of the host State was insufficiently guaranteed in the draft, concluded that, *inter alia*, the provision of paragraph 2

would have to apply not only in case of grave and manifest violation of the criminal law of the host State but also in case of grave and manifest violation of the obligations laid down in paragraph 1 of that article.

8. The Government of Switzerland expressed the view that

The obligation laid upon the sending State depends upon its goodwill and upon its interpretation of the violations. When, as has in fact occurred, the violation consists of an infringement of the security of the host State, the sending State can hardly be expected to recall the offender spontaneously. Yet recall is absolutely necessary in such cases.

It therefore suggested "two possible ways of replacing article 45, paragraph 2, by a more satisfactory provision": one would consist in the inclusion of

(a) A general provision on the protection of the security of the host State, such as those included in several headquarters agreements; this could read as follows:

"Nothing in these articles shall affect the right of the host State to take the necessary precautions in the interest of its security. In taking the necessary measures, which should be proportionate to the needs, the host State shall take due account of the interests of the organization and of the sending State. It shall enter into contact with them, as soon as circumstances permit, with a view to reaching agreement on appropriate measures to ensure the protection of those interests."

(b) For the second suggestion see paragraph 11 below.

9. Another Government [Israel] considered that on the basis of its general comments (see para. 5 above) "a more satisfactory formulation" of article 45 could read:

"If the host State has strong grounds for believing that a criminal offence involving ignominy has been committed against its laws by any person enjoying immunity from criminal jurisdiction, then it may notify the sending State of this, and the latter shall in that case either waive the aforesaid person's immunity, recall him, terminate his functions with the mission or secure his departure, as appropriate."

<sup>129</sup> *Ibid.*, para. 55.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*, para. 56.



The Government indicated that the phrase "a criminal offence involving ignominy" had been explained in its observations on article 10 and observed that

Should the suggestions made for that article find expression in the Commission's final text, it is believed that article 45 should be coordinated with it.

#### 10. The Secretariat of the United Nations observed that

Under the present formulation of the draft articles, if there was a serious abuse of the privilege of residence which does not constitute a grave and manifest violation of criminal law—for example, conspicuous interference in the internal political affairs of the host State, or running an extensive private business without permission, or even a long series of minor offences showing contempt for the local law—the only thing the host State could do to stop the abuse would be to consult with the sending State and the organization under article 50. If, however, duties are imposed only on the individuals concerned (as under the present article 45, paragraph 1, and article 46) and not on the sending State, the latter would have no legal obligation to take action, and the consultation might not be fruitful.

The United Nations Secretariat therefore suggested that the obligation laid down in paragraph 2 "be broadened to bring it into line with the corresponding provision of the Headquarters Agreement of the United Nations" (section 13, para. (b)) where the language is "in case of abuse of such privileges of residence by any such person in activities in the United States outside his official capacity". The Secretariat pointed out that this language had been followed in other headquarters agreements and conference agreements. In its view, therefore, the practice in the wording of agreements supported a broader formulation than that in the present draft. The Secretariat further observed that

There have also been cases of abuse of the privilege of residence, for example by engaging in commercial activity in the host State without that State's permission, which have led a sending State to recall the persons involved after protest by the host State.

The Secretariat considered that the incorporation of its suggestion would make the provision

cover any serious abuse of the privilege of residence, whether or not it constitutes a grave and manifest violation of criminal law, subject only to the proviso already included in the last sentence of paragraph 2.

#### 11. The Government of Switzerland also considered that one of the two possible ways of replacing paragraph 2 would be to include

a provision on the procedure to be followed in the event of expulsion, such as that contained in section 13 of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations.

#### 12. With reference in particular to the second sentence of paragraph 2, in the course of the debate in the Sixth Committee it was considered that

the provisions of paragraph 2 did not fully guarantee to members of permanent missions the free performance of their functions, since they did not always perform their functions on the premises of the organization or the permanent mission.<sup>132</sup>

#### 13. In its written comments the Government of Switzerland explained that one of the reasons why it regarded

paragraph 2 inadequate was that it excluded "offences committed within the premises of the mission, which implies that such offences do not fall within the jurisdiction of the host State". Another Government [Belgium] considered that "the last sentence of paragraph 2 reintroduces the principle of extritoriality, although this had been dropped in the Convention on Diplomatic Relations". Referring also to the second sentence of paragraph 2, one Government [Sweden] questioned the desirability of the provision contained therein. In its view,

It was one thing that the person concerned should not be prosecuted, but it [was] another matter whether there should not be the sanction of recall. It can hardly be in the interest of the organization concerned that a person who has committed a serious crime in exercising his functions—if such a situation is at all conceivable—should continue to serve as a member of a permanent mission. It is difficult, moreover, to imagine that the activities of the mission would be seriously disturbed by such a person being recalled.

#### 14. In this connexion, the secretariat of UNESCO expressed the view that

It is normal that the obligations it lays down should not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission within the organization but it is not normal that this non-application should also cover an act performed "within [...] the premises of a permanent mission". The important point was that the act should have been performed in carrying out the functions in question, but it does not matter where the act—official or private—has been performed. If an act had only to be performed on the premises of a permanent mission in order to escape the applicability of the obligations set forth in article 45, the result would be a partial revival of the notion of extritoriality, which, however, is nowadays rejected both by the courts and by writers on legal topics.

#### 15. In its editorial suggestions the Secretariat of the United Nations took the view that the word "either" before "the Organization" should be deleted and the word "on" should be inserted before "the premises": it pointed out that the word "either" was unnecessary here and that "on the premises" was a recognized expression frequently used in legal documents. (A/CN.4/L.162/Rev.1, section B.)

#### Paragraph 3

#### 16. In the course of the debate in the Sixth Committee it was considered that

The inclusion of the phrase "as laid down in the present Convention" would lessen the risk of arbitrary interpretations by the authorities of the host State, particularly in view of the general reservation contained in article 4 of the draft articles; its omission would imply the prevalence of the headquarters agreements concluded between the host State and the organization.<sup>133</sup>

#### 17. In its written comments, one Government [Israel] took the view that "the words 'the exercise of', which do not appear in the corresponding provisions of the Vienna Convention on Diplomatic Relations (article 41) seem superfluous". Another Government [Netherlands] proposed to insert the words "and means of transport" after the word "premises".

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*, para. 57.



(b) *Observations of the Special Rapporteur*

18. The Special Rapporteur wishes to stress at the outset that, as was pointed out in the Sixth Committee (see para. 2 above), article 45 is the result of a painstaking compromise arrived at in the Commission, which has "the merits and defects of a compromise". For the purposes of the present report, and in the light of the inconclusive comments of Governments and international organizations on the question as systematically presented in the preceding section, he does not deem it appropriate to jeopardize the delicate balance achieved in the Commission after a lengthy debate by introducing at this stage any substantial change in the general economy of the article which he is to submit to the Commission for its consideration and final decision.

19. As regards the views expressed in the Sixth Committee concerning paragraph 1 of the article (see para. 3 above), the Special Rapporteur wishes to point out that that paragraph is based on article 41, paragraph 1, of the Vienna Convention on Diplomatic Relations and on article 48, paragraph 1, on the Convention on Special Missions. The Special Rapporteur wishes also to recall that in his fourth report, he expressly stated in the commentary to the article<sup>134</sup> that the failure by a member of the permanent mission who enjoys immunity from jurisdiction to fulfil his obligations does not absolve the host State from its duty to respect the member's immunity. He remains of the same opinion.

20. As regards paragraph 2, to which most of the comments made on article 45 by Governments and international organizations referred, the Special Rapporteur notes that those comments are but the reflection of basic positions ranging from that which would favour the introduction of the *persona non grata* procedure in the context of the present draft to those favouring the retention of the substance of the provision, implied in suggestions of a more limited terminological character. The Special Rapporteur is of the view that some of those comments might suggest ways which the Commission could usefully explore, were it decided to alter the approach reflected in the present text. Once the Commission is agreed on the substance of the text, the Special Rapporteur would submit for its consideration an appropriate text, having in mind the comments made by Governments and international organizations mentioned above. The Special Rapporteur, nevertheless wishes to point out that it has been widely admitted that the *persona non grata* procedure is not applicable in the context of relations between States and international organizations and that paragraph 2 provides a substitute to that procedure in order to ensure the protection of the host State. While recognizing the necessity to protect adequately the interests of the host State, the Special Rapporteur points out that it is equally necessary to safeguard the independent exercise of their functions by representatives to international organizations. He believes that the present text of paragraph 2 gives due recognition to these two requirements and therefore does not propose

to introduce substantive changes to that paragraph as it is to be included in the texts he is to submit for article 45 in the present report.

21. With respect to the drafting point raised by the Secretariat of the United Nations referred to in paragraph 15 above, the Special Rapporteur feels unable to accept it; he wishes to recall in this connexion that a similar suggestion made by a member of the Commission during its discussion of the article failed to gain the approval of the Commission.<sup>135</sup>

22. With respect to the comment recorded in paragraph 16 above concerning paragraph 3 of the article, the Special Rapporteur wishes to point out that during the Commission's discussion it was decided to drop the phrase "as laid down in the present articles . . .", which appears *mutatis mutandis* in the corresponding provisions of the Convention on Diplomatic Relations (article 41, para. 3) and the Convention on Special Missions (article 47, para. 2).<sup>136</sup> That phrase was deemed unnecessary, particularly in the light of article 4 of the present draft. In that respect, the Special Rapporteur wishes to point out that the Commission has already agreed that the draft articles are without prejudice to different rules which may be laid down in headquarters agreements (paragraph 2 of the commentary to article 4). The prevalence of the headquarters agreements is therefore an established fact and the inclusion of the phrase in question would serve no useful purpose.

23. As regards the comment reflected in paragraph 17 above concerning the words "the exercise of" the Special Rapporteur wishes to recall that in this particular instance, the Commission decided to use as a model not article 41, paragraph 3, of the Convention on Diplomatic Relations, but article 55, paragraph 2, of the Convention on Consular Relations.<sup>137</sup>

24. As to the comment reflected also in paragraph 17 above suggesting the insertion of the words "and means of transport" after the word "premises", the Special Rapporteur deems it pertinent to point out that, as it is indicated in paragraph 3 of the Commission's commentary to the article, the second sentence of paragraph 2 excerpts from the application of the rule laid down in the first sentence of that paragraph "any act [. . .] performed in carrying out the functions" which is performed within the organization or the premises of permanent missions. The inclusion of the suggested words in paragraph 3 would appear to constitute a departure from the corresponding provisions of the two Vienna Conventions, which has not been justified.

25. In view of the foregoing, the Special Rapporteur submits for the Commission's consideration the text of article 45 as it was adopted by the Commission for submission to Governments and international organizations. Article 45 would therefore read as follows:

<sup>134</sup> *Ibid.*, vol. I, pp. 218 *et seq.*, 1032nd meeting, paras. 26 *et seq.*

<sup>136</sup> *Ibid.*, p. 178, 1024th meeting, para. 90.

<sup>137</sup> *Ibid.*, p. 176, 1024th meeting, paras. 54 *et seq.*

<sup>134</sup> Article 44. See *Yearbook of the International Law Commission*, 1969, vol. II, p. 18, document A/CN.4/218 and Add.1, chap. II.

**Article 45. Respect for the laws and regulations of the host State**

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

2. In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from criminal jurisdiction, the sending State shall, unless it waives this immunity, recall the person concerned, terminate his functions with the mission or secure his departure, as appropriate. This provision shall not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission within either the Organization or the premises of a permanent mission.

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

**Article 46. Professional activity**

*(a) Observations of governments and international organizations*

1. In the course of the debate in the Sixth Committee, it was considered that

The prohibition established in article 46 should be extended to the administrative and technical staff of the permanent mission as well, though an exception might be made in the case of teaching activities.<sup>138</sup>

2. In its editorial suggestions, the Secretariat of the United Nations made the following observation:

The title [of article 46] should be amended to read like the title of article 48 of the Convention on Special Missions: "Professional or commercial activity". There seems to be no reason why one of the two activities mentioned in the article should be included in the title and the other omitted (A/CN.4/L.162/Rev.1, section B).

*(b) Observations of the Special Rapporteur*

3. With regard to the comment referred to in paragraph 1 above, the Special Rapporteur wishes to point out that the present article is based on the provisions of article 42 of the Vienna Convention on Diplomatic Relations and article 48 of the Convention on Special Missions. In his view, the reasons which prompted the inclusion of such provisions in the manner reflected in the two Vienna Conventions apply equally in the context of the present draft articles. He therefore sees no reason to depart from the two above-mentioned Conventions on this point.

4. As to the suggestion of the Secretariat of the United Nations reflected in paragraph 2, above, the Special Rapporteur considers it well taken. He therefore proposes that the words "or commercial" be inserted in the title of the article, subject to his observations in the context of article 23.<sup>139</sup>

5. In view of the foregoing, the Special Rapporteur proposes that the article be retained in its present form,

subject to the change in its title referred to in the preceding paragraph. Article 46 would, therefore read as follows:

**Article 46. Professional or commercial activity**

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

**SECTION 4. END OF FUNCTIONS**

**Article 47. End of the functions of the permanent representative or of a member of the diplomatic staff**

*(a) Observations of governments and international organizations*

1. In the course of the debate in the Sixth Committee the suggestion was made that a new sub-paragraph (c) be added, reading "in case of death".<sup>140</sup>

2. In its written comments, the secretariat of IAEA noted that

Article 47 regulates the *end* of "the functions of the permanent representative" despite the fact that the draft articles do not regulate the *presence* of the permanent representative, or the *nature* or *commencement* of these functions, as was done in the case of the functions of "permanent missions".

3. The Secretariat of the United Nations made two editorial suggestions in connexion with article 47: first, it pointed out that, while article 47 states that "The functions . . . come to an end", the corresponding provision of article 114 in part IV uses the expression: "The functions . . . shall come to an end". Secondly it observed that as the expression "to this effect" in sub-paragraph (a) was "not very precise" and was not used in the corresponding and more specific article 43 (a) of the Vienna Convention on Diplomatic Relations, it should be replaced by the words "of their ending" or "of their termination". The Secretariat also drew attention to an obvious misprint at the end of the introductory sentence, which should read "come to an end, *inter alia*" (A/CN.4/L.162/Rev.1, section B).

*(b) Observations of the Special Rapporteur*

4. The Special Rapporteur does not deem it necessary to add a sub-paragraph (c) reading "in case of death" as it was suggested during the debate in the Sixth Committee (see para. 1 above). In his view, it is self-evident that the functions of the permanent representative or of a member of the diplomatic staff come to an end on death; besides, article 47 is not limitative as is shown by the use of the words *inter alia*.

5. With respect to the comment made by the secretariat of IAEA reflected in paragraph 2 above, the Special Rapporteur is unable to agree with the contention that

<sup>138</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 58.

<sup>139</sup> See above, Article 23, para. 7 of the observations.

<sup>140</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 59.

the draft articles do not regulate the presence, nature or commencement of their functions as regards the permanent representative. Those aspects are at worst inherent or implied in several of the substantive provisions of the first forty-seven articles of the draft. In the view of the Special Rapporteur the question raised in the comment of IAEA appears to be rather one of consistency: shouldn't article 47 refer also to the permanent mission? The Special Rapporteur would assume that the question is not being raised by the IAEA whether article 47 should *only* refer to the permanent mission, as it should be clear that the end of the functions of the permanent representative or of a member of the diplomatic staff does not necessarily imply the end of the functions of the mission and, further, that there is need, particularly in the light of article 42 on the duration of privileges and immunities, to provide for when the functions of a member of the permanent mission enjoying privileges and immunities have come to an end. In this connexion, the Special Rapporteur wishes to recall that during the Commission's discussion on the article, a proposal of the Drafting Committee that section 4 be entitled "End of the functions of the permanent mission or of its members" was eventually not adopted.<sup>141</sup> The Special Rapporteur defers to the Commission's decision as reflected in the present text of article 47.

6. With regard to the editorial suggestions of the United Nations Secretariat, the Special Rapporteur agrees that for the sake of consistency the phrase "the functions . . . come to an end" should be replaced by "the functions . . . shall come to an end". He also agrees that the expression "to that effect" in sub-paragraph (a) is not very precise and suggests replacing it by "of their termination".

7. In view of the foregoing, the Special Rapporteur proposes that the text of the article be retained in its present form, subject to the drafting changes referred to in paragraph 6 above. Article 47 would, therefore, read as follows:

**Article 47. End of the functions of the permanent representative or of a member of the diplomatic staff**

The functions of the permanent representative or of a member of the diplomatic staff of the permanent mission shall come to an end, *inter alia*:

(a) On notification of their termination by the sending State to the Organization;

(b) If the permanent mission is finally or temporarily recalled.

**Article 48. Facilities for departure**

**(a) Observations of Governments and international organizations**

1. The comments made by governments and international organizations in connexion with article 48 related to each of the two sentences of the article.

<sup>141</sup> *Yearbook of the International Law Commission, 1969*, vol. I, pp. 178-185, 1025th meeting, paras. 4-84, and *ibid.*, pp. 224-227, 1034th meeting, paras. 1-47.

**First sentence**

2. One Government [Israel] noted that the words "to leave its territory" at the end of the sentence have been substituted for the words "to leave at the earliest possible moment" which appear in the corresponding article of the Vienna Convention on Diplomatic Relation (article 44); it stated that it saw no reason for this change and therefore suggested reverting to the earlier text.

3. Another Government [Japan] took the view that the insertion of the words "whenever requested" was likely to be interpreted as placing a greater responsibility on the host State than the provision of article 44 of the Convention on Diplomatic Relations does on the receiving State. It suggested replacing the expression "whenever requested" by the expression "in case of need".

4. In its editorial suggestions, the Secretariat of the United Nations took the view that the words "in order" should be deleted in the second line. It pointed out that "the sentence specifies the kind of facilities to be granted and these are 'facilities to enable persons . . . to leave' not 'facilities in order to enable persons . . . to leave'". Better still, in the opinion of the Secretariat, would be to say "facilities for persons . . . and for members of the families of such persons . . . to leave its territory". The Secretariat pointed out that "the words 'in order' appear in the corresponding provision of the Convention on Diplomatic Relations (article 44). The Convention on Special Missions uses the expression 'facilities to enable' (article 45, para. 1)." (A/CN.4/L.162/Rev.1, section B.)

**Second sentence**

5. One Government [Canada] stated that

The last sentence of article 48 by requiring the host State to place at the disposal of persons enjoying privileges and immunities the necessary means of transport for their property would appear to be imposing an unrealistic duty on the host State.

It therefore suggested replacing that last sentence by the following:

It shall, in case of emergency, facilitate in every possible way the obtaining of means of transport for them and for such of their personal effects as is reasonable under the circumstances.

6. Another Government [Japan] stated that the wording "in case of emergency" was ambiguous with respect to multilateral relations. In its view, since the bilateral relationship between a sending State and the host State was not directly connected with the withdrawal of a permanent mission to an international organization, it was not clear what other cases of emergency existed.

**(b) Observations of the Special Rapporteur**

7. With respect to the comment reflected in paragraph 2 above, the Special Rapporteur wishes to recall that the Commission's decision to substitute the words "to leave its territory" by the words "at the earliest possible moment" which appeared in the text originally submitted

by him,<sup>142</sup> was made in support of the Drafting Committee's contention that the latter words "were inappropriate" with reference to permanent missions to international organizations. Furthermore, the words "its territory" were inserted in order to bring the English text into line with the French text. In these circumstances, the Special Rapporteur does not deem it necessary to revert to the formulation in article 44 of the Vienna Convention on Diplomatic Relations.

8. With regard to the comments reflected in paragraph 3 above, the Special Rapporteur wishes also to recall that the use of the words "whenever requested" was consequential upon the Commission's decision to omit all reference in the article to the "case of armed conflict" and to make the text deliberately general in character. The Special Rapporteur does not agree that those words could be interpreted as placing a greater responsibility on the host State than article 44 of the Vienna Convention on Diplomatic Relations does on the receiving State. He considers that in fact, with the addition of those words, the obligation laid down in the present article could be considered as less onerous than that stated in article 44 of the Vienna Convention, which is drafted in more general terms. Besides, the phrase "in case of need", which in the Vienna Convention appears only in the second sentence of the article, if used as a substitute for the phrase "whenever requested" would likewise widen the scope of the obligation of the host State.

9. In view of the fact that, as rightly pointed out by the United Nations Secretariat, the words "in order" do not appear in the corresponding provision of the Convention on Special Missions (article 45, para. 1), the special Rapporteur agrees to their deletion.

10. As regards the comment reproduced in paragraph 5 above, concerning the question whether the requirement that the host State place at the disposal of persons enjoying privileges and immunities the necessary means of transport for their property would not impose an unrealistic duty on the host State, the Special Rapporteur is of the view that the suggestion quoted in paragraph 5 above is too restrictive. He wishes to point out that by replacing the words "in particular, in case of need" which appear in article 44 of the Vienna Convention by the words "in case of emergency", the Commission has already substantially alleviated the burden of the host State in that respect; in his view, there is no reason to depart further from the corresponding provision in the Vienna Convention.

11. With respect to the comment reflected in paragraph 6 above, the Special Rapporteur, in addition to what is said in the preceding paragraph, wishes to refer to paragraph 1 of the Commission's commentary to the article which explains the meaning which the Commission attaches to the expression in question.

12. In view of the foregoing considerations, the Special Rapporteur proposes that the article be retained in its present form. Subject to the drafting change referred to in paragraph 9 above, article 48 would, therefore, read as follows:

<sup>142</sup> *Ibid.*, vol. II, p. 20, document A/CN.4/218 and Add.1, chap. II, article 47.

#### *Article 48. Facilities for departure*

The host State shall, whenever requested, grant facilities to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave its territory. It shall, in case of emergency, place at their disposal the necessary means of transport for themselves and their property.

#### **Article 49. Protection of premises and archives**

##### *(a) Observations of governments and international organizations*

1. In its written comments, one Government [Israel] made the following remarks:

... according to paragraph 2 of the commentary, the intention is that in the event of the sending State failing to comply within a reasonable time with the obligations imposed upon it under the second sentence of paragraph 1, the host State shall no longer be bound by the provisions of the first sentence of paragraph 1 but only by "any obligations which may be imposed upon it by its municipal law, by general international law or by special agreements" as regards the property, archives and premises. It is believed that this should be made more explicit in the text in order to avoid ambiguity. The addition of a phrase such as "after which time the obligations of the host State under this paragraph shall cease" could achieve this.

The same Government added that "the difference between the 'special' protection and protection of property, archives and premises under international law is not altogether clear".

2. Another Government [Japan] stated that "the second sentence is reasonable and should be retained".

3. The Government of Switzerland noted that since, according to the commentary, the second sentence of paragraph 1 also covered the designation of a third State as protector of the property of the mission,

It would seem preferable, while retaining the general formula, to mention this possibility expressly, as was done in article 45, subparagraph (b) of the [Vienna] Convention on Diplomatic Relations.

A similar view expressed by the secretariat of UNESCO in the following terms:

Article 49 [...] should have been based more on article 45 of the Vienna Convention [on Diplomatic Relations], in particular subparagraph (b). Provision should have been made for the mission which had been recalled to entrust the custody of its property and archives to the permanent mission of another State or to the diplomatic mission of another State. The idea expressed in paragraph 2 of the commentary ("The sending State is free to discharge that obligation in various ways, for instance, by removing its property and archives from the territory of the host State or by entrusting them to its diplomatic mission or to the diplomatic mission of another State") should have been made a provision of the convention.

4. Two editorial questions were raised in the written comments of governments and international organizations: one Government [Israel] proposed that the word "must" wherever it appears in paragraph 1 be replaced by "shall". The Secretariat of the United Nations suggested that the title be amended to read "Protection of premises, property and archives" as, in its opinion, "there seems to

be no reason for omitting one of the three items enumerated in the text and including the other two". (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

5. With respect to the comments quoted in paragraph 1 above, the Special Rapporteur does not agree that as presently drafted the second sentence of paragraph 1 does not clearly convey the intention of the Commission as expressed in paragraph 2 of its commentary on the article.

6. As regards the reference to the lack of clarity of "the difference between the 'special' protection and protection of property, archives and premises under general international law", the Special Rapporteur wishes to point out that in the text of the article the word "special" refers not to "protection" but to "duty"; the "duty" to protect is "special" in that it relates to property, archives and premises. In the opinion of the Special Rapporteur the Commission was correct in explaining in its commentary to the article that the termination of that special duty after the expiry of a reasonable period is without prejudice to the obligations which derive for the host State from the rules or norms of municipal and international law or from special agreements, as these may concern for example, the protection of the property of foreign States in general.

7. As to the views reflected in paragraph 3 above, the Special Rapporteur agrees that, in addition to the general formula, an express reference should be made to one of the ways in which the sending State may discharge its obligation under the article, namely, entrusting the premises, property and archives of the permanent mission to the custody of a third State, in order to conform to the Vienna Diplomatic precedent. He therefore proposes that the following be added as a third sentence to paragraph 1 of the article:

In the discharge of its obligations under the present paragraph, the sending State may entrust the custody of the premises, property and archives of the permanent mission to a third State.

The Special Rapporteur wishes to stress that the insertion, for the sake of consistency, of such express reference cannot be interpreted as excluding for the sending State the possibility to discharge its obligation in any other way, such as those referred to in the Commission's commentary and in the comments of UNESCO. In his view a detailed mention of those other ways in the article is not advisable as it would be, of necessity, incomplete and would make the text cumbersome.

8. The Special Rapporteur agrees that the word "must", wherever it appears in paragraph 1, should more appropriately be replaced by "shall". He also agrees that the title should be replaced by "Protection of premises, property and archives", subject to his observations in the context of article 23.<sup>143</sup>

9. In view of the foregoing, the Special Rapporteur proposes to retain the text of the article in its present form, subject to the additions and terminological changes

referred to in paragraphs 7 and 8 above. Article 49 would, therefore, read as follows:

**Article 49. Protection of premises, property and archives**

1. When the permanent mission is temporarily or finally recalled, the host State shall respect and protect the premises as well as the property and archives of the permanent mission. The sending State shall take all appropriate measures to terminate this special duty of the host State within a reasonable time. In the discharge of its obligations under the present paragraph, the sending State may entrust the custody of the premises, property and archives of the permanent mission to a third State.

2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and archives of the permanent mission from the territory of the host State.

**Article 50. Consultations between the sending State, the host State and the Organization**

(a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee in 1969

A number of representatives supported the text of article 50. In the opinion of some, tripartite consultations were the most appropriate method of solving any disputes which might arise. For others, such consultations would make it possible to dispose of many types of disputes very simply. A number of representatives, however, expressed reservations on the article. Certain representatives considered that article 50 did not specify how questions concerning the interpretation of the draft articles were to be resolved; moreover, in cases involving either the application or the interpretation of the draft articles, legal disputes on well-defined rules might arise. It therefore seemed necessary to provide for impartial third-party settlement. It was also said that the provisions of article 50 might not be adequate to resolve cases in which the host State was not willing to grant all the privileges and immunities specified in the draft articles, especially when they were very far-reaching. Further, it was stated that article 50 might prejudice the reply to the question as to which organ of the organization would be responsible for ensuring respect for the privileges and immunities granted. One outcome of the provisions of the article might be that the secretariat of the organization concerned might find itself invested with authority that could not rightly be acquired except in virtue of the organization's constitutional instruments.<sup>144</sup>

2. In 1970, article 50 was referred to again in the course of the debate in the Sixth Committee:

If any question arose between the sending State and the host State concerning the implementation of the draft articles, some representatives expressly supported the Commission's intention that article 50, on consultations among the sending State, the host State and an organization, which was now included at the end of part II, should be transformed into a general provision applicable also to parts III and IV of the draft. In that connexion, it was said that the scope of the article should not be limited to questions arising between the sending State and the host State, and it was suggested that the existing text should be amended so that the article would begin with the words: "If any question arises among the sending State, the host State and the Organization. . .".

<sup>143</sup> See above, Article 23, para. 7 of the observations.

<sup>144</sup> *Official Records of the General Assembly, Twenty-fourth Session Annexes, agenda items 86 and 94 (b), document A/7746, para. 60.*

Other representatives said that the Commission should seek formulas which, while guaranteeing the interests of the sending State and the independence of the organization concerned, should also adequately protect the host State against possible abuses by persons enjoying a privileged position under the provisions of the draft. Even the protection of the host State in cases of criminal acts did not seem to be sufficiently guaranteed by the draft. Those representatives considered that provisions such as those contained in article 50 or articles 45, 76 and 112 were inadequate.<sup>145</sup>

3. In its written comments, one Government [Yugoslavia] expressed the view that

The principle of trilateral consultations between interested States and international organizations is of special importance for the whole system embodied in the draft articles. Such consultations could not only help to settle any difficulties that might arise between the States and the organization, but would in general make for efficient co-operation between them.

4. Another Government [Canada] proposed the same drafting amendment as had been suggested in the Sixth Committee in 1970, namely, the substitution in the first phrase of article 50 of the words "If any question arises among a sending State, the host State and the Organization . . ." for "If any question arises between a sending State and the host State . . .". The Government explained that:

In this way, all possible questions that may arise will be covered by article 50. As it is presently drafted, only questions arising between the host State and a sending State can be the subject of consultations under article 50.

5. Two Governments expressed the view that article 50 was inadequate and a more effective procedure should be found to protect the interests of the sending States and the host State. They did not, however, make any concrete suggestion to that effect. In this connexion, one of the two Governments [Japan] stated that it was

not entirely convinced that the provision of this article is enough to cope with the difficulties which may arise as a result of the non-applicability between States members of the organization and the host State of the rules regarding *agrément* and *persona non grata*. For example, a situation might arise where a member of a permanent diplomatic mission declared *persona non grata* or a private person accused of violating the law of the host State, would be appointed as member of the permanent mission to an international organization seated in the host State.

In the view of the second Government [United Kingdom], although it was

true that the concept of *persona non grata* is not appropriate in relation to representatives to international organizations [ . . . ] some means must be found to deal with the case where the host State cannot tolerate, for reasons of public order or national security, the presence on its territory of a particular representative.

6. In the opinion of one Government [Yugoslavia]

The Commission's views on the possibility of inserting at the end of the draft articles provisions concerning settlement of disputes arising out of the application of the future convention deserve particular attention.

In this connexion one Government [Belgium], considering the article to be "imperfect", suggested that it "should be incorporated in a more detailed provision or in a

protocol on the settlement of disputes, as may be appropriate". Another Government [Netherlands] considered "a provision for the settlement of disputes concerning the interpretation and application of the Convention essential".

7. The Government of Switzerland considered that "the consultations provided for are insufficient for the application of a codification convention". It reiterated its view that

The corollary to the codification of international law must be the jurisdiction of international tribunals, preferably existing tribunals and in particular the International Court of Justice. It [i.e. the Government] will make a proposal in that sense in due course.

The Government of Switzerland further observed that

The special nature of the relations between the sending State and the host State require for certain specific questions the establishment of a tripartite body capable of coming to a decision in a very short time. This could be made responsible for handling, through a conciliation procedure, the objections of the host State to a member of a permanent mission (article 10) or to the size of the permanent mission (article 16).

It added that the conciliation machinery could operate in accordance with the following text:

"Within six months after the Convention enters into force with regard to the Organization, the latter shall establish a Conciliation Commission based on the following principles:

"1. The Commission shall be composed of three members: one representative of the Organization, one representative of the sending State and one representative of the host State.

"2. The representatives shall be designated in advance and their names shall be included in a list maintained by the Organization.

"3. Matters may be brought to the cognizance of the Commission by the Organization, the sending State or the host State.

"4. The absence of a representative shall not prevent the Commission from taking a decision.

"5. The Commission shall take its decisions by majority vote; it may make recommendations to the parties."

8. The observations submitted by the secretariat of the ILO read as follows:

This general provision envisages tripartite consultations between the sending State, the host State and the organization concerning the application of the convention. It thus imposes on the organizations the obligation to provide for the diplomatic protection, as it were, of the sending State. It seems to us that it would be very difficult for an organization to play the role of conciliator, perhaps even arbitrator, in connexion with problems not directly related to its own interests, such as respect for exemption from customs duties or the extent and content of immunity from jurisdiction. While there is no question that an organization can and should intervene if the host State hinders the functioning of the organization by, for example, prohibiting the entry into its territory of representatives of member States, it does not seem to us that questions relating rather to diplomatic usage and the comity of nations can usefully be made the subject of intervention by the organization. They are matters touching solely on the relations between two States and having nothing to do with the organization.

#### (b) Observations of the Special Rapporteur

9. The Special Rapporteur will first examine the drafting amendment referred to in paragraph 4 above and the written comments of the secretariat of the ILO. He will

<sup>145</sup> *Ibid.*, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, paras. 22-23.

next turn to the other comments submitted in connexion with article 50. These related to the following main points: the question of the organ competent to conduct on behalf of the organization the consultations provided for in article 50, the conciliation machinery proposed by the Swiss Government, and the question of the inclusion in the draft articles of provisions on the settlement of disputes.

#### *The drafting amendment*

10. The Government which proposed the drafting amendment referred to above in paragraph 4 explained that its intention was that article 50 should cover "all possible questions that may arise". The Special Rapporteur believes that the amendment runs counter to that intention. Indeed, with the amendment the article could be interpreted as applying only in those cases where the questions arising involved the three parties, namely: a sending State, the host State and the organization. The Special Rapporteur prefers the present text of article 50, which authorizes the organization to initiate consultations when a question arises only between a sending State and the host State.

#### *Observations of the ILO*

11. The main contention of the observations of the secretariat of the ILO (see para. 8 above) appears to be that matters such as "respect for exemption from customs duties or the extent and content of immunity from jurisdiction" constitute "problems not directly related to the [Organization's] own interests". The Special Rapporteur cannot agree with that contention. Suffice it to mention that article 24 imposes upon the organization the obligation to assist the sending State, the permanent missions and their members "in securing the enjoyment of the privileges and immunities provided for by the present articles".

12. The Secretariat of the ILO also maintains that the matters in question relate "to diplomatic usage and the comity of nations". This may be true but the main point surely is that those matters are of concern to international law and that one of the purposes of the draft articles is to formulate the rules of law governing them.

#### *The question of the organ competent to conduct on behalf of the organization the consultations provided for in article 50*

13. As was indicated above in paragraph 1, it was argued in the Sixth Committee that

One outcome of the provisions of the article might be that the secretariat of the organization concerned might find itself invested with authority that could not rightly be acquired except in virtue of the organization's constitutional instruments.

The Special Rapporteur would like to observe that what must be taken into account here is not only the organization's constitutional instrument but also its other "relevant rules"—to use the language of article 3. The problem referred to in the Sixth Committee will arise only when, under those "relevant rules", there is no organ which is in

a position to conduct the consultations provided for in article 50. It is clear that in such cases those consultations would have to be entrusted to the secretariat.

14. Referring specifically to the United Nations, its Legal Counsel pointed out at the Commission's 998th meeting that, in the provision which subsequently became article 50, the term "organization could only mean the Secretary-General; otherwise it would have to be the General Assembly, and no one would think of bringing a case concerning the behaviour of an individual diplomat before the Assembly".<sup>146</sup>

At the same meeting, the Special Rapporteur expressed a similar view observing that:

Only the Secretary-General could conduct the sort of unobtrusive diplomacy which was necessary if the organization was to play its role of liaison between the host State and the sending State in dealing with practical matters which did not amount to a formal dispute.<sup>147</sup>

#### *The conciliation machinery proposed by the Government of Switzerland*

15. It will be recalled that the conciliation commission proposed by the Swiss Government (see para. 7 above) would be empowered "to take its *decisions*"<sup>148</sup> by a majority vote". It would be "composed of three members: one representative of the Organization, one representative of the sending State and one representative of the host State". It is clear that in those circumstances, the decisive role would be played in most cases by the representative of the organization. The Special Rapporteur does not believe that it would be desirable to grant to the organization such sweeping powers in matters where the prestige of its members is at stake. Neither does he believe that such a proposal would be acceptable to a great number of member States.

#### *The question of the inclusion in the draft articles of provisions on the settlement of disputes*

16. As was noted by one Government [Netherlands] in its written observations, the Commission stated in paragraph 5 of its commentary on article 50 that it

reserved the possibility of including at the end of the draft articles a provision concerning the settlement of disputes which might arise from the application of the articles.

Three Governments expressed themselves in favour of the inclusion in the draft of such a provision and a fourth stated that the matter deserved "particular attention" (see paras. 6 and 7 above). If the Commission decides that the draft should include provisions on the settlement of disputes, the Special Rapporteur will prepare a text for its consideration.

#### *Text of article 50 proposed by the Special Rapporteur*

17. Several Governments expressed the view that article 50 was "inadequate". The Special Rapporteur does

<sup>146</sup> *Yearbook of the International Law Commission, 1969*, vol. I, p. 45, 998th meeting, para. 64.

<sup>147</sup> *Ibid.*, p. 46, para. 75.

<sup>148</sup> Italics supplied by the Special Rapporteur.



not claim that it is a panacea. He still believes that the article could play a useful role, even if the Commission included in its draft articles provisions on the settlement of disputes. He therefore suggests that the article should be retained in its present form. Article 50 would, therefore, read as follows:

**Article 50. Consultations between the sending State, the host State and the Organization**

*If any question arises between a sending State and the host State concerning the application of the present articles, consultations between the host State, the sending State and the Organization shall be held upon the request of either State or the Organization itself.*

\* \* \*

**DOCUMENT A/CN.4/241/ADD.4**

**NOTE**

The present addendum is based on the comments of Governments and international organizations referred to in the introduction to the report<sup>149</sup> and on the additional comments received by the Special Rapporteur before 31 March 1971, namely, those from Finland, Hungary, Japan, the Netherlands and the United Kingdom of Great Britain and Northern Ireland, and from UNESCO and IAEA. It is arranged along the same lines as explained in the introduction.<sup>150</sup>

**Part III. Permanent observer missions to international organizations**

**PART III IN GENERAL**

**(a) Observations of Governments and international organizations**

1. In the introduction to the present report, the Special Rapporteur has already made reference, in the context of his preliminary considerations on the scope and title of the draft articles, to the comments of Governments<sup>151</sup>—available to him at the time of the preparation of that part of the report—regarding the Commission's decision to include in its draft a set of articles dealing with permanent observer missions. The present section gives an account of the debates held in the Sixth Committee,<sup>152</sup> and of the written comments submitted by Governments and

international organizations,<sup>153</sup> following the preparation of the introduction, which concern that question as well as other questions on part III of the draft in general.

2. In the course of the debate in the Sixth Committee at the twenty-fourth session of the General Assembly several representatives endorsed the Commission's decision to include in the draft articles provisions dealing with permanent observers of non-member States to international organizations. In this connexion, the view was expressed that

any such provisions should take into account the legitimate interests of the host State, and not only the invitation of the organization concerned. In certain cases the host State might not even be a member of the international organization in question and would therefore have no say in deciding whether or not observers of a State which it did not recognize should be admitted. On the other hand, it was considered that conditions such as the agreement of the host State were unacceptable, since they restricted the independence of international organizations. The opinion was further expressed that the scope of provisions on the subject should be determined in accordance with the principles of universality and non-discrimination.<sup>154</sup>

3. In the course of the debate in the Sixth Committee at the twenty-fifth session of the General Assembly, several representatives noted

that the formulation of rules concerning the legal status and the facilities, privileges and immunities of permanent observer missions in the context of the draft articles on representatives of States to international organizations would fill a gap which existed at present in general international law.

Certain representatives expressed doubt about the need for a general codification of the status of permanent observer missions, believing that existing practice and international courtesy resolved the question satisfactorily in each specific case. However, many representatives who took part in the debate stressed the particular importance of that codification. The need for it was demonstrated by the very fact that the Charter of the United Nations, General Assembly resolution 169 (II) on the Headquarters Agreement and General Assembly resolution 257 (III) on permanent missions to the United Nations contained no provisions on permanent observer missions of non-member States. In that connexion it was recalled that the Secretary-General had stated in the introduction to his annual report on the work of the Organization covering the period 16 June 1965 to 15 June 1966 that "all countries should be encouraged and enabled, if they wish to do so, to follow the work of the Organization more closely".<sup>155</sup> In the opinion of the latter representatives, the codification of the legal status of permanent observer missions would promote international co-operation, ensure a more efficient functioning of international organizations and might be useful to solve some of the problems posed by the "micro-States". Similarly it was pointed out by other representatives that the formulation of rules concerning permanent observer missions was consistent with the principle of universality and represented an important step towards the elimination of certain discriminatory practices. Pointing out that the Charter was based on universality or that universality was one of the primary objectives of the United Nations, those representatives stated that the establishment of a suitable legal status for permanent observer missions would promote the achievement of the principles and purposes of the Organization. In that connexion, other representatives rejected the unqualified

<sup>149</sup> See above, p. 10, document A/CN.4/241 and Add.1 and 2, paras. 5-7.

<sup>150</sup> *Ibid.*, p. 11, para. 8.

<sup>151</sup> *Ibid.*, pp. 14 and 15, paras. 24, 25 and 27.

<sup>152</sup> For all references to the Sixth Committee's discussion of the draft articles, see foot-note 39 above.

<sup>153</sup> See foot-note 12 above.

<sup>154</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 20.*

<sup>155</sup> *Ibid.*, *Twenty-first Session, Supplement No. 1 A (A/6301/Add.1), p. 14.*



statement that the Charter was based on the principle of universality; universality was a goal that should be attained through the fulfilment of the criteria and requirements laid down in Article 4 of the Charter.<sup>156</sup>

4. In its written comments, the Government of Switzerland stated that "it has been greatly interested in the results of the work of the International Law Commission on permanent observer missions to international organizations" and added that it

attaches the greatest importance to this matter, both as the host State for the European headquarters of the United Nations and for many other international organizations and also as a non-member State of the United Nations which is represented in New York by an observer.

5. One Government [Israel] expressed in general its agreement with the proposed draft articles. Another Government [Finland] noted with satisfaction the articles concerning permanent observer missions and considered them to be "a valuable basis for the preparation of a convention on the subject".

6. One Government [Netherlands] expressed the view that

the question may legitimately be asked whether the institution of the observer mission—at least in the case of missions to world-wide organizations—is not in principle open to criticism, being in contradiction with the universal character of the organization. Apart from certain exceptional cases—accounted for by political reasons—as regards the membership of the United Nations, States which are interested in the work of an organization ought to become members of that organization. It does not appear desirable to normalize the basically not normal institution of the observer mission—particularly not on the same footing as the permanent missions, which are a normal element in the structure of international relationships.

One argument put forward by the Commission in favour of this normalization is that it would help to solve the problem of the "micro-States" within the United Nations (see para. 8 of the "general comments" on section 1 of part III). It is striking that this aspect is not further mentioned in the commentary on the individual articles.

Inasmuch as the draft articles will also apply to other than world-wide organizations, the institution of the observer mission becomes more acceptable.

7. One Government [Canada] indicated that it appreciated

that these articles must of necessity contain new elements of international law as opposed to the codification of existing rules. However, since observer missions do not, as such, represent, but observe, a permanent observer mission should not be placed on the same footing as that of a permanent mission.

8. Another Government [United Kingdom] expressed the view that, although

the Commission has rightly drawn attention [...] to the fact that there is at present no clear treaty basis for the status, privileges and immunities of permanent missions sent by non-member States to certain international organizations [...] the Commission has not referred to any evidence to suggest that this situation causes any appreciable difficulty in practice. Nor is it at all clear that the best way to remedy the situation would be by creating a new general international legal entity to be known as a "permanent observer

mission" whose status, privileges and immunities would be largely the same as those of permanent missions of Member States.

The concept of a permanent observer mission in the draft articles appears to involve granting to representatives of States which have no obligations under the constitutional instruments of the organization concerned, and possibly to representatives of entities which are not recognized as States or Governments by the host country, a status and functions which they are not entitled to have under the constitutional instruments of the organization. Due regard must be had to the position and interests of the host country and in the case of those organizations where there is not constitutional provision for observer missions and no settled practices, their establishment should be a matter for arrangement between the sending State, the organization and the host country, taking into account the special circumstances of each case. It is not at all clear that there would be any advantage in removing the flexibility which the present situation allows.

It added that it was

not convinced of the necessity or desirability of including in the proposed convention articles such as those in Part III of the draft articles. The articles are in any case drafted largely by reference back to Part II. It would be better to leave organizations in the future to decide for themselves whether and, if so, to what extent they should seek to accord the Part II status to observer missions.

9. One Government [Israel] indicated that its comments on the first and second groups of draft articles applied generally and in principle to the present group of draft articles. The secretariats of the United Nations, the ILO and IMF likewise indicated that their comments on the first and second groups of draft articles applied to the third group.

10. The secretariat of IMF expressed the view that

As mentioned in the Study by the Secretariat,<sup>157</sup> questions relating to permanent representatives or member delegations to international organizations are not applicable to the Fund. The structure of the Fund precludes the application of the draft articles to the Fund. It might be useful, therefore, to make it clear that the draft is not applicable to the Fund.

11. The secretariat of IAEA indicated that

Although there has never been any permanent observer accredited to IAEA, there have been instances of agreements involving non-member States and the problem is certainly one of interest to the Agency.

12. The Secretariat of WHO stated the following:

There are in practice two general categories of observers from non-member States to WHO, the main distinction being whether they are temporary or permanent. The first category covers certain situations where States which are not members but which are on the point of becoming members attend the World Health Assembly as observers, pending a decision by the Assembly on their application for membership. Provision for this is contained in rule 3 of the rules of procedure of the Assembly, which stipulates that the Director-General may invite States which have made application for membership or territories on whose behalf an application for associate membership has been made to send observers to sessions of the Assembly. Again, situations of this type have arisen in the case of associate members which have acceded to independence on a date which, under the rules, did not allow them to submit their application for membership in the organization. Such States were nevertheless invited as observers and the rules of procedure of the

<sup>156</sup> *Ibid.*, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, paras. 25-27.

<sup>157</sup> Study by the Secretariat, *op. cit.* (see foot-note 47), p. 206, paras. 76-78.

Assembly were changed later, after the adoption of appropriate resolutions by the Executive Board and Health Assembly.<sup>158</sup>

Aside from these temporary situations, there are others where quasi-permanent observers participate regularly in the work of the Health Assembly. Permanent observers from non-member States of WHO are in a special situation, which is similar to, yet different from, the situation in the United Nations. The similarity lies in the fact that the status of the permanent observers from non-member States is not established in any special provision and is not mentioned in the Constitution, the headquarters agreement or the resolutions adopted by the Executive Board or the Assembly. It exists solely as a result of the practice followed by the organization. However, the situation is different because such permanent observer missions to WHO are few in number and also because the legal bodies in question are of a very special character. In the United Nations, the establishment of permanent observer missions is justified because a number of States are not members of the Organization. On the other hand, most of them are members of WHO. The Federal Republic of Germany, the Republic of Korea, Switzerland and the Republic of Viet-Nam are cases in point, so that at present there are only three examples of permanent observers. In addition, these are very special situations in the context of international law, since they involve the Holy See, San Marino and the Order of Malta.

The relations established in these three cases are derived solely from practice and have no foundation in any written text. San Marino applied for membership in WHO in 1948, but the First Health Assembly declared the application inadmissible for procedural reasons. The application was submitted again in 1949, but it was accompanied by a reservation concerning San Marino's financial contribution.<sup>159</sup> The reservation was not accepted by the Assembly,<sup>160</sup> and, since that time, San Marino has been invited to each Health Assembly as an observer. Relations have been maintained on that basis ever since. Moreover, San Marino has in Geneva a permanent observer mission to the United Nations and other international organizations.

Relations with the Holy See also date back to the same period. The Holy See did not participate in the First Health Assembly. However, when the Second Assembly was convened at Rome in 1949, it was decided to invite the Vatican to participate in the work of the Assembly as an observer. Since that time, the Holy See has been invited regularly to the sessions of the Health Assembly. Like San Marino, it has a permanent observer mission to the United Nations Office and the specialized agencies at Geneva.

WHO's relations with the Order of Malta have an unusual origin, and were established much more recently. In 1950, the Order of Malta applied for admission to WHO, but consideration of the application was deferred. In 1952, a new application was submitted to the Assembly and included in its agenda. However, it was withdrawn, on the initiative of the Order itself. Ten years went by and in 1962 the Order of Malta asked, not for admission, but to be invited to attend WHO meetings as an observer. The Director-General decided that he would invite the Order to participate in the Assembly as an observer whenever the agenda included items which might be of interest to it. In fact, since that time the Order has regularly been invited to attend the Assemblies and has moreover established a permanent delegation to international organizations at Geneva.

The present status of permanent observers is in fact no different from that of the other observers covered by the WHO regulations. When these three observer missions were established, WHO was informed and it received a notification. They are invited to each

Health Assembly and the names of the observers are communicated to the Director-General. They are granted the facilities laid down in the regulations for observers in general. Rule 19 of the rules of procedure of the Health Assembly stipulates that, unless the Assembly decides otherwise, plenary meetings are open to them. In addition, under rule 46 of the rules of procedure, they may participate in any public meeting of the main committees of the Assembly and, upon the invitation of the Chairman or with the consent of the Assembly or committee make a statement on the subject under discussion. Moreover, such observers have access to non-confidential documents and to such other documents as the Director-General may see fit to make available. They may also submit memoranda to the Director-General, who determines the nature and the scope of their circulation.

### 13. The Secretariat of ITU stated the following:

With regard to permanent observer missions (draft articles 51-77), I wish to state that under article 27 of the International Telecommunication Convention (Montreux, 1965),<sup>161</sup> each Member of the Union reserves the right to fix the conditions under which it admits telecommunications exchanged with a State not party to the Convention. The Convention makes no other provision for relations between the ITU and non-Member States, which are not admitted to conferences of the Union. The relationship between the General Secretariat of the Union and such States is regulated by resolution No. 88 of the Administrative Council of the Union.<sup>162</sup>

### 14. In the course of the debate in the Sixth Committee, a number of delegations stressed that

At the second reading, the Commission should harmonize the various provisions of the draft and try to formulate them as stringently and precisely as possible. In particular, it was stated that the present number of articles was excessive and should be reduced through appropriate use of the technique of "drafting by reference". It was also suggested that, despite the differences between the two categories of missions, some of the provisions relating to permanent missions and to permanent observer missions could perhaps be combined, in order to simplify the general form of the draft.<sup>163</sup>

### 15. In its written comments, one Government [Israel] considered that

As the four parts of draft articles will form an integral part of the diplomatic law [...] in the final text of the draft articles, all those provisions relating to matters susceptible of uniform treatment should be redrafted and amalgamated in the fewest possible articles.

### 16. Another Government [Switzerland] suggested that

The references to earlier articles in the draft—those in articles 66 to 77 for example—should be grouped together in one or more articles. Moreover, this suggestion seems to meet the concern expressed by some members of the Commission itself.

### (b) Observations of the Special Rapporteur

### 17. The Special Rapporteur notes that, with one exception, the comments of Governments referred to in the preceding section confirm in general his observations<sup>164</sup>

<sup>161</sup> United Nations, *Juridical Yearbook*, 1965 (United Nations publication, Sales No. 67.V.3), p. 173.

<sup>162</sup> ITU, Supplement No. 2 (August 1967) to the *Volume of Resolutions and Decisions of the Administrative Council of ITU*. [The text of Administrative Council resolution No. 88 (amended) is reproduced in annex 1 to the observations of ITU. See below, p. 424, document A/8410/Rev.1, annex I, C, 11.]

<sup>163</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 18.

<sup>164</sup> See above, pp. 14 and 15, document A/CN.4/241 and Add.1 and 2, paras. 24 and 27.

<sup>158</sup> Resolution EB27.R25 (*Official Records of the World Health Organization*, 108, 10), resolution WHA14.45 (*ibid.*, 110, 19). This happened, for example, in the case of Togo in 1960 (*ibid.*, 103, 21).

<sup>159</sup> *Official Records of the World Health Organization*, No. 21, p. 312.

<sup>160</sup> Resolution WHA2.98 (*ibid.*, p. 54).

as regards the reaction of Governments on the Commission's decision to include a set of articles on permanent observer missions in its draft on representatives of States to international organizations.

18. The Special Rapporteur takes note of the information given by the secretariats of international organizations regarding their rules and practice on the subject. In this respect, he wishes to refer to the provisions of articles 3 and 4, which are intended to apply generally to part III of the draft.

19. As regards the comment of the secretariat of IMF reflected in paragraph 10 above, the Special Rapporteur wishes to refer to his observation on a similar comment made in the context of articles 3 to 5.<sup>165</sup>

20. In connexion with the comments concerning the structure of the draft, reflected in paragraphs 14 to 16 above, the Special Rapporteur wishes to point out that he has arranged the present document on an article by article basis in order to facilitate the discussion by the Commission of the contents of each and all of the provisions included in part III of the draft, in view of the comments made by Governments and international organizations, which referred specifically to most of those provisions. This arrangement is, of course, without prejudice to the decision which the Commission, and in particular its Drafting Committee, may reach on the consolidation of some articles in the light of the substantive discussion to be held thereon.

## SECTION 1. PERMANENT OBSERVER MISSIONS IN GENERAL

### General comments

#### (a) *Observations of Governments and international organizations*

##### 1. The Secretariat of UNESCO stated the following:

In section 1 of part III of the draft, under the heading "General comments", it is stated in paragraph 1 that "Permanent observer missions have [...] been sent [...] on some occasions to the United Nations Educational, Scientific and Cultural Organization". Actually the Holy See maintains a permanent mission to the organization, and has done so for a long time. The Executive Board of UNESCO took a decision regarding permanent observers—with particular reference to the permanent observer of the Holy See—as far back as 1951, at its twenty-sixth session. The text should therefore be amended along the following lines:

"... for instance, by the Holy See to the Food and Agriculture Organization of the United Nations and the United Nations Educational, Scientific and Cultural Organization, and by San Marino ...".

#### (b) *Observations of the Special Rapporteur*

2. With respect to the comment of the secretariat of UNESCO reflected in the preceding paragraph, the Special Rapporteur wishes to refer to his general observa-

tion on a similar comment made in the context of article 36.<sup>166</sup>

### Article 51. Use of Terms

#### (a) *Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 51<sup>167</sup> concerned the article as a whole and more specifically sub-paragraphs (a), (b), (i) and (k) of the article.

##### *Article as a whole*

2. One Government [Canada] considered that the contents of article 51 were generally acceptable. However, it suggested that "the elimination of the overlapping of article 51 with article 1 should receive careful attention".

3. In its editorial suggestions the Secretariat of the United Nations expressed the view that, as in the case of article 1, the verb "to mean" should be used throughout, instead of "to be" (A/CN.4/L.162/Rev.1, section B).

##### *Sub-paragraph (a)*

4. In the course of the debate in the Sixth Committee stress was laid on the importance of the reference in sub-paragraph (a) to the "representative character" of permanent observer missions with regard to the

general structure of part III of the draft and, in particular, the determination of the scope of the facilities, privileges and immunities which should be accorded to permanent observer missions. In that connexion, certain representatives referred to paragraph 2 of the commentary on article 53, which stated that a permanent observer mission did not represent the sending State "in" the organization but "at" the organization.

Some representatives said that permanent observer missions did indeed have a "representative character" and that the reference to it should therefore be retained. Others considered that that reference should be deleted, since an observer observed but did not represent.

It was also said that if the term "representation" was taken in the technical sense, it was clear that permanent observer missions were not representative, since in order to be representative in an international organization a State had to be a member of it. By definition, an observer did not participate in the organization's decisions and did not, in principle, have the right to take part in its debates. However, if the term "representation" was given the wider meaning which it had in ordinary usage and if emphasis was laid on the link which existed between the sending State and its permanent observer mission, it might be possible to speak of "representation", because the mission acted on behalf of the State which had appointed it. The sending State was not a member of the organization, but the permanent observer mission, in so far as it acted within the limits of its functions on behalf of the sending State, could be considered representative of that State.

Lastly, it was pointed out that in article 51, in sub-paragraph (a), it would be useful to insert the words "as defined in article 1" after the words "international organization", in view of the considerations outlined in paragraph 1 of the commentary on that article.<sup>168</sup>

<sup>166</sup> See above, p. 21, document A/CN.4/241/Add.3, Article 36, para. 21 of the observations.

<sup>167</sup> See foot-note 34 above.

<sup>168</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 36-39.

<sup>165</sup> *Ibid.*, p. 25, paras. 100 and 103.

5. In its written comments, one Government [Australia] expressed the view that the phrase "representative character" was

accurate to the extent that a permanent observer mission is "representative of" the sending State, but [...] not accurate to the extent that the mission "represents" the sending State in the organization itself.

Another Government [Canada] expressed the opinion that "the definition of the permanent observer mission should make it clear that the function of this type of mission is to 'observe' not 'represent'".

6. One Government [Israel] pointed out that the introductory words to article 51 dealing with the use of terms "indicate that those terms would specifically apply to part III of the draft articles"; that sub-paragraph (a) "defines the term 'permanent observer mission' as a mission sent to an 'international organization'"; and that paragraph 1 of the commentary to article 51 "explains that the latter term is used in the same sense as in draft article 1". In the light of the foregoing, it considered that

in view of the opening words to draft article 51, it might be desirable to include the words "as defined in article 1" after the words "international organization", unless the Commission should decide to amalgamate articles 1 and 51.

7. The secretariat of the ILO expressed the view that sub-paragraph (a)

does not indicate whether, to benefit from the convention, a non-member State has to be a party to the convention or whether it is enough if the State in whose territory the organization has its seat has ratified it. Probably both States have to be parties to the convention, but it might be preferable to say so specifically.

8. In its editorial suggestions, the Secretariat of the United Nations expressed the view that, as in the case of article 1, in sub-paragraph (a) the indefinite article should be inserted in the phrases "of a representative and permanent character" and "not a member of that organization" (A/CN.4/L.162/Rev.1, section B).

#### *Sub-paragraph (b)*

9. One Government [Canada] considered that, as sub-paragraph (a) should make it clear that the function of a permanent observer mission "is to 'observe' not 'represent' [...]" therefore the role of the 'permanent observer' referred to in sub-paragraph (b) would clearly be to 'observe' not 'represent'".

#### *Sub-paragraph (i)*

10. The secretariat of the ILO considered that the term "office" in paragraph (i) did not seem very clear. In its view, it might refer to

offices with a general field of activity, such as the United Nations Office at Geneva, as well as the regional offices of the Organization, which are designed only to meet the needs of their particular region. If the latter meaning is intended, it would appear that the host State would have to allow the establishment of missions in its territory by non-member States of the organization which are not situated in the region covered by the office to which the mission would be accredited.

It expressed, however, doubts that "this was the intention of the authors of the draft". It observed that

The fact that article 52 refers to the rules or practice of the organization does not seem to be a completely satisfactory solution in this case, since some organizations, such as the ILO, have no practice or rules relating to this matter.

#### *Sub-paragraph (k)*

11. In its editorial suggestions, the secretariat of the United Nations expressed the view that, as in the case of article 1, sub-paragraph (m), sub-paragraph (k) should be amended to read "... a principal or subsidiary organ, or any commission, committee or sub-group of any *such organ*" (A/CN.4/L.162/Rev.1, section B).

#### *(b) Observations of the Special Rapporteur*

12. As regards the comment reflected in paragraph 2 above, the Special Rapporteur wishes to refer to his observation on a similar comment made in the context of article 1.<sup>169</sup>

13. With respect to the suggestion reflected in paragraph 3 above, the Special Rapporteur wishes to refer to his observation on a similar suggestion made in the context of article 1.<sup>170</sup>

14. As regards the comments reflected in paragraphs 4, 5 and 9 above, contrary to the inclusion of the phrase "representative character" in sub-paragraph (a), the Special Rapporteur, while recalling his observation on a comment made in the context of sub-paragraph (d) of article 1,<sup>171</sup> considers that in so far as those comments refer to "representation" as a function of the permanent observer mission, they belong more appropriately in the context of the provision of article 53. The Special Rapporteur is of the view that, in the context of the provision of article 51 on the use of terms, the reference to the "representative character" should be maintained as that element is of the essence of the concept of mission; permanent observer missions are representative in character simply because they are invested by the sending State with authority to represent it in the performance of functions.

15. As regards the comments reflected in the last sentence of paragraph 4 and in paragraph 6 above, the Special Rapporteur wishes to refer to his observation on the question of the possible amalgamation of articles 1 and 51.<sup>172</sup> In the light of that observation he does not deem it opportune to express a view on the suggestion made pending the Commission's decision on that question.

16. As regards the comment reflected in paragraph 7 above, the Special Rapporteur considers that the question thus raised belongs more appropriately to the field of the

<sup>169</sup> See above, p. 16, document A/CN.4/241 and Add.1 and 2, paras. 34 and 37.

<sup>170</sup> *Ibid.*, p. 16, paras. 35 and 38.

<sup>171</sup> *Ibid.*, p. 19, paras. 59 and 63.

<sup>172</sup> *Ibid.*, p. 16, para. 37.

law of treaties than that of the present draft, and that it finds its answer in the corresponding provisions of the Vienna Convention on the Law of Treaties.<sup>173</sup>

17. As regards the suggestion reflected in paragraph 8 above, the Special Rapporteur wishes to refer to his observation on a similar comment made in the context of article 1, sub-paragraphs (b) and (d).<sup>174</sup>

18. With respect to the comment reflected in paragraph 10 above, the Special Rapporteur wishes to refer to his observation on a comment made in the context of sub-paragraph (l) of article 1.<sup>175</sup>

19. As regards the suggestion reflected in paragraph 11 above, the Special Rapporteur wishes to refer to his observation on a similar suggestion made in the context of sub-paragraph (m) of article 1.<sup>176</sup>

20. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, subject to the drafting changes referred to in paragraphs 13, 17 and 19 above. Article 51 would therefore read as follows:

#### *Article 51. Use of Terms*

For the purposes of the present part:

(a) A "permanent observer mission" means a mission of a representative and permanent character sent to an international organization by a State not a member of that organization;

(b) The "permanent observer" means the person charged by the sending State with the duty of acting as the head of the permanent observer mission;

(c) The "members of the permanent observer mission" mean the permanent observer and the members of the staff of the permanent observer mission;

(d) The "members of the staff of the permanent observer mission" mean the members of the diplomatic staff, the administrative and technical staff and the service staff of the permanent observer mission;

(e) The "members of the diplomatic staff" mean the members of the staff of the permanent observer mission, including experts and advisers, who have diplomatic status;

(f) The "members of the administrative and technical staff" mean the members of the staff of the permanent observer mission employed in the administrative and technical service of the permanent observer mission;

(g) The "members of the service staff" mean the members of the staff of the permanent observer mission employed by it as household workers or for similar tasks;

(h) The "private staff" means persons employed exclusively in the private service of the members of the permanent observer mission;

(i) The "host State" means the State in whose territory the Organization has its seat, or an office, at which permanent observer missions are established;

(j) The "premises of the permanent observer mission" mean the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the permanent observer mission, including the residence of the permanent observer;

(k) An "organ of an international organization" means a principal or subsidiary organ, or any commission, committee or sub-group of any such organ.

#### **Article 52. Establishment of permanent observer missions**

##### *(a) Observations of Governments and international organizations*

##### **1. In the course of the debate in the Sixth Committee**

The provisions of the article, as well as the principles on which they were based, were interpreted in different ways. In the light of those interpretations, some representatives thought that the provisions should be retained unchanged, others considered they should be redrafted in order to eliminate the existing ambiguity, and others proposed to amend the article, while a fourth group stated that, perhaps the best course might be to consider deleting it altogether.<sup>177</sup>

##### **2. Several representatives considered that the article should be retained as drafted by the Commission,**

because it recognized the need to enable States which were not members of international organizations to follow their work which was of interest to the international community as a whole, while safeguarding the essential autonomy of those organizations and respect for their rules and practice. Those representatives felt that non-member States did not have an unconditional and absolute right to establish permanent observer missions, for that right was subject to and conditioned by the rules of practice of the organization concerned. The will of the organization could not be ignored. Some of them added that if the organization had no relevant rules or practice, the establishment of such missions would be regulated by the provisions of the future convention to be drawn up on the basis of the draft articles. Certain representatives thought that it would be advisable for paragraph 2 of the commentary on the article to specify that the rule provided for in the article presupposed that the organization concerned was of universal character.<sup>178</sup>

##### **3. Other representatives stressed that**

The establishment of a permanent observer mission by a non-member State was a question whose practical solution should continue to depend on the rules and general practice of the organization concerned or on specific agreements concluded for that purpose. Principles such as the sovereign equality of States or universality could not prevail over the rules and practice of international organizations in that sphere. If no such rules and practices existed, the establishment of permanent observer missions should remain subject to an agreement between the sending State and the host State or the international organization concerned. The future convention was not the proper instrument to grant non-member States an absolute and unreserved right to establish permanent observer missions. Since the article in its entire form had been interpreted in other ways, those representatives considered that the Commission should redraft it, bearing in mind the considerations they had mentioned. It was also suggested that paragraph 3 of the commentary should be redrafted in order to bring it into line with the text of the article.<sup>179</sup>

##### **4. Other representatives considered that**

The Commission should give the article a broader legal basis more in keeping with the principles of sovereign equality of States and universality. They proposed that the phrase "in accordance with the

<sup>173</sup> See foot-note 36 above.

<sup>174</sup> See above, pp. 18, 19 and 20, document A/CN.4/241 and Add.1 and 2, paras. 48, 54, 61 and 65.

<sup>175</sup> *Ibid.*, p. 22, paras. 78 and 81.

<sup>176</sup> *Ibid.*, p. 22, paras. 82 and 83.

<sup>177</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 40.*

<sup>178</sup> *Ibid.*, para. 41.

<sup>179</sup> *Ibid.*, para. 42.

rules or practice of the Organization" should be deleted from the article. In their view, the article should state clearly that non-member States had the right to establish permanent observer missions in order to perform the functions mentioned in article 53 of the draft. The existing wording was unduly restrictive, created the possibility of discrimination between States in contradiction with the other provisions of the draft, did not take fully into account the considerations formulated in the commentary on the article, did not facilitate the implementation of the principle of universality or, generally speaking, the purposes and principles of international organizations of universal character, and was inconsistent with the [...] statement of the Secretary-General.<sup>180</sup> It was also pointed out that in any case the "rules or practice" referred to in the article could not be considered valid unless they conformed to the general principles of the Charter of the United Nations. Reference to them would merely create difficulties in the interpretation of the provisions of the article.

It was also said that the existing wording of the article was unsatisfactory because the phrase "in accordance with the rules or practice of the Organization" could give rise to interpretations which assimilated the requirements for the establishment of permanent observer missions to the conditions and procedures provided for in Article 4 of the Charter for the admission of States to the United Nations. Since the main purpose of permanent observer missions was precisely to enable non-member States to follow closely the work of organizations of universal character, a restrictive interpretation of that kind should be precluded by redrafting the article in a more suitable way.

The view was also expressed that the Commission was not supposed to deal with the question of the "right" of non-member States to follow closely the activities of international organizations of universal character in the context of its draft articles on representatives of States to international organizations. The situation of permanent observer missions could only be improved through a better interpretation of the statutes of international organizations.<sup>181</sup>

5. Lastly, some representatives questioned the need for the article and said that the Commission should re-examine the question of retaining it. In their view

the deletion of the article would affect neither the symmetry nor the legal content of the rest of the draft. In that connexion, it was also pointed out that the wording of the article raised the difficult question of determining what entities were entitled to be regarded as States. It was also suggested that the main point at issue was the right of States members of an organization to maintain control over the establishment of permanent observer missions; the efficacy of and the need for the article should be considered from that standpoint.<sup>182</sup>

6. In its written comments one Government [Canada] expressed the view that the article was generally acceptable. Another Government [Finland] indicated that the wording of article 52 seems to be quite appropriate. Given the character of international organizations, granting States an unreserved and unconditional right to establish a permanent observer mission to any international organization whatsoever would be inappropriate. On the other hand, requiring the consent of every Member State would perhaps be too strict.

7. One Government [Israel] considered that

The sending of observer missions to an international organization by non-member States can only be done in conformity with the rules and practice of the organization. In that connexion it is doubtful if

relatively generalized concepts such as "principles of sovereign equality of States and of universality" (para. 3 of the commentary) could prevail over the rules and practice of the organization in question.

Another Government [Canada] expressed its understanding that the article did not give "an automatic right to establish a permanent observer mission". A third Government [Japan] stressed that the Commission had rightly made the right of non-member States to establish permanent observer missions conditional on the relevant rules or practice of the organization.

In the view of two Governments, when such rules or practice did not provide for the establishment of permanent observer missions, "it would be a matter for arrangement between the sending State, the organization and the host State" [Canada] and "[...] a non-member State should be allowed to send an observer mission to an organization only if the host State and the organization agreed to receive such a mission" [Japan].

8. One Government [Netherlands], subscribing to the view that no State may derive from the article the right to establish an observer mission with an organization unless the rules or customary practice of the organization itself provide for such a possibility, considered that from such point of view the article was "too broadly formulated"; it recommended "a more precise formulation" on the lines it had suggested earlier for article 6.<sup>183</sup>

9. The Government of Switzerland expressed the view that

The words "in accordance with the rules or practice of the Organization" should be replaced by "with the agreement of the Organization and in accordance with its rules or practice", which would come at the beginning of the sentence, for it is felt that the organizations should be empowered to grant or refuse permission to establish a permanent observer mission. The present reference to the rules or practice of the Organization seems to signify that permanent observer missions may be established if the general practice of the organization admits of their existence. On the other hand, it does not seem to permit a separate decision to be taken in each case.

10. The secretariat of the IAEA noted that

the phrase "in accordance with the rules or practice of the Organization" would appear to be somewhat repetitious as article 3 of the draft articles provides that "the application of the present articles is without prejudice to any relevant rules of the Organization". On the other hand, we assume that the intent is to emphasize this point and to bring into play, in this particular context, the concept of "practice".

11. Two Governments [Poland and Hungary, respectively] considered that

the principle expressed in article 52 of the draft, according to which any non-member State may establish a permanent observer mission to an international organization of universal character, should be applied equally to all non-member States.

This article ought to lay down that all non-member States may establish permanent observer missions to the international organizations of universal character.

In the view of one of these Governments [Hungary], the present wording of the provision, more specifically the expression

<sup>180</sup> *Ibid.*, Twenty-first Session, Supplement No. 1 A (A/6301/Add.1), p. 14.

<sup>181</sup> *Ibid.*, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, paras. 43-45.

<sup>182</sup> *Ibid.*, para. 46.

<sup>183</sup> See above, p. 26, document A/CN.4/241 and Add.1 and 2, para. 108.

"in accordance with the rules or practice of the Organization", is contrary to the principle of the sovereign equality of States and to the principle of universality. It is also inconsistent with draft article 75, which forbids discrimination between States.

#### In the view of the other Government [Poland]

it should be made absolutely clear that the rules or practice applied in an organization cannot lead to any discrimination whatsoever in the treatment of individual States.

The opinion was expressed [Hungary] that there was a contradiction between article 52 and the attached commentary. Namely, it is rightly stated in paragraph 2 of the commentary that it is of vital interest to non-member States to be able to follow the work of international organizations, and that the association of non-member States with international organizations is of benefit to the organizations and conducive to the fulfilment of their principles and purposes. In view of the foregoing, the right solution would be for the present wording of article 52 to be replaced by the text of article 51 proposed by the Special Rapporteur in his fifth report.<sup>184</sup>

12. In the opinion of two Governments [Australia, United Kingdom], the drafting of the article might suggest, as evidenced by the comments of the Commission and of States indicating that it had already been so construed, that a non-member State was in some way being granted the right to establish a permanent observer mission to an international organization if it considered that it could do so in accordance with the rules or practice of the organization. In their view, international practice had not established such right. And the objection would indeed be strengthened if there were any question of the word "practice" being intended to cover the mere fact that other non-members already had observer missions to the organization. A non-member State was, by definition, not a party to the constitution of the organization in question and it was only by agreement or decision of the members that a non-member State could become entitled to send an observer mission. The members of an organization maintained control over the establishment of observer missions. Moreover, in the absence of any provision in the constitution or otherwise binding on the host State, the establishment of observer missions in its territory must require its consent. How this should be codified was a matter which should be given further consideration by the Commission; but it was essential that the Commission should examine from this standpoint both the efficacy of, and indeed the need for article 52.

If it was felt that any provision was required on the question of the establishment of permanent observer missions, it would be preferable to provide simply that the establishment of permanent observer missions to an organization was regulated by the member States of the organization in accordance with the relevant constitutional documents and decisions of the organization and subject to the consent of the host State. But the problems presented by the drafting of this article illustrated the general difficulty of trying to lay down uniform rules relating to observer missions given that the cases which arose in practice were naturally so heterogeneous.

13. The secretariat of UPU, while noting that the article "leaves the way open for the establishment of permanent

observer missions to international organizations by non-member States", indicated that the practice of UPU does not correspond to the general scope of this provision, because there is a certain reticence towards non-member countries. It further noted that "the right is not unconditional but is dependent on the rules or practice of the organization". For these reasons, it reiterated "the need to settle the question of the establishment of the legal relationship between the proposed convention and international organizations".

14. In its editorial observations, the Secretariat of the United Nations expressed the view that, as it had suggested in the case of article 6, "in the last line, the words 'set forth' should be replaced by the words 'provided for' ". (A/CN.4/L.162/Rev.1, section B.)

#### (b) Observations of the Special Rapporteur

15. The Special Rapporteur notes that the comments made by Governments both during the debates in the Sixth Committee and in writing, as systematically presented in the preceding section, are but the expression of basically different positions reflected in the four alternative approaches described in paragraph 1 above. The arguments advanced in support of each approach reproduce, in general, those which were made in the course of the discussion in the Commission, some of which are reflected in paragraph 3 of the Commission's commentary to the article. In these circumstances, the Special Rapporteur cannot but record that the comments of Governments are not sufficient in themselves to give to the Commission any clear directive as to the manner in which the question might be resolved. As for himself, he wishes to point out that in paragraphs 1 and 2 of its commentary to the article the Commission endorsed the view expressed by the Special Rapporteur in his own commentary to the then draft article 51 in the fifth report he submitted on the topic that the article lays down a "general rule".

Underlying such a general rule is the assumption that the organization is one of universal character. [...] Given the central position which such international organizations [of universal character] occupy in the present-day international order and the world-wide character of their activities and responsibilities, it becomes of vital interest to non-member States to be able to follow the work of those organizations more closely. It could also be of benefit to the organizations as a whole and conducive to the fulfilment of their principles and purposes.<sup>185</sup>

The Special Rapporteur wishes further to note that article 52 is subject to the provisions of article 75 on non-discrimination. The Special Rapporteur, therefore, does not consider it necessary, for the purposes of the present report, to introduce in the text which he is to submit to the Commission for its consideration and final decision any substantive change which would alter the balance achieved in the provision of the article as presently drafted.

16. In the light of the general considerations made in the preceding paragraph, the Special Rapporteur is unable to agree with the concrete drafting suggestions reflected in paragraphs 4, 8, 9 and 11 above. Furthermore, as regards

<sup>184</sup> *Yearbook of the International Law Commission, 1970*, vol. II, p. 1, document A/CN.4/227 and Add.1 and 2.

<sup>185</sup> *Ibid.*, p. 7, document A/CN.4/227 and Add.1 and 2, chap. II.



the suggestion reflected in paragraph 8 above, he wishes to refer to his observation on a comment made in the context of article 6.<sup>186</sup> As to the suggestion reflected in paragraph 9 above, he wishes to point out that the establishment of permanent observer missions is to be effected "in accordance with the rules or practice of the Organization".

17. As regards the comment reflected in paragraph 13 above, the Special Rapporteur wishes to refer to his observations on comments made in the context of article 22.<sup>187</sup>

18. With respect to the editorial suggestion reflected in paragraph 14 above, the Special Rapporteur wishes to recall his proposal in the context of article 6 that "no change should be made in the text" of that article.<sup>188</sup> Therefore, for the sake of uniformity in the presentation of the text of the articles included in this report, he does not propose to replace the words "set forth" in article 52. The editorial suggestion made should be taken into consideration by the Drafting Committee.

19. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 52 would, therefore, read as follows:

**Article 52. Establishment of permanent observer missions**

Non-member States may, in accordance with the rules or practice of the Organization, establish permanent observer missions for the performance of the functions set forth in article 53.

**Article 53. Functions of a permanent observer mission**

**(a) Observations of Governments and international organizations**

1. In the course of the debate in the Sixth Committee certain representatives

questioned the desirability of attempting an enumeration of the functions of a permanent observer mission. Each observer mission constituted a special case and it would therefore be inadvisable to lay down guidelines which would inevitably tend to introduce an element of rigidity in practice. Certain representatives observed that permanent observer missions maintained the necessary liaison between the sending State and the organization but did not represent that State in the organization. Representatives of non-member States could sometimes be invited to participate in meetings of organs or conferences on an equal footing with member States, but in such cases the representatives of non-member States fell into the category of "delegations to organs and to conferences" and not into that of "permanent observer missions". It was also observed that, strictly speaking, "negotiation" was not one of the functions of an observer.<sup>189</sup>

<sup>186</sup> See above, pp. 26 and 27, document A/CN.4/241 and Add.1 and 2, paras. 108 and 113.

<sup>187</sup> See above, pp. 43 and 45, document A/CN.4/241/Add.3, Article 22, paras. 12-19 and 26 of the observations.

<sup>188</sup> See above, p. 27, document A/CN.4/241 and Add.1 and 2, para. 116.

<sup>189</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 47.*

2. In its written comments, one Government [United Kingdom] expressed the view that

the functions listed are broader than those which might be performed by some observer missions. In other cases, the functions of such a mission could be wider than those listed. Here again, it would be preferable to leave this matter to be dealt with case by case in the future.

3. Another Government [Finland] considered it unnecessary

to mention the promotion of co-operation between the sending State and the organization in the enumeration of the functions of a permanent observer mission.

4. Most of the Governments which commented on the article addressed themselves to the phrase "negotiating with the Organization when required and representing the sending State at the Organization". In that connexion one Government [Australia] observed that the provisions regarding permanent observer missions had evidently been based on the premise that these missions "perform functions virtually identical to the functions performed by permanent missions" and had "therefore been accorded similar status, privileges and immunities". In its view that premise was not valid and the description of a permanent observer mission in articles 51 and 53 did not "accurately reflect the role of a permanent observer mission". The function of an observer mission was "to observe and maintain liaison with the organization"; it did not, "in the active sense, 'represent' the sending State". Another Government [Canada], agreeing with the foregoing view, suggested that the phrase be "rephrased or deleted in order to make it clear that an observer mission does not represent". A third government [Japan] favoured also the deletion of the phrase. In this connexion it stated that

occasions may arise where a non-member State negotiates with the organization, or such a State must be represented at the organization. For example, parties to the Statute of the International Court of Justice that are not Members of the United Nations participate in the procedure for effecting amendments to the Statute in the United Nations. Since a non-member State has the discretion to decide by whom it shall be represented, a permanent observer may be designated to negotiate with the organization or to represent it at the organization. From this it does not necessarily follow that representing at or negotiating with the organization constitute proper functions of a permanent observer mission as such.

In its view the deletion of the phrase would "in no way preclude a permanent observer mission from performing such functions".

5. The Government of Switzerland expressed

some misgivings about the views in paragraph 2 of the commentary contrasting permanent missions and observers. In its view, the permanent observer does specifically represent his Government in (*auprès*) the Organization. Moreover, it may be noted that, in French, this is the term used in describing such missions. For example, the Swiss observer mission in New York is officially called the "Office of the Permanent Observer of Switzerland to (*auprès*) the United Nations" and the Swiss representative at Geneva is called the "Observer of the Federal Political Department to (*auprès*) the United Nations in Geneva and Permanent Representative to (*auprès*) the other International Organizations".

It considered that

precisely because the sending State is not a member of the organization, the position of the mission is very similar to that of an



embassy to a foreign Government. In the same way as an embassy represents the sending State in (*auprès*) the receiving State, the observer mission represents it in (*auprès*) the organization, and participation in the internal work of the organization, which is one of the fundamental tasks of a Member State's permanent mission, is, in principle, clearly impossible in the case of observers, just as of course there is no equivalent in international relations. Like the ambassador, the observer therefore ensures representation between two entities which are exterior to each other. Accordingly, it is not a Member State's permanent mission which should be equated with a diplomatic mission (while the observer is accorded a lower degree of competence) but rather the observer who should be equated with the embassy, since the permanent mission, which participates in the internal work of the organization, has an important extra degree of competence for which there is no analogy in inter-State relations.

This similarity between observer missions and diplomatic missions has certain practical consequences relating to their status which should be taken up again at a later stage.

#### 6. The Secretariat of IAEA considered that

The distinction made between representing the State *at* the organization, as opposed to the concept of representing the State *in* the organization seems to be an extremely fine one and might even lead to a certain confusion. Moreover, the concept of representing the State at the organization might be felt to prejudice the distinction between missions of Member States and non-member States. Perhaps this could be clarified by replacing the word "at" by the following words: "in its relations with".

#### 7. The Government of Switzerland also expressed the view that

as to the text of the draft article, the words "representing its Government at sessions of organs of the Organization at which it has been invited to participate" should be added to the text. This formulation is based on the wording used in the United Nations Legal Counsel's memorandum dated 22 August 1962.<sup>190</sup>

It further stated that

an organization sometimes invites non-member States to participate in some of its work and, occasionally, it is obliged to do so. In that connexion, it is possible to cite Switzerland's participation in the elections in the International Court of Justice and in the revisions of the Statute of the Court. Such participation is one of the normal responsibilities of observer missions.

The Swiss Government, in addition, suggested that "in the penultimate line of the article the words 'with the organization' should be changed to 'with or in the Organization', the phrase used in article 7 (c)".

#### 8. The secretariat of UPU explained that

The International Bureau deals directly with the Postal Administrations of member countries and only exceptionally with the permanent missions of member States. This is because of the nature of the activities of UPU and the regulations in force, which make the International Bureau serve the Postal Administrations (article 20 of the Constitution).

#### (b) Observations of the Special Rapporteur

9. As regards the comments reflected in paragraphs 1 and 2 above concerning the enumeration of functions in article 53, the Special Rapporteur is of the view that the required flexibility is achieved in the provision of the article by the use of the words *inter alia*.

10. As regards the comment reflected in paragraph 3 above, the Special Rapporteur takes the view that the express reference to the promotion of co-operation which has been included in the text of article 7 is even more warranted in the context of article 53 in view of the nature and purpose of the relationship between a sending State and the organization implicit in the notion of permanent observer mission, as stressed in the passage from the Secretary-General of the United Nations quoted in paragraph 1 of the Commission's commentary to article 53.

11. As regards the comments reflected in paragraphs 1 and 4 above regarding the function of negotiation, the Special Rapporteur, while observing that that function flows directly from the representative character of the mission, wishes to draw attention to the distinction introduced between the provisions of articles 7 and 53 by the use in the latter article of the words "where required" after the words "negotiating with the Organization", emphasized by the Commission in paragraph 2 of its commentary to the article.

12. The Special Rapporteur is unable to agree with the criticisms concerning the inclusion of "representation" among the functions of the permanent observer mission. In his view, as already pointed out,<sup>191</sup> representation is inherent in the very nature of a mission and it is in this sense that the notion has been reflected in article 7 of the draft. In this connexion, the Special Rapporteur wishes to draw attention to the comments made by the Government of Switzerland, reflected in paragraph 5 above.

13. As regards the comments reflected in paragraphs 5 and 6 above concerning the use of the expression "at", the Special Rapporteur wishes to refer to paragraph 2 of the Commission's commentary on the article which in his view correctly explains the use of that expression instead of the word "in" used in article 7 in order to emphasize the fact that permanent observers, being representatives of States non-members of the organization, do not perform functions identical with those of permanent missions of member States. In these circumstances, the Special Rapporteur is unable to agree with the second drafting suggestion reflected in paragraph 7 above.

14. As regards the first drafting suggestion reflected in paragraph 7 above, the Special Rapporteur is of the view that it concerns observer delegations, a matter on which he submitted a working paper<sup>192</sup> at the Commission's twenty-second session but which the Commission considered that it should not take up at this time.<sup>193</sup>

15. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 53, would therefore read as follows:

#### **Article 53. Functions of a permanent observer mission**

The functions of a permanent observer mission consist *inter alia* in maintaining liaison and promoting co-operation between the sending

<sup>191</sup> See above, Article 51, para. 14 of the observations.

<sup>192</sup> A/CN.4/L.151.

<sup>193</sup> *Yearbook of the International Law Commission*, 1970, vol. II, pp. 274-275, document A/8010/Rev.1, para. 14.

<sup>190</sup> Reproduced in *Yearbook of the International Law Commission*, 1967, vol. II, p. 190, document A/CN.4/L.118 and Add.1 and 2, part one, A, para. 169.

State and the Organization, ascertaining activities and developments in the Organization and reporting thereon to the Government of the sending State, negotiating with the Organization when required and representing the sending State at the Organization.

**Article 54. Accreditation to two or more international organizations or assignment to two or more permanent observer missions**

*(a) Observations of Governments and international organizations*

**1. One Government [Finland] expressed the view that**

Among other reasons, regulating the status and rights of permanent observer missions is of importance because the possibility to establish such missions as described in these articles [54 and 56] could constitute a suitable solution to the problems of the representation of small States including so-called micro-States. Consequently, States should have the right [...] to be represented at two or more organizations or organs by the same representative. The provisions should therefore be flexible enough in this respect.

**2. The Government of Switzerland observed that**

In addition to plurality of functions as observer to two or more international organizations, it is indeed useful to provide for the possibility of accrediting the head or a member of a permanent mission to one organization as an observer to another organization. This is advantageous to States which are members of only one or some of the organizations established at a given place and which want observer status in other organizations. It may be noted [...] that at Geneva the same person acts as permanent representative to the specialized agencies of which Switzerland is a member and as observer to the United Nations. His title, which was quoted in connexion with article 53, [...] mentions both these functions.

In its view, however, the present wording of the article was not perhaps absolutely clear and it might be amended as follows:

*"The sending State may accredit the same person as permanent observer to two or more international organizations or simultaneously as a member of its permanent mission to one or more international organizations and as permanent observer to one or more other organizations."*

**3. One Government [United Kingdom] considered that the article dealt "with matters on which it is not necessary or desirable to seek to lay down uniformity in the proposed convention". In its view "the matters in question should be dealt with as a matter of practice in each organization or in the rules of procedure of the organization".**

**4. In its editorial observations (A/CN.4/L.162/Rev.1, section B), the Secretariat of the United Nations stated that if the suggestions it had made concerning article 8 were accepted,<sup>194</sup> article 54 could be amended to read:**

*"Article 54. Accreditation to two or more international organizations or appointment to two or more permanent observer missions*

*"1. The same person may be:*

*"(a) accredited by the sending State as its permanent observer to two or more international organizations;*

*"(b) appointed by the sending State as a member of the staff of its permanent observer missions to two or more international organizations."*

<sup>194</sup> See above, Article 53, para. 5 of the observations.

<sup>195</sup> See above, p. 29, document A/CN.4/241 and Add.1 and 2, para. 136.

*"2. A person accredited by the sending State as its permanent observer to one or more international organizations may also be appointed by that State as a member of the staff of its permanent observer missions to one or more other international organizations."*

*"3. A person appointed by the sending State as a member of the staff of its permanent observer missions to one or more international organizations may also be accredited by that State as its permanent observer to one or more other international organizations."*

**5. In relation to article 54, one Government [Netherlands] observed that**

While this article repeats the provisions of article 8 in respect of permanent missions, a provision analogous to that laid down in article 9 has not been included either here or in a subsequent article. In his fifth report, the Special Rapporteur did make a proposal for the latter.<sup>196</sup>

Although the commentary makes it clear why this proposal was not adopted, its exclusion suggests that the Commission deems any provision concerning the compatibility of representative functions to be superfluous for two reasons, namely, that this compatibility is not disputed in practice by any State (a practice sufficiently well established in the Vienna Conventions of 1961 and 1963) and, secondly, that this compatibility also follows from article 59, paragraph 2.

That Government indicated that it too considered "any provision analogous to article 9 superfluous".

*(b) Observations of the Special Rapporteur*

**6. The Special Rapporteur is of the view that the change suggested in the comment reflected in paragraph 2 above is not simply one of wording but one that extends the scope of the provision of article 54 as presently drafted by including a reference to *permanent missions*, thereby also breaking the symmetry which exists between the provisions of articles 8 and 54. The Special Rapporteur wishes also to observe that as correctly pointed out in the comment reflected in paragraph 5 above, part III does not contain a provision analogous to that of article 9. In these circumstances, he believes that the situation referred to in the suggested amended version might more appropriately find its place in the context of article 9.**

**7. As regards the suggested text reflected in paragraph 4 above, the Special Rapporteur wishes to refer to his observations on a similar suggestion made in the context of article 8.<sup>197</sup>**

**8. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 54 would, therefore read as follows:**

***Article 54. Accreditation to two or more international organizations or assignment to two or more permanent observer missions***

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

<sup>196</sup> Yearbook of the International Law Commission, 1970, vol. II, p. 8, document A/CN.4/227 and Add.1 and 2, chap. II, "Note on assignment to two or more international organizations or to functions unrelated to permanent missions".

<sup>197</sup> See above, pp. 29 and 30, document A/CN.4/241 and Add.1 and 2, paras. 136 and 142.

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

#### Article 55. Appointment of the members of the permanent observer mission

##### (a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee certain representatives

agreed with the principle of the freedom of choice by the sending State of the members of the permanent observer mission. Others took the view that the article did not give adequate protection to the host State.<sup>198</sup>

2. The Government of Switzerland referred to its comments on article 10<sup>199</sup> and added:

The host State should be empowered to formulate objections to the presence of a given individual in its territory as a member of an observer mission. Without prejudice to the conciliation commission which it has been suggested should be set up, [200] it should be empowered to refuse to grant all or some of the immunities to the person concerned.

3. Another Government [Netherlands], referring also to its comments on the first series of draft articles ("General remarks" and comments on article 10) and to its comments on the second series,<sup>201</sup> indicated that it

would like to see the position of the host State invested with further guarantees. It should be borne in mind that the principle of reciprocity entertained in bilateral diplomatic relations can hardly ever be applied in the regulation of the quasi-diplomatic status of representatives to organizations. A partial remedy may be found in the inclusion of a provision to the effect that a host State shall have the right to require that a member of a diplomatic or consular mission, declared *persona non grata* by the host State, may not return as a member of a permanent mission, an observer mission or a delegation.

##### (b) *Observations of the Special Rapporteur*

4. As regards the comments reflected in the three preceding paragraphs, the Special Rapporteur wishes to refer to his observations on comments made in the context of article 10<sup>202</sup> which he considers equally applicable in the case of permanent observer missions.

5. In the light of the foregoing, the Special Rapporteur proposes that article 55 be retained in its present form. Article 55 would, therefore, read as follows:

<sup>198</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 48.

<sup>199</sup> See above, p. 31, document A/CN.4/241 and Add.1 and 2, para. 147.

<sup>200</sup> See above, p. 82, document A/CN.4/241/Add.3, Article 50, para. 7 of the observations.

<sup>201</sup> *Ibid.*, p. 75, Article 45, para. 7 of the observations.

<sup>202</sup> See above, p. 31, document A/CN.4/241 and Add.1 and 2, paras. 144-150.

#### Article 55. Appointment of the members of the permanent observer mission

Subject to the provisions of articles 56 and 60, the sending State may freely appoint the members of the permanent observer mission.

#### Article 56. Nationality of the members of the permanent observer mission

##### (a) *Observations of Governments and international organizations*

1. One Government [Pakistan] expressed the opinion that

draft article 56 correctly recognizes the right of the sending State to choose the members of its permanent observer mission from among nationals of third States possessing the required training and experience. The highly technical character of some international organizations makes it desirable not to restrict unduly the freedom of choice of States, especially in the case of developing countries.

Another Government [Finland], considering that

among other reasons, regulating the status and rights of permanent observer missions is of importance because the possibility to establish such missions as described in these articles could constitute a suitable solution to the problems of the representation of small States, including so-called micro-States,

took the view that the provisions of article 56 should therefore be flexible enough.

2. One Government [Canada] suggested that the last sentence of the article be redrafted to read:

They may be appointed from among persons having the nationality or persons being permanent residents of the host State, with the consent of that State which may be withdrawn at any time.

3. The secretariat of IBRD expressed the view that

The proposed rule in draft articles 11, 56 and 85 that a State should in principle be represented by its nationals appears to enter an area that might best be omitted from the proposed instrument. Whether a State, particularly one newly independent with perhaps still unsettled rules of nationality and probably a severe shortage of trained officials, is able to place sufficient trust in a non-national and whether it finds among its own nationals one it considers suitable to represent it and who can be spared from other, perhaps more urgent, assignments, would seem to be a question that each State should be able to resolve for itself, without extraneous considerations such as the preference that would be expressed by the proposed instrument. Similarly, whether a State permits one of its nationals to become an official or representative of another would also seem to be a matter in which it is not necessary to intervene. The Commission's obvious embarrassment with the proposed subject appears from the term, "in principle"—one most unusual in an instrument of this type and in practice incapable of interpretation and enforcement.

4. The secretariat of UNESCO, recalling its comments concerning article 11, considered that

the provision that the permanent observer and the members of the diplomatic staff of the observer mission "may not be appointed from among persons having the nationality of the host State, except with the consent of that State which may be withdrawn at any time" seems too restrictive. [...] Nationality should not be of any concern in the choice of a permanent observer and the diplomatic staff of the mission, and the host State should not be given a right of veto in the matter. [...] even the provision whereby the permanent observer and the members of the diplomatic staff of the mission "should in

principle be of the nationality of the sending State" is too restrictive, because, for reasons of another kind, the permanent representative and the permanent observer cannot be put on the same footing in that respect. The only restriction with regard to nationals of the host State which seems to be justified is that concerning privileges and immunities, [...] the host State should not be obliged to grant such persons all the privileges and immunities; those restrictions are explicitly laid down in articles 69 (by reference to the provisions of article 40) and 70 (by reference to the provisions of article 41), and it would be advisable to leave it at that.

#### (b) *Observations of the Special Rapporteur*

5. As regards the comments reflected in paragraphs 3 and 4 above, the Special Rapporteur wishes to draw attention to the explicit reference made by the Commission in paragraph 4 of its commentary to article 56 to the fact that the article reflects its decision, in dealing with the problem of nationality of the members of the permanent observer mission, to take a similar approach to that taken in the context of article 11. He wishes further to recall that he did not propose any change to the text of article 11.<sup>203</sup> In these circumstances, he defers to the commission's decision.

6. As regards the suggested rewording of the last sentence of the article, reflected in paragraph 2 above, the Special Rapporteur considers that the addition of a reference to "persons being permanent residents of the host State" in so far as it may relate to nationals of the sending State, would unduly restrict the scope of the provision contained in the first sentence of the article, and in so far as it relates to nationals of a third State, would run counter to the Commission's decision as explained in paragraph 3 of its commentary to the article, with which he is in agreement.

7. In the light of the foregoing, the special Rapporteur proposes that the article be retained in its present form. Article 56 would, therefore, read as follows:

#### *Article 56. Nationality of the members of the permanent observer mission*

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

#### *Article 57. Credentials of the permanent observer*

##### (a) *Observations of Governments and international organizations*

1. The comments made by governments and international organizations in connexion with article 57 concerned the article as a whole and each of the two paragraphs of the article.

##### *Article as a whole*

2. The Government of Switzerland expressed support for the idea of issuing permanent observers with creden-

tials, as it resulted in "a welcome clarification of their status".

3. Some governments, however, expressed disagreement with the inclusion of the provision of article 57 in the draft. One Government [United Kingdom] considered that the article

dealt with matters on which it is not necessary or desirable to seek to lay down uniformity in the proposed convention. The matters in question should be dealt with as a matter of practice in each organization or in the rules of procedure of the organization.

The opinions were also expressed that "permanent observers, being representatives of non-member States, do not perform functions identical with those of permanent missions of member States. They do not perform as a general rule and on a standing basis the functions of permanent missions" [Pakistan]; that "a permanent observer does not represent the sending State in the organization" [Japan]; and that the formality of credentials "is not met with in practice" as regards permanent observers [Netherlands]. In the view of two Governments, the requirement of notification to the organization as provided for in article 61 would suffice for the purposes of the permanent observers [Japan, Netherlands]. It was also said that additional formality added nothing to the status of the permanent observer; the practice of the United Nations should be followed whereby permanent observers simply addressed a letter to the Secretary-General instead of presenting credentials [Japan, Pakistan].

4. One Government [Finland], making reference to article 87, expressed the view that

in this article and in the commentary thereto, the presentation of credentials is described in varying terms. Terminology should be harmonized.

5. The secretariat of ITU pointed out that

the Secretary-General of ITU is given no power to accept the accreditation of a permanent observer mission, nor the credentials of its permanent observer.

##### *Paragraph 1*

6. One Government [Canada] expressed the view that taking into account the position of an observer mission in comparison with that of a permanent mission, paragraph 1 of article 57 could be less rigid in its formulation and redrafted as follows: "The credentials of the permanent observer may be issued either by the Head of Government or the Minister for Foreign Affairs or by another competent minister . . .".

##### *Paragraph 2*

7. One Government [Netherlands] considered that in conformity with the terms used in other articles and in view of the definition in article 51 (a), the words "a non-member State" should be replaced by "the sending State".

8. Another Government [Canada] suggested that the phrase after the words "permanent observer" should read: "shall act as its observer in one or more organs of the Organization when such role is permitted".

##### (b) *Observations of the Special Rapporteur*

9. As regards the comments reflected in paragraph 3 above, contrary to the provision of the article, the Special

<sup>203</sup> *Ibid.*, para. 156.

Rapporteur wishes to defer to the position taken by the majority of the members of the Commission, reflected in paragraph 3 of the Commission's commentary on the article to the effect that "it would be preferable to provide, in the draft articles, for the submission of credentials. Moreover, inclusion of such a provision would help make as complete as possible the legal regulation of the institution of permanent observers to international organizations" and with the Commission's belief, expressed in paragraph 4 of its commentary to the article that "permanent observers should be able to present credentials in substantially the same form as permanent representatives".

10. With regard to the comment reflected in paragraph 4 above, the Special Rapporteur wishes to point out that paragraph 1 of article 57 reproduces, with the requisite adaptations, the text of article 12 on permanent missions, on which both paragraphs of article 87 are also based. Further, that the replacement in article 87 of the word "minister" by "authority" has been explained by the Commission in paragraph 2 of its commentary to article 87. There remains, however, one difference consisting in the use in paragraph 1 of article 87 of the expression "transmitted to the Organization" instead of the expression "transmitted to the competent organ of the Organization" which is used in both articles 12 and 57. In this respect he wishes to refer to the observations in the context of article 87.<sup>204</sup>

11. As regards the comment reflected in paragraph 6 above, the Special Rapporteur notes that the suggested amended version appears to differ from the present text in that it excludes the reference to "the Head of State" and replaces the word "shall" by "may". He is, however, not sure whether the suggested amended version implies also the deletion of the phrase "if that is allowed by the practice followed in the Organization, and shall be transmitted to the competent organ of the Organization". Be it as it may, the Special Rapporteur, while drawing attention to paragraph 4 of the Commission's commentary on the article, wishes to express his belief that as presently drafted the article, in that it contains an enumeration which includes *inter alia* "the Head of State" and "another competent minister", and refers to "the practice followed in the Organization", preserves the necessary flexibility while safeguarding the legitimate interests of the organization.

12. The Special Rapporteur is in agreement with the suggestion made in the comment reflected in paragraph 7 above for the sake of consistency and uniformity.

13. The Special Rapporteur is unable to agree with the rephrasing suggested in the comment reflected in paragraph 8 above in so far as it amounts to deleting all reference to "representation", a subject on which he has already expressed his views.<sup>205</sup>

14. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form,

subject to the drafting change referred to in paragraph 12 above. Article 57 would, therefore, read as follows:

**Article 57. Credentials of the permanent observer**

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

2. A sending State may specify in the credentials submitted in accordance with paragraph 1 of this article that its permanent observer shall represent it as an observer in one or more organs of the Organization when such representation is permitted.

**Article 58. Full powers to represent the State in the conclusion of treaties**

**(a) Observations of Governments and international organizations**

1. The comments made by Governments and international organizations in connexion with article 58 related to the article as a whole, the title and paragraph 1 of the article.

*Article as a whole*

2. One Government [Israel], observing that the Vienna Convention on the Law of Treaties does not deal adequately with this aspect, agreed that articles 14 and 58 could be retained in the present set of draft articles, but it believes that, together with article 88, a single provision would be sufficient.

3. On the other hand, the Government of Switzerland recalled that in its earlier comments<sup>206</sup> it had

suggested deleting article 14, whose place in the part concerning permanent missions is the same as that of article 58 in the part concerning observers. It expressed the view that this matter relates to the conclusion of treaties between States and international organizations, a field which should be codified separately.

Another Government [Japan] also considered that the article should be deleted

since the matter will be dealt with in connexion with "the question of treaties concluded between States and international organizations", a subject which is on the agenda of the Commission.

A third Government [United Kingdom] expressed the view that the article deals

with matters on which it is not necessary or desirable to seek to lay down uniformity in the proposed convention. The matters in question should be dealt with as a matter of practice in each organization or in the rules of procedure of the organization.

*Title of the article*

4. One Government [Netherlands] indicated that the observation made in its comments on the title of article 14<sup>207</sup> also applied to the title of article 58.

<sup>204</sup> See below, p. 120, document A/CN.4/241/Add.5.

<sup>205</sup> See above, Article 51, para. 14 of the observations, and Article 53, para. 12 of the observations.

<sup>206</sup> See above, p. 33, document A/CN.4/241 and Add.1 and 2, para. 172.

<sup>207</sup> *Ibid.*, p. 34, para. 174.

5. Another Government [Canada] suggested that the title of the article should read: "Full powers with respect to the conclusion of treaties".

#### *Paragraph 1*

6. One Government [Finland] expressed the view that the wording of the paragraph is appropriate as it limits the powers of a permanent observer to adopt treaties in virtue of his functions to the treaties concluded between the sending State and the organization.

7. Another Government [Canada] stated that "in the context of the role of an observer mission, it is suggested that [...] the word 'representing' be deleted and replaced by the words 'being authorized by'".

8. The Government of Switzerland suggested that the word "adopting" [...] should be replaced by "negotiating", so as to avoid confusion with signing—dealt with in paragraph 2—and also to make allowance for the modern tendency to replace signing by a vote of adoption.

9. The secretariat of UNESCO, recalling its comment on article 14, expressed the view that

it does not seem [...] very apt to speak of "adopting the text of a treaty" in the case of a bilateral instrument. It would seem [...] more accurate and more in accordance with the facts to say that a permanent observer is considered as representing his State "for the purpose of negotiating and drawing up the text of a treaty . . .", or "for the purpose of negotiating a treaty and drawing up the text thereof . . .".

10. The secretariat of IAEA expressed the view that

the first paragraph and in particular the concept that a permanent observer might "adopt" the text of a treaty without the necessity of having full powers, seems also to blur the distinction between the competence of permanent representatives and that of permanent observers. Might it not be preferable to use the word "negotiate" which is used in article 53 and, in fact, repeated in the commentary to article 58 itself? The first paragraph of article 58 might then read as follows:

"A permanent observer in virtue of his functions and without having to produce full powers is recognized as being competent to negotiate the text of a treaty between his State and the international organization to which he is accredited."

#### *(b) Observations of the Special Rapporteur*

11. As regards the comment reflected in paragraph 2 above, the Special Rapporteur wishes to refer to his observation in the context of the general comments made on part III.<sup>208</sup>

12. With respect to the comments reflected in paragraph 3 above favouring the deletion of the article, the Special Rapporteur wishes to refer to his observation on a similar comment made in the context of article 14.<sup>209</sup>

13. As regards the comment concerning the title of the article reflected in paragraph 4 above, the Special Rapporteur

wishes to refer to his observation on a similar comment made in the context of article 14,<sup>210</sup> subject to his general observation made in the context of article 23.<sup>211</sup>

14. As regards the comment reflected in paragraph 5 above, the Special Rapporteur reiterates what has been mentioned in the preceding paragraph. In addition, he wishes to indicate that, as in the case of article 57,<sup>212</sup> he would be unable to accept the suggested redrafting in so far as it deletes the reference to "representation", a subject on which he already expressed his views.<sup>213</sup> In the same manner, he is unable to agree to the replacement suggested in the comment reflected in paragraph 7 above.

15. As regards the comments reflected in paragraphs 8, 9 and 10 above concerning the use of the word "adopting", the Special Rapporteur is of the view that this word, which appears also in the text of article 14, is the most appropriate as it conforms with the provisions of the Vienna Convention on the Law of Treaties.

16. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, subject to the change referred to in paragraph 13 above. Article 58 would, therefore, read as follows:

#### *Article 58. Representation of States in the conclusion of treaties with international organizations*

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

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

#### *Article 59. Composition of the permanent observer mission*

##### *(a) Observations of Governments and international organizations*

1. The comments made by Governments in connexion with article 59 concerned each of the two paragraphs of the article.

#### *Paragraph 1*

2. One Government [Canada] expressed the view that paragraph 1 should include a provision to the effect that the "deputy or asso-

<sup>210</sup> *Ibid.*, p. 34, paras. 174 and 178.

<sup>211</sup> See above, p. 46, document A/CN.4/241/Add.3, Article 23, para. 7 of the observations.

<sup>212</sup> See above, Article 57, paras. 8 and 13 of the observations.

<sup>213</sup> See above, Article 51, para. 14 of the observations, and Article 53, para. 12 of the observations.

<sup>208</sup> See above, "Part III in general", para. 20 of the observations.

<sup>209</sup> See above, pp. 33 and 34, document A/CN.4/241 and Add.1 and 2, paras. 172 and 176.

ciate permanent observer” shall enjoy the status of permanent observer when the latter is absent.

#### Paragraph 2

3. As regards paragraph 2, one Government [Canada] expressed satisfaction “as to the recognition of the differences in privileges and immunities enjoyed by different types of delegates”.

4. Another Government [Netherlands] expressed the view that the provision of paragraph 2

could better be placed in section 2, in the same way as article 107 has been inserted in section 2 of Part IV.

In the last part of the provision the words used differ from those in the last part of paragraph 2 of article 9 of the 1969 Convention on Special Missions. [214] There seems to be no difference in intent, so it is recommended that the same wording be adopted.

#### (b) *Observations of the Special Rapporteur*

5. As regards the comment reflected in paragraph 2 above, the Special Rapporteur wishes to point out that terms such as “deputy or associate permanent observer” do not appear in the text of article 51 on the “use of terms” nor have they been referred to elsewhere in the draft.

6. The Special Rapporteur considers well taken the comment reflected in paragraph 4 above concerning the placing of the provision of paragraph 2 of the article, without thereby intending to prejudge the decision which the Commission may reach on the consolidation of some articles in the light of the substantive discussion to be held thereon. As regards the drafting suggestion referred to in the same comment the Special Rapporteur considers that the difference in wording between the texts of articles 59 (and 107) and paragraph 2 of article 9 of the Convention on Special Missions does not imply a difference in substance. In these circumstances, he prefers the wording of article 59 for its simplicity; to follow the language of the corresponding provision of the Convention on Special Missions would make the text of article 59 rather cumbersome, particularly in view of the additional reference in it to “a permanent mission”.

7. In the light of the foregoing and subject to the considerations stated in paragraph 6 above, the Special Rapporteur proposes for the purposes of this report to retain the article in its present form. Article 59 would, therefore, read as follows:

#### **Article 59. Composition of the permanent observer mission**

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

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

<sup>214</sup> See foot-note 41 above.

#### **Article 60. Size of the permanent observer mission**

##### *(a) Observations of Governments and international organizations*

1. The Government of Switzerland reiterated its comment on article 16 <sup>215</sup> concerning the limiting of the size of the mission.

2. Another Government [Canada] stated that it “would welcome the relocation of the present article 50 so that it would apply to article 60 as well as to article 16, i.e. to a permanent observer mission as well as to a permanent mission”.

##### *(b) Observations of the Special Rapporteur*

3. As regards the comment reflected in paragraph 1 above, the Special Rapporteur wishes to refer to his observation on the corresponding comment made in the context of article 16. <sup>216</sup>

4. With respect to the comment reflected in paragraph 2 above, the Special Rapporteur wishes to refer to his observation in the context of the contents and title of part I. <sup>217</sup>

5. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 60 would, therefore, read as follows:

#### **Article 60. Size of the permanent observer mission**

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

#### **Article 61. Notifications**

##### *(a) Observations of Governments and international organizations*

1. The Government of Switzerland reiterated its comment on article 17, <sup>218</sup> concerning notification of the host State by the observer and not by the organization, as an indispensable requirement for the granting of privileges. It also referred to its comments on articles 9 and 17 <sup>219</sup> with regard to notification of double assignments (article 59, para. 2).

2. Another Government [Netherlands] expressed the view that

If article 62 were deleted, [220] it would suffice to add to article 61, paragraph 1, a sub-paragraph (b) reading as follows:

“the name of the person who will act as *chargé d'affaires ad*

<sup>215</sup> See above, p. 34, document A/CN.4/241 and Add.1 and 2, para. 185.

<sup>216</sup> *Ibid.*, p. 35, para. 187.

<sup>217</sup> *Ibid.*, p. 15, para. 30.

<sup>218</sup> *Ibid.*, p. 35, para. 189.

<sup>219</sup> *Ibid.*, pp. 29 and 35, paras. 134 and 189.

<sup>220</sup> See below, Article 62, para. 1 of the observations.



*interim*, if the post of permanent observer is vacant or the permanent observer is unable to perform his functions, and if the sending State wishes to fill this vacancy”.

3. A third Government [United Kingdom] expressed the opinion that

Paragraphs 3 and 4 do not take sufficient account of the position of the host State. It is the host State which must accord the privileges and immunities to which the persons in question are to be entitled. There should at least be some requirement that the organization should transmit the notifications to the host State without delay.

4. In its editorial observations (A/CN.4/L.162/Rev.1, section B) the Secretariat of the United Nations indicated that the suggestions it had made with regard to article 17<sup>221</sup> applied also *mutatis mutandis* to article 61.

#### (b) *Observations of the Special Rapporteur*

5. As regards the comment reflected in paragraph 1 above, the Special Rapporteur wishes to recall his proposal that no substantial changes be made to the texts of articles 9 and 17.<sup>222</sup>

6. As regards the comment reflected in paragraph 2 above, the Special Rapporteur wishes to refer to his proposal that article 62 be retained in its present form.<sup>223</sup>

7. As regards the comment reflected in paragraph 3 above, the Special Rapporteur wishes to refer to his observation made in the context of article 42<sup>224</sup> to the effect that the provision of paragraph 4 of the article safeguards against possible delays in the transmission of notifications to the host State by the organization.

8. With respect to the suggestions referred to in paragraph 4 above, the Special Rapporteur wishes to refer to his observation thereon in the context of article 17.<sup>225</sup>

9. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 61 would, therefore, read as follows:

#### *Article 61. Notifications*

1. The sending State shall notify the Organization of:

(a) The appointment of the members of the permanent observer mission, their position, title and order of precedence, their arrival and final departure or the termination of their functions with the permanent observer mission;

(b) The arrival and final departure of a person belonging to the family of a member of the permanent observer mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the permanent observer mission;

(c) The arrival and final departure of persons employed on the private staff of members of the permanent observer mission and the fact that they are leaving that employment;

(d) The engagement and discharge of persons resident in the host State as members of the permanent observer mission or persons employed on the private staff entitled to privileges and immunities.

<sup>221</sup> See above, p. 35, document A/CN.4/241 and Add.1 and 2, para. 192.

<sup>222</sup> *Ibid.*, pp. 30 and 35, paras. 142, 193 and 195.

<sup>223</sup> See below, Article 62, para. 7 of the observations.

<sup>224</sup> See above, p. 71, document A/CN.4/241/Add.3, Article 42, para. 14 of the observations.

<sup>225</sup> See above, p. 35, document A/CN.4/241 and Add.1 and 2, paras. 192 and 195.

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

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

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

#### *Article 62. Chargé d'affaires ad interim*

##### (a) *Observations of Governments and international organizations*

1. One Government [Netherlands] expressed agreement “with the Commission that the sending State should not be obliged to appoint a *chargé d'affaires ad interim* for an observer mission. Accordingly, any detailed regulation governing this institution seems ponderous”.<sup>226</sup>

2. Another Government [United Kingdom] expressed the view that

Although the title *Chargé d'affaires* may be appropriate in some cases, it would not be suitable in all. “Acting head of the permanent observer mission” or “acting permanent observer” would be more suitable in most cases. Here again, however, the flexibility of the present situation is preferable to any attempt to lay down a uniform rule. If anything, a slight amendment to article 51 (b) would be preferable to the inclusion of article 62.

3. One Government [Canada] observed that

In view of the fact that *Chargé d'affaires ad interim* is a well established title, its use here might be somewhat confusing. Accordingly, [it] would prefer the use of the words “Acting permanent observer” rather than *Chargé d'affaires ad interim* for the replacement of permanent observers.

4. In its editorial observations (A/CN.4/L.162/Rev.1, section B), the Secretariat of the United Nations, recalling its suggestion for article 18<sup>227</sup> expressed the view that the words “in case” in the second sentence should be replaced by “if”.

##### (b) *Observations of the Special Rapporteur*

5. As regards the comments reproduced in paragraphs 1 to 3 above, the Special Rapporteur wishes to refer to the Commission's views reflected in paragraphs 1 and 3 of its commentary to the article that “it was thought desirable [...] in order to make the regulation of the institution of permanent observers as complete as possible, to include a provision on this topic” and that “it was reasonable” to use the term “*chargé d'affaires ad interim*” in connexion with permanent observer missions “because of the representative functions performed by observers”. The Special Rapporteur defers to the Commission's decision based on the above-mentioned views.

6. As regards the suggestion referred to in paragraph 4 above, the Special Rapporteur wishes to refer to his observation on a similar suggestion made in the context of article 18.<sup>228</sup>

<sup>226</sup> See above, Article 61, para. 2 of the observations.

<sup>227</sup> See above, p. 36, document A/CN.4/241 and Add.1 and 2, para. 198.

<sup>228</sup> *Ibid.*, p. 36, paras. 198 and 201.



7. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 62 would, therefore, read as follows:

**Article 62.** *Chargé d'affaires ad intérim*

If the post of permanent observer is vacant, or if the permanent observer is unable to perform his functions, a *chargé d'affaires ad intérim* may act as head of the permanent observer mission. The name of the *chargé d'affaires ad intérim* shall be notified to the Organization either by the permanent observer or, in case he is unable to do so, by the Minister for Foreign Affairs or by another competent minister if that is allowed by the practice followed in the Organization.

**Article 63.** *Offices of permanent observer missions*

(a) *Observations of Governments and international organizations*

1. The comments made by Governments in connexion with article 63 related to the article as a whole and more specifically to paragraph 1 in the light of paragraph 2 of the Commission's commentary on the article, and to paragraph 2.

*Article as a whole*

2. The Government of Switzerland stated that it endorsed the principle set out in the article.

*Paragraph 1*

3. Three Governments [Madagascar, Netherlands, Switzerland] shared the view expressed by some members of the Commission, reflected in paragraph 2 of the Commission's commentary to the article, that the word "localities" should be replaced by "a locality". In that connexion, one Government [Madagascar] expressed the view that

It would hardly be reasonable to allow the premises of an observer mission to be dispersed over the territory of a host State, since such premises enjoy important immunities and tax exemptions (article 67).

*Paragraph 2*

4. In the course of the debate in the Sixth Committee, some doubts were expressed about paragraph 2 of the article. It was considered that

International practice had not yet crystallized sufficiently to warrant the inclusion of such provision in the draft articles. Certain representatives said that it was inadvisable to give the impression of encouraging States to establish offices of their permanent observer missions in the territory of a State other than the host State because such situations gave rise to problems, particularly where privileges and immunities were involved. On the other hand, it was argued that to make such establishment conditional on the prior consent of the host State might cause special difficulties for newly independent countries which still lacked an extensive network of embassies and missions.<sup>290</sup>

5. In its written comments, one Government [Pakistan] expressed the fear that the provision in paragraph 2 might "cause hardship to newly independent States".

<sup>290</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 49.

(b) *Observations of the Special Rapporteur*

6. As regards the comments reflected in paragraph 3 above, the Special Rapporteur wishes to refer to his observations on a comment made in the context of article 20.<sup>290</sup>

7. As regards the comments reflected in paragraphs 4 and 5 above concerning paragraph 2 of the article, the Special Rapporteur wishes to point out that that paragraph reproduces, with the requisite adaptations, the text of paragraph 2 of article 20. He wishes further to recall that, as stated in paragraph 1 of the Commission's commentary on article 20—reproduced in paragraph 1 of its commentary to article 63—paragraph 2 of the article deals "with the rare cases in which sending States wish to establish offices of their permanent missions outside the territory of the host State". The Special Rapporteur is not inclined to agree with the apprehensions to which the requirement of the prior consent of a third State has given rise, particularly when the requirement of the prior consent of the host State does not appear to have led to similar results.

8. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 63 would, therefore, read as follows:

**Article 63.** *Offices of permanent observer missions*

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

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

**Article 64.** *Use of [flag and] emblem*

(a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee

There were differences of opinion concerning the right of the permanent observer mission to use the flag of the sending State. Certain representatives took the view that reference to the use of the flag should be deleted because it sufficed to grant such missions the right to use the emblem. Others, however, suggested that the reference to the flag should be retained, on the ground that a permanent observer mission had the right to use both the emblem and the flag of the sending State.<sup>291</sup>

2. In its written comments one Government [Madagascar] observed that "the right to use the flag is expressly recognized". Another Government [Finland] expressed the view that "the right to use the flag of the sending State is not necessary for a permanent observer mission but there is no reason to exclude it". The Government of Switzerland considered that

In view of the observations on the similarity between observer missions and diplomatic missions, [292] it seems natural to grant the

<sup>290</sup> See above, pp. 36 and 37, document A/CN.4/241 and Add. 1 and 2, paras. 208, 211 and 213.

<sup>291</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 50.

<sup>292</sup> See above, Article 53, para. 5 of the observations.

mission the right to display the flag of the sending State on its premises and to extend that right to the observer's residence and the vehicle he uses.

A fourth Government [Netherlands] indicated that if the article was considered necessary, it seemed preferable to refer to the "flag and emblem".

3. Two Governments [Canada, Japan] favoured the deletion of the reference to the use of the flag.

4. One Government [Madagascar] expressed the view that "if diplomatic relations do not exist or are severed [...] use of the flag should be the subject of arrangements to be concluded between the sending State and the receiving State".

#### (b) *Observations of the Special Rapporteur*

5. The Special Rapporteur notes that the comments of governments as reflected in paragraphs 1 to 3 above confirm the division of views which took place in the Commission concerning the reference to "the flag". As for himself, the Special Rapporteur wishes to recall that the corresponding draft article (article 59) submitted by him in his fifth report on the topic<sup>233</sup> included a reference to the flag. Nevertheless, in view of the inconclusive comments made by governments, he does not deem it appropriate for the purposes of the present report to introduce any changes in the text of the article which he is to submit to the Commission for its consideration and final decision.

6. As regards the comment reflected in paragraph 4 above, the Special Rapporteur wishes to indicate that the situation referred to concerns the question of the possible effects of exceptional situations, which is dealt with elsewhere in the present report.<sup>234</sup>

7. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Subject to the Commission's decision on the bracketed words, article 64 would, therefore, read as follows:

#### *Article 64. Use of [flag and] emblem*

1. The permanent observer mission shall have the right to use the [flag and] emblem of the sending State on its premises.

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

### SECTION 2. FACILITIES, PRIVILEGES AND IMMUNITIES OF PERMANENT OBSERVER MISSIONS

#### *General comments*

##### (a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee some representatives, emphasizing the need to ensure the

effective performance of their functions by permanent observer missions, endorsed the solutions proposed by the Commission to determine the privileges and immunities of such missions. Those representatives considered that,

Even if they were established by non-member States, permanent observer missions were of a representative and permanent character and their privileges and immunities should therefore be generally the same as those accorded to permanent missions, subject to any minor changes which the special characteristics of the functions of permanent observer missions might make it advisable to introduce in individual provisions. [...] It was pointed out that the alternative suggested by some—the privileges and immunities would be limited to those which were strictly "necessary for the performance of the functions"—was not sufficiently precise, would lead to inequalities of treatment and would open the way to subjective interpretations of the relevant provisions. In the opinion of those representatives, the Commission had struck a proper balance between the preservation of the interests of the host State and the need to protect relations between permanent observer missions and organizations.<sup>235</sup>

2. Other representatives supported in principle the approach adopted by the Commission to the question of the privileges and immunities of permanent observer missions. They felt, however, that

The representative character of those missions and the functions which they performed justified granting them the full range of diplomatic immunities and privileges, without discrimination and irrespective of their [...] nature. In the view of those representatives, therefore, it would be advisable for the Commission to follow the Vienna Convention on Diplomatic Relations of 1961<sup>[236]</sup> more closely and to remove from the draft articles any elements which did not conform to contemporary diplomatic law.<sup>237</sup>

3. Other representatives felt that

The objective criterion of functional necessity, embodied in Article 105 of the Charter of the United Nations, rather than theories based on the representative character or on unjustified parallels, should be the point of departure for delimiting the privileges and immunities of permanent observer missions [...]. There was no legal or historical basis for the view that every mission [...] was automatically entitled, because it was acting on behalf of a State, to the full range of diplomatic privileges and immunities. Permanent observer missions did not have the same representative capacity as "diplomatic missions" or the same functions and responsibilities as the permanent missions of Member States. [...]

Those representatives expressed reservations about the Commission's approach to the matter. In their opinion, the draft articles relating to the privileges and immunities of permanent observer missions [...] were based too closely on diplomatic law, tended without justification to identify permanent observer missions with permanent missions [...], and departed from contemporary practice and existing agreements. The Convention on the Privileges and Immunities of the United Nations<sup>[238]</sup> and the Convention on the Privileges and Immunities of the Specialized Agencies<sup>[239]</sup> should be regarded, as a general rule, as a maximum and no privileges and immunities which were not really necessary should be asked for. [...] Those representatives concluded by expressing the hope that the Commission would review the draft articles in question in the light of those observations, for it was essential to avoid the future convention being ratified by only a small number of States.

<sup>235</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 28.*

<sup>236</sup> See foot-note 38 above.

<sup>237</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 29.*

<sup>238</sup> See foot-note 20 above.

<sup>239</sup> See foot-note 45 above.

<sup>233</sup> *Yearbook of the International Law Commission, 1970, vol. II, p. 11, document A/CN.4/227 and Add.1 and 2, chap. II.*

<sup>234</sup> See above, p. 15, document A/CN.4/241 and Add.1 and 2, paras. 30-31.

In support of [these] observations, it was stated that limiting privileges and immunities was the best way of censuring their application in practice; that it was desirable to avoid imposing excessively heavy administrative burdens on the host State; that parliaments and public opinion were opposed to broadening the categories of persons enjoying privileged treatment; [...] and that an unnecessarily high level of privileges and immunities would make States reluctant to invite international organizations [...] to establish themselves [...] in their territory. In response to the latter argument, it was said that no State was obliged to permit an organization to establish its headquarters [...] in its territory, but if it did it should accept the obligation to accord the appropriate privileges and immunities to the missions [...] concerned.

It was also said that although the Commission based its draft as a whole on functional necessity, it departed from that criterion with regard to some specific provisions. Attention was drawn to the difference between multilateral diplomacy and bilateral diplomacy. In the case of the latter, the host State could protect itself by various measures such as the declaration of *persona non grata*, reciprocity, etc. The interests at stake were much more complex and much less complementary in multilateral diplomacy, where it could happen that the host State did not recognize the sending State.<sup>240</sup>

#### 4. Certain representatives said they

had no objection to the scope of the privileges and immunities conferred in the draft articles, provided that they were applied only to organizations in the United Nations family and to others of similar importance. In their view, it was necessary to find a more precise definition of the term "international organization of universal character".<sup>241</sup>

5. In its written comments, one Government [Finland] expressed the view that "in principle the permanent observer missions should have the same status as the permanent missions". The Government of Switzerland supported

the idea that the privileges and immunities of observer missions should be the same as those of permanent missions. In its view, a great deal could also be borrowed from the status of diplomatic missions, because of the similarity between the two types of missions.

Another Government [Israel] stated its inclination

towards a broad formulation of facilities, privileges and immunities for the official representatives of States; it considers that uniformity of treatment is preferable to the many ambiguities and obscurities now encountered. If, however, this view is not adopted, it is suggested that the Commission may wish to consider presenting the material in a series of separate instruments.

6. Some Governments [Australia, Japan, United Kingdom] considered that the draft articles virtually equated permanent observer missions with permanent missions for the purposes of determining the facilities, privileges and immunities to be accorded to them. In this connexion, one Government [United Kingdom] did not deem it "advisable to adopt articles which imply that this assimilation will be justifiable in all cases. The matter should be left to be dealt with in a flexible manner, case by case. Another Government [Canada] was of the opinion that the "reference made in draft articles 65 to 77 to the draft articles on permanent missions should be more restrictive". A third Government [Australia] expressed the view that the Commission should review the parallel it has drawn, taking into account the functions of permanent observer missions and the fact

that, since they do not belong to the organization, they are not subject to its rules. On the basis of a proper relationship between permanent missions and permanent observer missions the status, privileges and immunities of the latter would be considerably reduced from those shown in the present draft articles. They might appropriately be similar to those proposed [by that Government] for delegations to organs and conferences.<sup>242</sup>

7. Other Governments likewise stressed the "functional necessity" element. One Government [Canada], while considering that "privileges and immunities granted to permanent observer missions should only be those which are essential to the execution of their functions" indicated that it

welcomes and supports the statement made by the Chairman of the International Law Commission in the Sixth Committee that "The Commission would [...] also bear in mind [...] the suggestion of various delegations that articles 65 to 75 should be reconsidered in the light of the functional theory of privileges and immunities".

Another Government [Japan] expressed the view that

Placing permanent observer missions on the same footing as permanent diplomatic missions or permanent missions is not necessary for the performance of these limited functions.

Privileges and immunities to be accorded to permanent observer missions should be such as to ensure efficient performance of their main and normal functions. The functions of permanent observer missions consist, in principle, in observing the activities of international organizations and, to a lesser degree, in maintaining the necessary liaison between sending States and organizations. Thus, their functions differ, both in extent and in nature, from those of permanent diplomatic missions or permanent missions, which functions lie essentially in representing the sending States respectively in the receiving State or in the organization. Occasions may sometimes arise in which permanent observer missions are entrusted by their sending States with functions of representation at or negotiation with organizations. These functions, however, as the commentary on article 53 indicates, are not regularly recurrent and not inherent in the nature of permanent observer missions.

Moreover, the Commission's approach to the matter is not supported by the practice of international organizations of the United Nations family. In granting privileges and immunities to permanent observer missions, one should not depart from the practice of international organizations.

The same Government suggested that

the draft articles on privileges and immunities of permanent observer mission be based on the Vienna Convention on Consular Relations.<sup>243</sup>

8. The secretariat of WHO indicated that

The privileges and immunities which may be accorded [...] observers, regardless of privileges they may enjoy in other respects, are governed by the relevant provisions of the Headquarters Agreement<sup>244</sup> when the meeting is held at Geneva or of other agreements, concluded either previously or for the occasion, when the meeting is held away from Headquarters.

9. In its editorial suggestions, the Secretariat of the United Nations noted that

The title of section 2 of part II reads simply "Facilities, privileges and immunities". Moreover, "mission" is in the singular in the titles of sections 3 of parts II and III. It is in the plural in the titles of sections 1 of parts II and III. "Delegation" is in the singular in the

<sup>240</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 30-33.

<sup>241</sup> *Ibid.*, para. 34.

<sup>242</sup> See below, p. 123, document A/CN.4/241/Add.6, Part IV, Section 2, General comments, para. 6.

<sup>243</sup> See foot-note 50 above.

<sup>244</sup> United Nations, *Treaty Series*, vol. 26, p. 331.

title of section 3 of part IV and is in the plural in the titles of sections 1 and 2 of that part (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

10. The Special Rapporteur notes that the comments of governments on the facilities, privileges and immunities of permanent observer missions to international organizations, as systematically presented in the preceding section, confirm the difference in attitude among members of the Commission, as reflected in paragraphs 5 and 6 of the Commission's general comments on section 2 of part III of the draft.<sup>245</sup> The arguments advanced by governments in support of their positions reproduce in general those which were made during the discussion at the twenty-second session of the Commission, some of which are included in the above-mentioned paragraphs of the Commission's general comments. In these circumstances the Special Rapporteur cannot but record that the comments of Governments are not sufficient in themselves to give to the Commission any clear directive as to the manner in which the question might be resolved. As for himself, the Special Rapporteur wishes to point out that the view he expressed on the question in his own commentary to the then draft article 60 in the fifth report he submitted on the topic<sup>246</sup> received the endorsement of the majority of the members of the Commission, as it is reflected in paragraph 6 of the above-mentioned general comments in the following terms:

[...] notwithstanding the fact that permanent observer missions to international organizations are established by non-member States while permanent missions are established by member States, they both have a representative and permanent character. This is reflected in article 51 (a), which defines a "permanent observer mission" as "a mission of representative and permanent character sent to an international organization by a State not a member of that organization". This definition is identical in substance with the definition of the permanent mission in article 1 (d), according to which a "permanent mission" is a "mission of representative and permanent character sent by a State member of an international organization to the Organization". Facilities, privileges and immunities are to be determined by reference not only to the functions of the permanent observer mission but also by reference to its representative character. On this view, the facilities, privileges and immunities to be accorded to permanent observer missions should be substantially the same as those accorded to permanent missions, with such differences as are dictated by differences in function.<sup>247</sup>

The Special Rapporteur remains of the same opinion. The Special Rapporteur wishes further to point out that, as stated in paragraph 7 of the Commission's general comments on section 2 of part III, it was on the basis of the view reflected in the passage quoted above that the Commission proceeded to draft the articles contained in section 2. The Special Rapporteur, therefore, does not consider it necessary, for the purposes of the present report, to alter the Commission's approach in the articles on facilities, privileges and immunities with which he is to furnish the Commission for consideration and final decision.

<sup>245</sup> Yearbook of the International Law Commission, 1970, vol. II, p. 283, document A/8010/Rev.1, chap. II, B.

<sup>246</sup> Ibid., p. 12, document A/CN.4/227 and Add.1 and 2.

<sup>247</sup> Ibid., p. 283, document A/8010/Rev.1, chap. II, B.

11. As regards the view reflected in paragraph 4 above concerning the meaning of the term "international organization of universal character", the Special Rapporteur wishes to refer to his observations in the context of subparagraph (b) of article 1.<sup>248</sup>

12. With respect to the comment reflected in paragraph 9 above, the Special Rapporteur wishes to refer to his general observation made in the context of article 23.<sup>249</sup>

**Article 65. General facilities**

(a) *Observations of Governments and international organizations*

1. One Government [Japan] indicated that the comments it had made on article 22<sup>250</sup> also applied to article 65.

2. Another Government [Netherlands] expressed the view that in accordance with its suggestion on article 22<sup>251</sup> article 65 should also mention: "... such facilities as are required for the performance ...".

3. The secretariat of UNESCO, recalling its comment on article 22,<sup>252</sup> observed that "it is open to question" whether the clause contained in the second sentence "would not be out of place in such a convention".

(b) *Observations of the Special Rapporteur*

4. With respect to the comments reflected in paragraphs 1 to 3 above, the Special Rapporteur wishes to refer to his observations on comments made in the context of article 22.<sup>253</sup>

5. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 65 would, therefore, read as follows:

**Article 65. General facilities**

The host State shall accord to the permanent observer mission the facilities required for the performance of its functions. The Organization shall assist the permanent observer mission in obtaining those facilities and shall accord to the mission such facilities as lie within its own competence.

**Article 66. Accommodation and assistance**

(a) *Observations of Governments and international organizations*

1. One Government [Netherlands] indicated that its comment relating to article 93<sup>254</sup> was

<sup>248</sup> See above, p. 18, document A/CN.4/241 and Add.1 and 2, paras. 49-54.

<sup>249</sup> See above, p. 46, document A/CN.4/241/Add.3, Article 23, para. 7 of the observations.

<sup>250</sup> Ibid., p. 43, Article 22, para. 5 of the observations.

<sup>251</sup> Ibid., p. 43, para. 3.

<sup>252</sup> Ibid., p. 43, para. 6.

<sup>253</sup> Ibid., p. 45, paras. 22 and 23, 20, and 23 respectively.

<sup>254</sup> See below, p. 127, document A/CN.4/241/Add.6, Article 93, para. 1 of the observations.

also applicable to the accommodation of [...] permanent observer missions, albeit to a lesser extent, as providing for the accommodation of permanent representatives seems to require less strenuous efforts. It might, however, still be considered whether the distribution of duties in article [...] 66 too might not be reversed.

2. Another Government [Japan] stated that its comments on article 24<sup>255</sup> also applied to article 66.

3. The secretariat of UNESCO expressed the opinion that "article 66 [...] calls for the same observations as we made concerning article 23, paragraph 2".<sup>[256]</sup>

4. The Secretariat of the United Nations referred to its editorial suggestions concerning article 23.<sup>257</sup> (A/CN.4/L.162/Rev.1, section B.)

#### (b) *Observations of the Special Rapporteur*

5. As regards the comment reflected in paragraph 1 above, the Special Rapporteur wishes to refer to his observation thereon in the context of article 93.<sup>258</sup>

6. As regards the comment referred to in paragraph 2 above, the Special Rapporteur wishes to recall his observation thereon in the context of article 24<sup>259</sup> which he considers applicable in the context of the present article.

7. As regards the comment referred to in paragraph 3 above, the Special Rapporteur wishes to recall that he took the position that that comment called for no observation on his part in the context of article 23. He is of the same opinion in the context of the present article.

8. As regards the comment reflected in paragraph 4 above, the Special Rapporteur wishes to refer to his observation on the corresponding suggestions made in the context of article 23.<sup>260</sup>

9. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 66 would, therefore, read as follows:

#### **Article 66. Accommodation and assistance**

The provisions of articles 23 and 24 shall apply also in the case of permanent observer missions.

#### **Article 67. Privileges and immunities of the permanent observer mission**

##### (a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee, some representatives made the general comment that the privileges and immunities thus granted to permanent observer missions might

<sup>255</sup> See above, p. 47, document A/CN.4/241/Add.3, Article 24, para. 4 of the observations.

<sup>256</sup> *Ibid.*, p. 46, Article 23, para. 6 of the observations.

<sup>257</sup> *Ibid.*, p. 46, para. 2.

<sup>258</sup> See below, p. 128, document A/CN.4/241/Add.6, Article 93, para. 4 of the observations.

<sup>259</sup> See above, p. 47, document A/CN.4/241/Add.3, Article 24, paras. 4 and 8 of the observations.

<sup>260</sup> *Ibid.*, p. 46, Article 23, paras. 2 and 7 of the observations.

be too extensive, and suggested that the Commission should reconsider the question.<sup>261</sup>

##### 2. Other representatives emphasized that

The inviolability of the premises of the mission, as provided for in draft article 25, must be respected and ensured. These representatives criticized the present wording of paragraph 1 of the latter article and expressed the view that, even in case of disaster, no derogation from the inviolability of the premises should be allowed without the permission of the head of the mission concerned. A further comment was that the words at the end of article 25, paragraph 1—"and only in the event that it has not been possible to obtain the express consent of the permanent representative"—were too restrictive of the presumption of consent in case of fire or other disaster that seriously endangered public safety provided for in that paragraph; it was suggested those words should be replaced by a sentence based on the criterion of "the reasonableness of efforts to obtain the consent of the permanent representative".<sup>262</sup>

3. In its written comments, one Government [Canada] expressed the view that "since the task of an observer mission differs in certain aspects from that of a permanent mission, article 67 should be more explicit regarding this distinction". It suggested that

This article, instead of referring to articles 25, 26, 27, 29 and 38, paragraph 1 (a), of the present draft articles, should, *mutatis mutandis*, follow articles 31, 32, 33, 35 and 50, paragraph 1 (a) of the Vienna Convention on Consular Relations.

##### *Entry into the host State*

4. The Secretariat of the United Nations expressed its belief that "express provision should be made [...] to ensure to members of permanent observer missions [...] and to members of their families, the right of entry into and sojourn in the territory of the host State and the freedom of transit to and from the premises of the international organization". It added that

The reasons for the foregoing suggestions may be found in the Secretariat's observations on part II of the provisional draft, which are applicable, *mutatis mutandis*, to those on permanent observer missions.<sup>[263]</sup>

5. The secretariat of the WHO indicated that "as a general rule", the headquarters or other relevant agreements

provide for a minimum of freedom of entry and sojourn for all persons irrespective of nationality, summoned by WHO, as is the case with observers to whom an official invitation has been extended.

##### (b) *Observations of the Special Rapporteur*

6. As regards the views reflected in paragraphs 1 and 2 above, the Special Rapporteur wishes to refer to his observations on similar comments made in the context of article 25.<sup>264</sup>

<sup>261</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 51.

<sup>262</sup> *Ibid.*, para. 52. In connexion with the inviolability of premises, see also the comments made during the debate in the Sixth Committee concerning article 94 (*ibid.*, para. 68), reproduced below, p. 128, document A/CN.4/241/Add.6, Article 94, para. 1 of the observations.

<sup>263</sup> See above, p. 52, document A/CN.4/241/Add.3, New article 27 *bis*, para. 5 of the observations.

<sup>264</sup> *Ibid.*, pp. 48 and 49, Article 25, paras. 4-6, 9, 15 and 20 of the observations.

7. As regards the comment reflected in paragraph 3 above, the Special Rapporteur refers to his observation in the context of the general comments on section 2 of part III.<sup>265</sup>

8. As regards the comment reproduced in paragraph 4 above, regarding "entry into the host State", the Special Rapporteur wishes to refer to his observations on the similar comment reflected under the new article 27 *bis*,<sup>266</sup> which he considers applicable in the case of permanent observer missions. In the light of those observations and, in particular, of his proposal for the inclusion in the draft of a new article 27 *bis*,<sup>267</sup> the Special Rapporteur considers that, without prejudice to the final decision to be taken on his proposal, article 67 should contain a reference also to the provisions of that new article.

9. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, with the modification referred to in paragraph 8 above. Article 67 would, therefore, read as follows:

**Article 67. Privileges and immunities  
of the permanent observer mission**

The provisions of articles 25, 26, 27, 27 *bis*, 29 and 38, paragraph 1 (a), shall apply also in the case of permanent observer missions.

**Article 68. Freedom of movement**

**(a) Observations of Governments  
and international organizations**

1. The Government of Switzerland made reference to its comment on article 28.<sup>268</sup> Another Government [Canada] suggested that article 68 "should follow article 34 of the Vienna Convention on Consular Relations instead of article 28 of this draft convention". A third Government [Japan] did not consider it

necessary for the performance of the functions of the permanent observer mission that members of the permanent observer mission and, in particular, members of their family enjoy the same freedom of movement as members of the permanent diplomatic mission.

**(b) Observations of the Special Rapporteur**

2. As regards the comments reflected in the preceding paragraph the Special Rapporteur wishes to refer to his observations on the comments made in the context of article 28<sup>269</sup> and in the context of the general comments on section 2 of part III.<sup>270</sup>

3. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 68 would, therefore, read as follows:

**Article 68. Freedom of movement**

The provisions of article 28 shall apply also in the case of members of the permanent observer mission and members of their families forming part of their respective households.

**Article 69. Personal privileges and immunities**

**(a) Observations of Governments  
and international organizations**

1. In the course of the debate in the Sixth Committee, the general comment was made that the Commission "should reconsider whether all the privileges and immunities thus granted were really necessary in the case of permanent observer missions and their members".<sup>271</sup>

2. With regard to article 30 on personal inviolability, it was stated that

consideration should be given to the insertion of a second paragraph, reading: "This principle does not exclude in respect of the permanent representative either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing serious crimes or offences".<sup>272</sup>

3. In reference to the categories of persons enjoying privileges and immunities under the terms of article 40, paragraph 1 (members of the family of the permanent representative and members of the family of the diplomatic staff of the permanent mission forming part of their respective households), it was observed that the phrase "if they are not nationals of the host State" should be replaced by "if they are not nationals of or permanently resident in the host State".<sup>273</sup>

4. In its written comments, one Government [Japan] expressed the view that

the provision of article 69 goes too far. The Commission might amend the article to the effect that members of the permanent observer mission and members of their family enjoy such personal privileges and immunities as are accorded by the Vienna Convention on Consular Relations to members of consular posts.

5. Another Government [Canada] suggested that

article 69, paragraph 1, instead of referring to article 30 of the present draft articles, follow article 40 of the Convention on Consular Relations and that the following be added in article 69 to the text of article 40 of the Convention on Consular Relations: "This principle does not exclude, in respect of the permanent observer, either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing serious crimes or offences".

Also in paragraph 1, no reference should be made to article 31. Instead of referring to articles 32, 35, 36, 37 and 38, paragraphs 1 (b) and 2 of the present draft articles, paragraph 1 of article 69 should [...] refer to articles 41, 48, 49, 52 and 50, paragraphs 1 (b) and 2 of the Convention on Consular Relations. "In paragraphs 2, 3, 4 and 5, the provisions contemplated for the different categories of persons should be determined along the lines of the status of such categories of persons at a consular post".

6. The secretariat of UNESCO indicated that "article 69, which states that article 32 shall apply in the case

<sup>265</sup> See above, Section 2, General comments, para. 10.

<sup>266</sup> See above, p. 52, document A/CN.4/Add.3, New article 27 *bis*, paras. 7-13 of the observations.

<sup>267</sup> *Ibid.*, p. 53, para. 13.

<sup>268</sup> *Ibid.*, p. 53, Article 28, para. 3 of the observations.

<sup>269</sup> *Ibid.*, p. 54, para. 4 of the observations.

<sup>270</sup> See above, Section 2, General comments, para. 10.

<sup>271</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 53.

<sup>272</sup> *Ibid.*, para. 54.

<sup>273</sup> *Ibid.*, para. 55.

of permanent observer missions, calls for the same observations as we made concerning article 32".<sup>[274]</sup>

#### 7. The secretariat of UNESCO also noted that

article 69 does not state that article 33 shall apply in the case of permanent observers and members of the diplomatic staff of the permanent observer mission.

In its view

this is the result of an oversight, because if such persons enjoy the immunity from jurisdiction provided for in article 32, provision must also be made for waiving that immunity. There is no reason why the question of waiving immunity should be provided for and regulated in the case of some (permanent representatives) and not in the case of others (permanent observers). [...] it would be better to speak of "withdrawing" the immunity rather than "waiving" it, because to speak of "withdrawing the immunity" shows immediately that it is not for the beneficiaries themselves to deprive themselves of the immunity but that such a decision must be taken by the authority to which they are responsible.

8. In connexion with the reference in article 69 to article 40, paragraphs 1, 2, 3 and 4, the secretariat of UNESCO recalled its comments concerning article 40<sup>275</sup> and reiterated it regretted "the assimilation of persons having their permanent residence in the host State to nationals of that State".

9. In its editorial suggestions, the Secretariat of the United Nations took the view that "in the third line of paragraph 2, the words 'and the members' should be replaced by 'and of members'. This would make the meaning clearer." Also that "in paragraph 3 the words 'together with' should be replaced by 'and of' for the same reason". (A/CN.4/L.162/Rev.1, section B.)

#### (b) *Observations of the Special Rapporteur*

10. As regards the general comments reflected in paragraphs 1, 4 and 5 above, the Special Rapporteur wishes to refer to his observations in the context of the general comments on section 2 of part III.<sup>276</sup>

11. As regards the comment reflected in both paragraphs 2 and 5 above, the Special Rapporteur wishes to refer to his observation on a similar comment made in the context of article 30.<sup>277</sup>

12. As regards the suggestion reflected in paragraph 3 above, the Special Rapporteur wishes to refer to his observation on a similar suggestion made in the context of article 40.<sup>278</sup>

13. As regards the comment reflected in paragraph 6 above, the Special Rapporteur wishes to refer to his observations on the comments made in the context of subparagraph (d) of article 32.<sup>279</sup>

<sup>274</sup> See above, p. 57, document A/CN.4/241/Add.3, Article 32, para. 15 of the observations.

<sup>275</sup> *Ibid.*, p. 67, Article 40, para. 5 of the observations.

<sup>276</sup> See above, Section 2, General comments, para. 10.

<sup>277</sup> See above, p. 55, document A/CN.4/241/Add.3, Article 30, paras. 3 and 4 of the observations.

<sup>278</sup> *Ibid.*, pp. 67 and 68, Article 40, paras. 3 and 10 of the observations.

<sup>279</sup> *Ibid.*, pp. 57 and 58, Article 32, paras. 15 and 18-23 of the observations.

14. The Special Rapporteur confirms the comment made by the secretariat of UNESCO, reproduced in paragraph 7 above, to the effect that "article 69 does not state that article 33 shall apply in the case of permanent observers and members of the diplomatic staff of the permanent observer mission". He is, however, unable to agree with the contention of the secretariat of UNESCO that "this is the result of an oversight". The Special Rapporteur wishes to point out that article 69, which concerns "personal privileges and immunities" does not include a reference to article 33 because such reference has been expressly made in the text of article 71 on "waiver of immunity and settlement of civil claims". As regards the suggested replacement of the word "waiving" by "withdrawing", the Special Rapporteur is not inclined to agree with it since in his view the verb "to waive", which is the one used in the English text of the corresponding provisions of the Vienna Conventions on Diplomatic and on Consular Relations, the Convention on Special Missions and the Conventions on the privileges and immunities of the United Nations and of the Specialized Agencies, does not mean necessarily that it is "for the beneficiaries themselves to deprive themselves of the immunity".

15. As regards the comment reflected in paragraph 8 above, the Special Rapporteur wishes to refer to his observation on a comment made in the context of article 40.<sup>280</sup>

16. With respect to the comment reflected in paragraph 9 above, the Special Rapporteur wishes to point out that the words whose replacement is suggested have been included in article 69 because they are the ones used in the text of the provisions of article 40 to which reference is made therein. He is therefore, for the sake of consistency and uniformity, not in a position to accept the suggested changes.

17. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 69 would, therefore, read as follows:

#### *Article 69. Personal privileges and immunities*

1. The provisions of articles 30, 31, 32, 35, 36, 37 and 38, paragraphs 1 (b) and 2, shall apply also in the case of the permanent observer and the members of the diplomatic staff of the permanent observer mission.

2. The provisions of article 40, paragraph 1, shall apply also in the case of members of the family of the permanent observer forming part of his household and the members of the family of a member of the diplomatic staff of the permanent observer mission forming part of his household.

3. The provisions of article 40, paragraph 2, shall apply also in the case of members of the administrative and technical staff of the permanent observer mission, together with members of their families forming part of their respective households.

4. The provisions of article 40, paragraph 3, shall apply also in the case of members of the service staff of the permanent observer mission.

5. The provisions of article 40, paragraph 4, shall apply also in the case of the private staff of members of the permanent observer mission.

<sup>280</sup> See above, pp. 67 and 68, document A/CN.4/241/Add.3, Article 40, paras. 5 and 11 of the observations.



**Article 70. Nationals of the host State and persons permanently resident in the host State**

*(a) Observations of Governments and international organizations*

1. The secretariat of UNESCO referred to the comments it made concerning article 41.<sup>281</sup>

2. In its editorial suggestions, the Secretariat of the United Nations observed that

Grammatically, the phrase "who are nationals of or permanently resident in the host State" can be taken as applying only to "persons on the private staff". The sentence should be amended to make it clear that this phrase also applies to "members of the permanent observer mission". One possibility would be to insert commas before and after the words "and persons on the private staff"; alternatively the article could be amended to read: "The provisions of article 41 shall apply also in the case of *persons who, being* members of the permanent mission *or employed* on the private staff, are nationals of or permanently resident in the host State" (A/CN.4/L.162/Rev.1, section B).

*(b) Observations of the Special Rapporteur*

3. As regards the comment reflected in paragraph 1 above, the Special Rapporteur wishes to refer to his observation on a comment made in the context of article 41.<sup>282</sup>

4. The Special Rapporteur considers well taken the point raised in the comment reflected in paragraph 2 above. His own preference is for the first alternative suggested, which he proposes to adopt.

5. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, subject to the drafting change referred to in paragraph 4 above. Article 70 would, therefore, read as follows:

**Article 70. Nationals of the host State and persons permanently resident in the host State**

The provisions of article 41 shall apply also in the case of members of the permanent observer mission, and persons on the private staff, who are nationals of or permanently resident in the host State.

**Article 71. Waiver of immunity and settlement of civil claims**

*(a) Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee the view was expressed that

Where a waiver of immunity could not be obtained because it would impede the performance of the functions of the permanent observer mission, the sending State should use its best endeavours to bring about a just settlement of the claim.<sup>283</sup>

<sup>281</sup> *Ibid.*, p. 68, Article 41, para. 2 of the observations.

<sup>282</sup> *Ibid.*, pp. 68 and 69, paras. 2 and 7.

<sup>283</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 56.*

2. In its written comments, one Government [Canada] expressed the view that

Instead of referring to articles 33 and 34 of the present draft articles, article 71 should follow *mutatis mutandis* articles 44 and 45 of the Convention on Consular Relations.

*(b) Observations of the Special Rapporteur*

3. With respect to the view referred to in paragraph 1 above, the Special Rapporteur wishes to point out that that view has been textually reflected in article 34 as regards civil claims.

4. With respect to the comment reflected in paragraph 2 above, the Special Rapporteur wishes to refer to his observation in the context of the general comments on section 2 of part III.<sup>284</sup>

5. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 71 would, therefore, read as follows:

**Article 71. Waiver of immunity and settlement of civil claims**

The provisions of articles 33 and 34 shall apply also in the case of persons enjoying immunity under article 69.

**Article 72. Exemption from laws concerning acquisition of nationality**

*(a) Observations of Governments and international organizations*

1. In its editorial suggestions, the Secretariat of the United Nations expressed the view that "the words 'not being nationals' should be replaced by '*who are not* nationals', which is the clearest way to express this idea". (A/CN.4/L.162/Rev.1, section B.)

*(b) Observations of the Special Rapporteur*

2. The Special Rapporteur agrees with the suggested change reflected in the preceding paragraph, as the words "who are not nationals" are those now used in article 39,<sup>285</sup> to which reference is made in article 72.

3. Subject to the drafting change referred to above the Special Rapporteur proposes that the article be retained in its present form. Article 72 would, therefore, read as follows:

**Article 72. Exemption from laws concerning acquisition of nationality**

The provisions of article 39 shall apply also in the case of members of the permanent observer mission who are not nationals of the host State and members of their families forming part of their household.

<sup>284</sup> See above, Section 2, General comments, para. 10.

<sup>285</sup> See above, p. 67, document A/CN.4/241/Add.3, Article 39, paras. 4 and 6 of the observations.



**Article 73. Duration of privileges and immunities****(a) Observations of Governments and international organizations**

1. In the course of the debate in the Sixth Committee the view was expressed in connexion with the notifications mentioned in article 42, paragraph 1 that "mention should be made only of notification to the host State 'by the Organization'".<sup>286</sup>
2. In its written comments, one Government [Canada] expressed the view that the article "should follow article 53 of the Convention on Consular Relations; only notification by the organization to the host State should be relevant". (A/CN.4/240, p. 15.)

**(b) Observations of the Special Rapporteur**

3. As regards the comments reflected in paragraphs 1 and 2 above concerning notifications, the Special Rapporteur wishes to refer to his observation on a similar comment made in the context of paragraph 1 of article 42.<sup>287</sup>
4. As regards the comment reflected in paragraph 2 above that the article "should follow article 53 of the Convention on Consular Relations" the Special Rapporteur wishes to observe that the text he proposed in his present report for paragraph 2 and the first sentence of paragraph 3 of article 42 has been based and drafted in the light of paragraphs 2 and 3 of article 53 of that Convention, respectively.<sup>288</sup>
5. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 73 would, therefore, read as follows:

**Article 73. Duration of privileges and immunities**

The provisions of article 42 shall apply also in the case of every person entitled to privileges and immunities under the present section.

**Article 74. Transit through the territory of a third State****(a) Observations of Governments and international organizations**

1. One Government [Netherlands] referred to its comments relating to article 110.<sup>289</sup>
2. In its editorial suggestions, the Secretariat of the United Nations expressed the view that "the words 'and the couriers' should be amended to read 'and of the couriers'. This would make for greater clarity." (A/CN.4/L.162/Rev.1, section B.)

<sup>286</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes, Agenda item 84, document A/8147, para. 57.*

<sup>287</sup> See above, pp. 70 and 71, document A/CN.4/241/Add.3, Article 42, paras. 3 and 14 of the observations.

<sup>288</sup> *Ibid* pp. 70, 71 and 72, Article 42, paras. 12, 22 and 23, of the observations.

<sup>289</sup> See below, p. 138, document A/CN.4/241/Add.6, Article 110, para. 1 of the observations.

**(b) Observations of the Special Rapporteur**

3. As regards the comment reflected in paragraph 1 above, the Special Rapporteur wishes to refer to his observations on the comment made in the context of article 110.<sup>290</sup>
4. The Special Rapporteur is in agreement with the editorial suggestion reflected in paragraph 2 above.
5. In the light of the foregoing, the Special Rapporteur wishes to propose that the article be retained in its present form, subject to the drafting change referred to in the preceding paragraph. Article 74 would, therefore, read as follows:

**Article 74. Transit through the territory of a third State**

The provisions of article 43 shall apply also in the case of the members of the permanent observer mission and members of their families, and of the couriers, official correspondence, other official communications and bags of the permanent observer mission.

**Article 75. Non-discrimination****(a) Observations of Governments and international organizations**

1. In the course of the debate in the Sixth Committee some representatives agreed with the inclusion of the article in the draft, noting that

it was based on the principle of sovereign equality of States proclaimed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 in resolution 2625 (XXV) at the closing meeting of the commemorative session on the occasion of the twenty-fifth anniversary of the United Nations.<sup>291</sup>

2. In its written comments, one Government [Canada] expressed the view that "in article 75, reference could be made to article 72 of the Convention on Consular Relations".

3. Another Government [Netherlands] indicated that its comment concerning a different wording of article 44<sup>292</sup> was "equally applicable to article 75". It added that the question

may be asked whether the facility to grant exemption, in individual cases, from a general prohibition by the host State—such as the forbidding of visits to certain areas or the carrying of photographic equipment—might be incompatible with the non-discrimination principle.

In its view the answer was "in the negative".

**(b) Observations of the Special Rapporteur**

4. As regards the comment reproduced in paragraph 2 above, the Special Rapporteur wishes to make reference

<sup>290</sup> *Ibid.*, p. 138, paras. 1 and 3.

<sup>291</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 58.*

<sup>292</sup> See above, p. 74, document A/CN.4/241/Add.3, Article 44, para. 5 of the observations.

to his observation in the context of the general comments on section 2 of part III.<sup>293</sup>

5. With respect to the comment referred to in paragraph 3 above, the Special Rapporteur wishes to recall his observation thereon in the context of article 44.<sup>294</sup>

6. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 75 would, therefore, read as follows:

**Article 75. Non-discrimination**

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

**SECTION 3. CONDUCT OF THE PERMANENT OBSERVER MISSION AND ITS MEMBERS**

**Article 76. Conduct of the permanent observer mission and its members**

*(a) Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee it was argued that

The provision concerning respect for the laws and regulations of the host State (article 45) did not give adequate protection to that State, since it could not be established whether the person concerned had committed a "grave and manifest violation" so long as the sending State did not waive his immunity.<sup>295</sup>

2. The view was also expressed that

A provision concerning compulsory insurance against third-party risks arising from the use, in the host State, of vehicles owned by permanent observer missions or their members should be included in this article.<sup>296</sup>

3. In its written comments one Government [Canada] suggested that "article 76 should follow in substance articles 55, 56 and 57 of the Convention on Consular Relations".

4. Another Government [Israel] suggested that

Permanent observer missions and their members, as well as all the other representatives to which the different parts of the draft articles apply, should be required to carry third party insurance policies to cover damage or injury that may arise from the use of vehicles by them in the receiving State. This observation applies to articles 45 and 112, and it is offered as a contribution to the solution of the problem dealt with in articles 32, paragraph 1 (d) and 100, paragraph 2 (d) (alternative A).

5. The Secretariat of the United Nations expressed the opinion that the obligation of the sending State, envisaged by reference in article 76

to recall or otherwise to remove a member of its permanent observer mission . . . , if it does not waive his immunity, should be extended to cover any serious abuse of the privilege of residence.

<sup>293</sup> See above, Section 2, General comments, para. 10.

<sup>294</sup> See above, p. 74, document A/CN.4/241/Add.3, Article 44, paras. 5 and 11 of the observations.

<sup>295</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 59.

<sup>296</sup> *Ibid.*, para. 60.

6. The secretariat of UNESCO referred to its remarks concerning article 45.<sup>297</sup>

*(b) Observations of the Special Rapporteur*

7. As regards the comments reflected in paragraphs 1, 5 and 6 above, the Special Rapporteur wishes to refer to his observations on the similar comments made in the context of paragraph 2 of article 45.<sup>298</sup>

8. In view of the position he has taken in the present report as regards article 45,<sup>299</sup> the Special Rapporteur does not deem it necessary to express his reaction in the context of article 76 to the suggestion reflected in both paragraphs 2 and 4 above which he is sure will be taken into consideration by the Commission in due course.

9. As regards the comment reproduced in paragraph 3 above, the Special Rapporteur wishes to refer to his observation in the context of the general comments on section 2 of part III.<sup>300</sup>

10. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 76 would, therefore, read as follows:

**Article 76. Conduct of the permanent observer mission and its members**

The provisions of articles 45 and 46 shall apply also in the case of permanent observer missions.

**SECTION 4. END OF FUNCTIONS**

**Article 77. End of functions**

*(a) Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee it was stated that

Article 48, concerning facilities for departure, imposed an unrealistic duty on the host State. The last sentence of that article should be replaced by the following: "It shall, in case of emergency, facilitate in every possible way the obtaining of means of transport for them, and for such of their personal effects as is reasonable under the circumstances, to leave the territory".<sup>301</sup>

2. In its written comments, one Government [Canada] expressed the view that "article 77 should follow articles 25, 26 and 27 of the Convention on Consular Relations".

3. The secretariat of UNESCO referred to its comments concerning article 49.<sup>302</sup>

<sup>297</sup> See above, p. 76, document A/CN.4/241/Add.3, Article 45, para. 14 of the observations.

<sup>298</sup> *Ibid.*, pp. 75, 76 and 77, paras. 4-15 and 20.

<sup>299</sup> *Ibid.*, p. 77, paras. 18, 20 and 25.

<sup>300</sup> See above, Section 2, General comments, para. 10.

<sup>301</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 61.

<sup>302</sup> See above, p. 80, document A/CN.4/241/Add.3, Article 49, para. 3 of the observations.

(b) *Observations of the Special Rapporteur*

4. As regards the view reflected in paragraph 1 above, the Special Rapporteur wishes to recall his observation thereon made in the context of article 48.<sup>303</sup>

5. As regards the comment reflected in paragraph 2 above, the Special Rapporteur wishes to refer to his observation in the context of the general comments on section 2 of part III.<sup>304</sup>

6. With respect to the comment referred to in paragraph 3 above, the Special Rapporteur wishes to recall his observation thereon in the context of article 49.<sup>305</sup>

7. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 77 would, therefore, read as follows:

**Article 77. End of functions**

The provisions of articles 47, 48 and 49 shall apply also in the case of permanent observer missions.

\* \* \*

**DOCUMENT A/CN.4/241/ADD.5****NOTE**

The present addendum is based on the comments of Governments and international organizations referred to in the introduction to the report.<sup>306</sup> It is arranged along the same lines as explained in the introduction.<sup>307</sup>

**Part IV. Delegations of States to organs and to conferences****SECTION 1. DELEGATIONS IN GENERAL****Article 78. Use of terms****(a) Observations of Governments and international organizations**

1. In its written observations<sup>308</sup> the Netherlands Government refers to sub-paragraph (b) of article 78.<sup>309</sup> It points out that

<sup>303</sup> *Ibid.*, pp. 79 and 80, Article 48, paras. 5 and 10 of the observations.

<sup>304</sup> See above, Section 2, General comments, para. 10.

<sup>305</sup> See above, pp. 80 and 81, document A/CN.4/241/Add.3, Article 49, paras. 3 and 7 of the observations.

<sup>306</sup> See above, p. 10, document A/CN.4/241 and Add.1 and 2, paras. 5-7.

<sup>307</sup> *Ibid.*, p. 11, para. 8.

<sup>308</sup> See foot-note 12 above.

<sup>309</sup> For all references to the draft articles and the Commission's commentaries, see foot-note 34 above.

Besides conferences convened by or under the auspices of international organizations [...], there are other international conferences, some of which certainly have a universal character—e.g. the International Red Cross Conferences, the Hague Diplomatic Conferences of 1951 and 1964 on the Unification of Law Governing the International Sale of Goods, the Brussels Diplomatic Conferences on Maritime Law (since 1910), and the European Fisheries Conference of 1963/1964.

**The Netherlands Government notes that**

the status of delegations to these and similar conferences is not covered in the draft articles, nor would it seem to be covered by the 1969 Convention on Special Missions,<sup>[310]</sup> unless article 6 of that Convention is to be interpreted as covering delegations to international conferences as well.

2. In its written observations on article 78 the ILO notes that “the article refers solely to delegations consisting of government representatives and not other delegations such as those representing employers and workers”. It also refers to the relation between part IV of the draft articles and article 13, which deals with the accreditation of permanent representatives to organs. In the opinion of the ILO,

It would seem desirable to state specifically that delegations to organs or to conferences should always be accredited according to the rules of the organization and that general accreditation to the organization would not be a sufficient basis for assuming that permanent delegates are automatically members of the delegation of the country they represent in each particular meeting.

3. WHO refers to sub-paragraph (e) of article 78 (meaning of a “representative”). It points out that WHO uses a different term:

Under article 11 of its constitution, the persons who represent States are called “delegates”. Under article 47 of the Constitution, the term “representative” is used in the case of WHO Regional Committees.

WHO suggests that the draft articles should therefore take account of the special system laid down in WHO's constituent instruments.

4. IBRD observes that since part IV of the draft is restricted to “Delegations of States to organs and to conferences” and article 78 (c) makes it clear that “a delegation to an organ” is to represent the State “therein”, no provision of the proposed instrument appears to cover delegations sent by States to negotiate with the organization itself. It points out that

In the practice of the financial institutions of the IBRD Group (and probably of certain other international organizations) delegations of this type considerably outnumber those to which part IV is addressed, but international law is most deficient with respect to the former for they are referred to neither in the Articles of Agreement of any of the IBRD Group of organizations, nor in the Specialized Agencies' Convention<sup>[311]</sup> or in other similar agreements. This would thus seem to be a significant lacuna in the existing international legal structure, to which the proposed instrument might well address itself.

**5. ITU observes that**

Members of delegations to ITU conferences are not usually diplomats and in most cases do not hold diplomatic passports. If it may be assumed, however, that all persons who have been formally

<sup>310</sup> See foot-note 41 above.

<sup>311</sup> See foot-note 45 above.

accredited by a sending State are to be considered as having diplomatic status and are therefore "members of the diplomatic staff" for the purposes of article 78 (*h*), it would seem that the definitions in this article reflect the practice generally applied to delegations of States Members of ITU to plenipotentiary and administrative conferences of the Union.

It points out, however, that in addition to its Administrative Council, the Union has two organs, known as the CCIs for short, the meetings of which are attended by persons representing their Governments, namely: (*a*) the International Radio Consultative Committee (CCIR), and (*b*) the International Telegraph and Telephone Consultative Committee (CCITT). In the opinion of ITU,

Persons appointed by a member country to serve on the Council are accredited and would, according to the interpretation mentioned above, be included in the category of "members of the diplomatic staff" for the purposes of the draft treaty.

The CCIs, however, ITU goes on to say, do not seem to fit into the pattern envisaged in article 78:

As these bodies do not have the power to draw up treaties or regulations, but merely make recommendations, no system of formal accreditation for representatives of States is used. It would seem questionable, therefore, whether such persons enjoy diplomatic status for the purposes of article 78, although they have the same need for facilities, privileges and immunities as "members of the diplomatic staff" to ITU conferences. In actual practice, they are treated no differently from accredited representatives at conferences of the Union.

Another observation made by ITU in connexion with article 78 relates to certain representatives of entities—usually non-governmental—who attend CCI plenary assemblies and meetings of their study groups. ITU points out that these

non-governmental representatives make a major contribution to the work of the CCIs, and need to enjoy most of the privileges and immunities granted to representatives of States in order to perform their tasks.

ITU notes that, in practice, host Governments have accorded them the necessary facilities, but that the situation is anomalous.

6. The editing observations of the United Nations Secretariat (A/CN.4/L.162/Rev.1, section B) included the following suggestions with respect to article 78:

(i) The verb "to mean" should be used throughout instead of "to be".

(ii) In the opening phrase, the word "purpose" should be replaced by "purposes", to conform with articles 1 and 51.

(iii) In sub-paragraph (*a*), the words "and any commission" should be replaced by "or any commission".

(iv) In sub-paragraph (*h*), a comma should be inserted between the words "delegation" and "including".

#### (b) *Observations of the Special Rapporteur*

7. The examples of international conferences of a universal character cited by the Netherlands Government (para. 1 above) fall within the purview of the subject of relations between States and international organizations. The question of conferences convened by or through international organizations was included in the draft

articles on the assumption that such conferences are a collateral to organs of international organizations. The Special Rapporteur wishes, however, to recall in this respect the working paper which he submitted to the Commission at its twenty-second session on temporary observer delegations and conferences not convened by international organizations.<sup>312</sup>

8. As to the observation of the ILO (para. 2 above) that article 78 refers solely to delegations consisting of government representatives and not other delegations such as those representing employers and workers, the Special Rapporteur wishes to point out that the tripartite system of representation as known in the ILO is a particular feature of that organization and as such is covered by articles 3 to 5. Furthermore it is to be noted that at the ILO General Conference, employers' and workers' delegates are in fact members of national delegations. Article 3 of the ILO Constitution<sup>313</sup> provides that member States shall be represented at the ILO General Conference by four representatives, of whom two shall be government delegates and the other two employers' and workers' delegates respectively. It is true that the employers' and workers' members of the Governing Body do not represent the countries of which these persons are nationals, but are elected by employers' and workers' delegates to the Conference. However, by virtue of annex I (concerning the ILO) to the Convention on the Privileges and Immunities of Specialized Agencies,<sup>314</sup> employers' and workers' members of the Governing Body are assimilated to representatives of member States, except that the waiver of the immunity of any such person may be made only by the Governing Body.

9. Article 78 does not prejudice the use of terms other than "representatives". The Special Rapporteur does not therefore consider it necessary to provide in the draft articles for the special system laid down in the constituent instruments of some international organizations in which terms such as "delegate" are used.

10. The Special Rapporteur wishes now to turn to the observation by IBRD (para. 4 above) that the definition of a "delegation to an organ" as the delegation sent by a State member of the organ to represent it "therein" does not appear to cover delegations sent by States to negotiate with the organization itself. It is true that in drafting part IV of the draft, the Commission has in mind delegations which participate in the meetings of the organs. Delegations sent by States to negotiate with the organization (or rather with an organ of the organization, which is usually the secretariat) belong to the "question of treaties concluded between States and international organizations or between two or more international organizations". The Commission decided at its twenty-second session to include this question in its general programme of work.<sup>315</sup>

<sup>312</sup> A/CN.4/L.151.

<sup>313</sup> International Labour Office, *Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference* (Geneva, 1971).

<sup>314</sup> United Nations, *Treaty Series*, vol. 33, p. 290.

<sup>315</sup> *Yearbook of the International Law Commission, 1970*, vol. II, p. 310, document A/8010/Rev.1, para. 89.

11. The Special Rapporteur does not share the doubts expressed by ITU concerning the diplomatic status of the persons appointed by a member State to serve in the CCIIs (para. 5 above). These persons possess the representative character even if they do not have the power to draw up treaties or regulations but merely make recommendations or no system of formal accreditation for representation is used for them. The Special Rapporteur notes that ITU itself in its written observations concedes that in actual practice these persons are treated no differently from accredited representatives at conferences of the Union. As to the second observation of ITU relating to non-governmental representatives, the Special Rapporteur wishes to point out that this observation bears on the scope of the draft articles, a question which he took up in the introduction of the present report.

12. The Special Rapporteur agrees with the editing suggestions made by the United Nations Secretariat relating to article 78 (para. 6 above). He notes that changes ii and iv suggested by the United Nations Secretariat are already incorporated in the printed version of the report of the Commission on the work of its twenty-second session.<sup>318</sup>

13. In view of the foregoing, the Special Rapporteur proposes that the article be retained in its present form subject to the drafting changes referred to in paragraph 6 above. Article 78 would therefore read as follows:

*Article 78. Use of terms*

For the purposes of the present part:

(a) An "organ" means a principal or subsidiary organ of an international organization or any commission, committee or sub-group of any such organ, in which States are members;

(b) A "conference" means a conference of States convened by or under the auspices of an international organization, other than a meeting of an organ;

(c) A "delegation to an organ" means the delegation designated by a State member of the organ to represent it therein;

(d) A "delegation to a conference" means the delegation sent by a participating State to represent it at the conference;

(e) A "representative" means any person designated by a State to represent it in an organ or at a conference;

(f) The "members of the delegation" mean the representatives and the members of the staff of the delegation to an organ or to a conference, as the case may be;

(g) The "members of the staff of the delegation" mean the members of the diplomatic staff, the administrative and technical staff and the service staff of the delegation to an organ or to a conference, as the case may be;

(h) The "members of the diplomatic staff" mean the members of the delegation, including experts and advisers, who have been given diplomatic status by the sending State for the purposes of the delegation;

(i) The "members of the administrative and technical staff" mean the members of the staff of the delegation to an organ or to a conference, as the case may be, employed in the administrative and technical service of the delegation;

(j) The "members of the service staff" mean the members of the staff of the delegation to an organ or to a conference, as the case may be, employed by it as household workers or for similar tasks;

(k) The "private staff" mean persons employed exclusively in the private service of the members of the delegation to an organ or to a conference, as the case may be;

(l) The "host State" means the State in whose territory a conference or a meeting of an organ is held.

**Article 79. Derogation from the present part**

**Article 80. Conference rules of procedure**

*(a) Observations of Governments and international organizations*

1. In the course of the consideration by the Sixth Committee<sup>317</sup> of the third group of draft articles at the twenty-fifth session of the General Assembly in 1970, it was noted with approval by a number of delegations that articles 79 and 80 introduced an element of flexibility into the draft and prevented unduly rigid application of the provisions.

2. In the opinion of the Government of Sweden, the content of article 79 seems to belong in part I (General provisions). It suggests, therefore, that the article be included in article 5.

3. The Government of Switzerland states that it might be desirable to amend article 79 so as to cover agreements already concluded, as well as those to be concluded in the future. It also points out that the purpose of this article, including the proposed addition, would be met by articles 4 and 5, provided it was clearly understood that they apply to the draft as a whole, as the Commission observes in its commentary on article 4, and that the wording of article 5, which is too restrictive in its present form, is revised accordingly.

4. The ILO points out that article 79, which it observes basically reproduces the text of article 5 of the draft, might create some ambiguity, particularly with regard to the scope of articles 3 and 4, which are not reproduced. The ILO feels that "it would be preferable either not to reproduce the substance of article 5, or to reproduce the whole of articles 3 to 5".

5. The Government of Japan refers to the commentary on article 80, where it is stated that the Commission is of the opinion that, in view of their nature, rules of procedure should not derogate from provisions relating to privileges and immunities. In the view of the Japanese Government, it is unlikely that conference rules of procedure would deal with provisions on privileges and immunities. It therefore suggests that the question of derogation from the provisions on privileges and immunities be left entirely to article 79 and that the application of article 80 be limited to section 1 of part IV.

6. IBRD observes that though part IV of the draft covers delegations to both organs and conferences, article 80 refers only to the rules of procedure of conferences. It states that in the light of the commentary

<sup>318</sup> *Ibid.*, p. 285, document A/8010/Rev.1, chap. II B.

<sup>317</sup> For all references to the Sixth Committee's discussion of the draft articles, see foot-note 39 above.

It is assumed that a reference to rules of procedure of organs was omitted as these are considered to be covered by the "rules of the Organization" referred to in draft article 3.

7. The United Nations Secretariat makes two editing suggestions:

(i) In article 79 it would be better to say "agreements containing different provisions".

(ii) In article 80 it would be better, for the sake of uniformity, to say "The provisions of articles . . .". Articles 66 to 74, 92, 104, 113 and 115 use this form of words consistently (A/CN.4/L.162/Rev.1, section B).

*(b) Observations of the Special Rapporteur*

8. The Governments and international organizations making the above-mentioned observations on article 79 appear to find difficulty in reconciling the provision of this article with those of articles 3 to 5. It is to be noted that article 79 was included by the Commission in part IV as supplementary to article 5 of part I, since the latter article applies only to "representatives of States to an international organization". The Special Rapporteur has suggested in the present report<sup>318</sup> and in the drafting of articles 3 to 5 a number of changes the purpose of which is to make them of general application to the draft as a whole. Should the Commission accept these suggestions, the above-mentioned difficulties encountered in connexion with article 79 would appear in a different light and there may not be a need for the inclusion of such provision in part IV.

9. The Special Rapporteur is not sure he sees contradiction between what is stated by the Commission in its commentary on article 80 and the observation of the Japanese Government inasmuch as all the articles referred to in article 80 are contained in section 1 of part IV and therefore do not relate to privileges and immunities.

10. The Special Rapporteur accepts the editing suggestions of the United Nations Secretariat.

11. Articles 79 and 80 would therefore read as follows:

*Article 79. Derogation from the present part*

Nothing in the present part shall preclude the conclusion of other international agreements containing different provisions concerning delegations to an organ or a conference.

*Article 80. Conference rules of procedure*

The provisions of articles 81, 83, 86, 88 and 90 shall apply to the extent that the rules of procedure of a conference do not provide otherwise.

*Article 81. Composition of the delegation*

*(a) Observations of Governments and international organizations*

1. In its written observations, the Netherlands Government states that it shares the view of the majority of

the Commission that a delegation must include at least one person empowered to represent the sending State.

2. The ILO notes in connexion with article 81 that although States may appoint a head of delegation, the rules applicable in the ILO do not compel them to do so, since each of the Government delegates (as well as the employers' and workers' delegates) are treated by the conference as being on an equal footing. It further points out that the delegates representing employers and workers are not subject to the authority of any head of delegation.

3. In its editorial observations (A/CN.4/L.162/Rev.1, section B), the United Nations Secretariat suggests that in the last sentence of article 81, the words "members of the" should be inserted between "include" and "diplomatic". The reason given for this suggestion is that article 78 does not define the term "staff" but the expressions "members of the [diplomatic] [administrative and technical] [service] staff".

*(b) Observations of the Special Rapporteur*

4. In reply to the above-mentioned observation of the ILO, the Special Rapporteur wishes to point out that by using the word "may" in article 81 the Commission intended to indicate—and an explicit statement to that effect appears in the commentary on the article—that the appointment of the head of the delegation is permissive and not mandatory.

5. In view of the above, the Special Rapporteur does not propose to make any change in the text of article 81. He wishes, however, to recommend to the attention of the Drafting Committee the editing point of the United Nations Secretariat on article 81. Article 81 would therefore read:

*Article 81. Composition of the delegation*

A delegation to an organ or to a conference shall consist of one or more representatives of the sending State from among whom the sending State may appoint a head. It may also include diplomatic staff, administrative and technical staff and service staff.

*Article 82. Size of the delegation*

*(a) Observations of Governments and international organizations*

1. In the course of the consideration by the Sixth Committee of the third group of draft articles at the twenty-fifth session of the General Assembly,

Certain representatives referred approvingly to [article 82]. Others did not consider it really necessary and suggested its deletion. It was also stated that the article did not give adequate protection to the host State.<sup>319</sup>

2. In its written observations, the Government of Finland notes that

<sup>318</sup> See above, p. 15, document A/CN.4/241 and Add.1 and 2, paras. 29-31.

<sup>319</sup> *Official Records of the General Assembly, Twenty-fifth session, Annexes, agenda item 84, document A/8147, para. 64.*

Delegations often have functional difficulties due to the insufficient number of delegates appointed to them. However, some kind of limitation could at times be appropriate as regards the size of a delegation.

3. The Government of Switzerland expresses the view that the subject of article 82 is a rather delicate one, and that it is not easy to define the rights of the host State in cases where a delegation to an organ or to a conference is of an exaggerated size. It points out that the fundamental rule, deriving from general international law, is that each State is, in principle, free to refuse entry into its territory, subject to the special obligations it has entered into in that connexion, e.g. those resulting from the headquarters agreement concluded between the host State and the organization. The Swiss Government expresses the view that such special norms will commonly involve for the host State the obligation to allow delegations to enter, with some opportunity to formulate objections in cases where they are of an exaggerated size, and that, where it is not possible to invoke any special norm, the general principle applies and it may be wondered whether this article limits the discretionary power of the host State in that regard. In the opinion of the Swiss Government, this does not seem to be the case with the present wording of article 82 and such an approach appears to be acceptable. The Swiss Government also expresses its intention to pursue a most liberal policy in this matter.

4. WHO states that article 11 of its Constitution provides that each member State shall be represented by not more than three delegates, while article 12 provides that alternates and advisers may accompany delegates. It points out that there is no written provision limiting the number of alternates and advisers, and the size of the delegation varies considerably according to the country concerned.

5. ITU states that the terms of article 82 conflict with the definition of "delegations" in Annex 2 to the International Telecommunications Convention (Montreux, 1965)<sup>320</sup> in which it is stated: "Each Member and Associate Member shall be free to make up its delegation as it wishes".

#### (b) *Observations of the Special Rapporteur*

6. The Special Rapporteur is unable to share the interpretation of the Swiss Government (para. 3 above) to the effect that article 82 does not limit the discretionary power of the host State in determining the size of a delegation to an organ or conference. It is also to be noted that article 82 is based on article 16 relating to the size of permanent missions. In paragraph 1 of its commentary on article 16 the Commission pointed out the essential difference between that article and paragraph 1 of article 11 of the Vienna Convention on Diplomatic Relations<sup>321</sup>: according to the provision of the Vienna Convention, the receiving State

may require that the size of a mission be kept within limits to be

considered by it<sup>322</sup> to be reasonable and normal. [...] Article 16 of the present draft articles states the problem differently. It lays down as a guide line to be observed by the sending State that the latter should endeavour, when establishing the composition of its permanent mission, not to make it excessively large.

The remedy available to the host State in case of non-observance by the sending State of the rule laid down in article 82 will be regulated by article 50 and by any further provision which the Commission might decide to include in the draft concerning remedies available to the host State in the event of claimed abuses by a permanent mission, a permanent observer mission or a delegation to an organ or a conference.

7. Regarding the observations of ITU (para. 5 above), the Special Rapporteur does not see any conflict between article 82 and the definition of the term "delegations" in the Montreux Convention of ITU. This definition appears to regulate the question of the composition of the delegation and the freedom of choice of its members by the sending State.

8. The Special Rapporteur suggests that article 82 be retained in its present form. The article would therefore read as follows:

#### *Article 82. Size of the delegation*

The size of a delegation to an organ or to a conference shall not exceed what is reasonable or normal, having regard to the functions of the organ or, as the case may be, the tasks of the conference, as well as the needs of the particular delegation and the circumstances and conditions in the host State.

#### **Article 83. Principle of single representation**

##### (a) *Observations of Governments and international organizations*

1. In the course of the consideration by the Sixth Committee of the third group of draft articles at the twenty-fifth session of the General Assembly,

Some representatives expressed reservations concerning the desirability of the article and its present wording. The principle of single representation should not be formulated too categorically, but provision should be made for deviation from it in certain circumstances. At a time of increasing interdependence, it seemed wrong to prevent joint representation in some cases by providing that a delegation to an organ or to a conference might represent only one State. It should be borne in mind that joint representation facilitated the participation of small and developing countries, if only for financial reasons, and that there existed international agreements concerning the representation of one country by another. The following solutions were proposed: the insertion at the beginning of the article of the words "as a rule"; the addition at the end of the article of the words "unless the rules and practice of the organ or conference otherwise provide"; the deletion of the article, leaving the solution of the question to the practice of the international organization concerned.<sup>323</sup>

2. The Government of Canada suggests that article 83 be redrafted so as not to exclude double representation

<sup>320</sup> For the text of the Convention, see United Nations, *Juridical Yearbook, 1965* (United Nations publication, Sales No. 67.V.3), p. 173.

<sup>321</sup> See foot-note 38 above.

<sup>322</sup> Italics supplied by the Special Rapporteur.

<sup>323</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 65.*



when permitted by the organ or the organization concerned.

3. In the opinion of the Government of Finland, a delegation should be entitled to represent two or more States if necessary.

4. Article 83 does not appear to the Government of Japan to be necessary. In its view, progressive development of law on conferences convened by international organizations should not preclude a delegation to an organ or to a conference from representing more than one State.

5. The Government of Madagascar refers to article 6 of the Vienna Convention on Diplomatic Relations which specifies that two or more States may accredit the same person as head of mission to another State. It points out that article 83 raises a similar issue and that

It would be desirable for several reasons, not to specify so categorically the principle that a delegation may represent only one State. The Malagasy Government notes, moreover, that the practice described by the Special Rapporteur is not always followed at international conferences. It indicates that one representative acting for the Upper Volta and the Congo (Brazzaville) signed the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft.

6. The Government of the Netherlands makes the following observation:

From paragraph 1 of its commentary, it would seem that the Commission is under the impression that the principle of single representation, as laid down in this article, reflects the practice of international organizations, as described by the Special Rapporteur. But his fifth report <sup>324</sup> shows that the Special Rapporteur based his findings on the practice of the United Nations alone. The Netherlands Government points out that there are other organizations which provide for the possibility of multiple representation. Bearing in mind the Commission's intention to review the matter of single or multiple representation in the light of comments from Governments, the following instances may be recalled:

The Universal Postal Union of 1874 (Berne Convention of 1874, revised in the Acts of the Union, Vienna, 1964). Article 101, paragraph 2 of the General Regulations of the Universal Postal Union <sup>325</sup> provides for the possibility of double representation in the Congress of the Union.

The International Union for the protection of Industrial Property (Convention of Paris 1883, revised at Stockholm 1967). <sup>326</sup> Article 13, paragraph 3 (b) contains a special regulation for group representation in the Assembly of the Union.

The International Telecommunication Union (Madrid Convention of 1932, revised at Montreux 1965). Chapter 5, margin Nos. 640-642, of the General Regulations pertaining to the Treaty <sup>327</sup> provides for double representation in the Conference of the Union and also for the transference of votes up to a maximum of one extra vote.

The International Organization of Legal Metrology (Paris Convention, 1955). <sup>328</sup> Article XVII provides for the possibility of trans-

ferring votes in the International Committee of Legal Metrology up to a maximum of two extra votes.

The European Economic Community (Treaty of Rome, 1957). <sup>329</sup> Article 150 provides for the possibility of a member of the Council of the Community acting as proxy for not more than one other member in case of a vote.

It seems clear that international practice—from which no doubt further examples could be drawn—requires greater flexibility than allowed for by the Commission. On the other hand the draft articles do not aim to be more than directory; see articles 3 and 80.

The Netherlands Government is in agreement with the regulation laid down in article 83. If the statutes of an organization or the regulations for a conference do not mention this matter, it seems right to accept the principle of single representation as a general rule, one of the reasons being that—as is clear from our examples taken from international practice—divergent rules are conceivable for multiple representation and the latter is sometimes not practicable without additional provisions.

It seems however preferable that the commentary on this article more fully reflect current practice, and state more clearly the conclusion that it may be advisable for individual organizations and conferences to adopt a different rule than that contained in article 83.

7. The Government of Sweden states that when advanced as a general residuary rule, the contents of article 83—namely that unless the rules of procedure provide otherwise (cf. article 80), a delegation to an organ or to a conference may represent only one State—is not acceptable. In the opinion of the Swedish Government

It is hard to see why, in principle, several States should not be considered free to send one (joint) delegation to represent them all. It concedes that in the case of a particular organ or conference, the rules of procedure could prohibit such representation or else regulate the status of a delegation representing more than one State. The Swedish Government concludes its observation by suggesting that as the residuary rule referred to above need not be expressly stated, the article could be omitted and the matter left to rules of procedure.

8. The Government of New Zealand states the following:

The Government of New Zealand wishes to reiterate the views expressed by its representative in the Sixth Committee on 8 October 1970 <sup>330</sup> on article 83 of the International Law Commission's draft articles on representatives of States to international organizations.

Article 83 lays down a general rule that a delegation to an organ or conference may represent only one State. This article has to be read subject to articles 3, 4, 5, 79 and 80, which collectively ensure that the general rule it lays down does not in any way affect the relevant existing rules of international organizations or conferences nor preclude international organizations or conferences from adopting a different rule in the future. The rule in article 83 is therefore of a residual character only. The Government of New Zealand is nevertheless of the view that the rule is unnecessary and undesirable. It would prefer that the question of whether a delegation to an organ or conference should be permitted to represent more than one State should be left to be decided specifically by that organ or conference.

The Government of New Zealand has a particular interest in this question because under article V (b) of the Treaty of Friendship between New Zealand and Western Samoa concluded in 1962 <sup>331</sup> it is provided that, when requested, and where permissible and appropriate the Government of New Zealand will represent the Government of Western Samoa at any international conference at which

<sup>324</sup> *Yearbook of the International Law Commission*, 1970, vol. II, p. 1, document A/CN.4/227 and Add.1 and 2.

<sup>325</sup> United Nations, *Treaty Series*, vol. 611, p. 86.

<sup>326</sup> WIPO, *Paris Convention for the Protection of Industrial Property* (Geneva, 1970) [201 (E)].

<sup>327</sup> ITU, *International Telecommunication Convention* (Montreux, 1965), Geneva, General Secretariat of ITU, annex 4, p. 99.

<sup>328</sup> United Nations, *Treaty Series*, vol. 560, p. 3.

<sup>329</sup> *Ibid.*, vol. 294, p. 17.

<sup>330</sup> *Official Records of the General Assembly, Twenty-fifth Session, Sixth Committee*, 1193rd meeting.

<sup>331</sup> United Nations, *Treaty Series*, vol. 453, p. 3.



Western Samoa is entitled to be represented. In pursuance of this provision New Zealand has over the past eight years represented the Government of Western Samoa at its request on a number of occasions. In addition to this formalized arrangement which gives New Zealand a special interest in this question of dual representation, the Government of New Zealand is concerned that a number of other small States and territories in the South-West Pacific might well wish, for financial reasons, to have single delegations representing more than one State at a particular conference or conferences of interest to them. It would be unfortunate, therefore, in New Zealand's view, if as a result of the inclusion of article 83, the principle of single representation were to govern all situations where rules of procedure of the organ or conference do not provide otherwise. The Government of New Zealand would prefer that the Commission included no rule on this matter in its final text.

The Government of New Zealand has consulted on this question with the Government of Western Samoa which has requested that the International Law Commission be informed that it wishes to be associated with the observations of the Government of New Zealand on this article.

9. The Government of Pakistan expresses the opinion that the Commission rightly recognized the correct position in draft article 83. It noted that this article is based on the general practice at conferences convened under the auspices of the United Nations.

10. The Government of Switzerland makes the following observation:

It would seem advisable to take account here of the trend towards multiple representation which has been noted on a number of occasions. Among its other advantages, this practice has the merit of facilitating the participation of small States in the work of international organizations and conferences. It is therefore suggested that the text of the draft should be amended to authorize multiple representation.

Apart from the representation of two or more States by the same delegation, it would be advisable—for the benefit of small States in particular—to raise no obstacle to the different but well-established practice whereby a member of a permanent mission or an observer mission acts as the delegate of another State at certain meetings. For example, in the election of judges at the International Court of Justice, a member of the Office of the Observer of Switzerland to the United Nations is usually designated as the delegate for Liechtenstein.

Since it shares some of the concern expressed by the Commission in the commentary, the Swiss Government proposes the addition of a new article 83 *bis* establishing that under certain conditions a member of a delegation may represent another State.

11. WHO states that the principle of single representation embodied in article 83 applies in WHO although it may be noted that WHO practice also allows delegates from a member State to represent one or indeed more non-governmental organizations in the Assembly.

12. ITU points out that the terms of article 83 conflict with chapter 5, paragraphs 6, 7 and 8 of the General Regulations<sup>332</sup> annexed to the ITU Montreux Convention, the texts of which are as follows:

"640 6. As a general rule, Members of the Union should endeavour to send their own delegations to conferences of the Union. However, if a Member is unable, for exceptional reasons, to send its own delegation, it may give the delegation of another Member of the Union powers to vote and sign on its behalf. Such powers must be

conveyed by means of an instrument signed by one of the authorities mentioned in 629 or 630, as appropriate.

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

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

13. UPU points out that the regulations in force in UPU allow a delegation to represent only one member country other than its own (article 101, paragraph 2, of the General Regulations of UPU<sup>333</sup>). It therefore shares the reservations expressed by certain members of the Commission about article 83 and agrees with the reasoning advanced by them.

#### (b) *Observations of the Special Rapporteur*

14. The Special Rapporteur feels that there is substance in the reservations expressed by a number of delegations to the Sixth Committee concerning the categorical manner in which article 83 is formulated in its present wording. As appears from the Commission's commentary on this article, the position of the members of the Commission on that provision is divided. Moreover, the Commission included in the commentary an explicit statement emphasizing the provisional character of the present wording of article 83, in which it underlined the fact that it will review the matter of single representation at the second reading of the draft articles in the light of the observations which it receives from governments and international organizations. As to the three solutions proposed by delegations in the Sixth Committee (para. 1 above), the Special Rapporteur is not in agreement with the deletion of the article. He is in agreement with the insertion at the beginning of the article of the words "as a rule" or the addition at the end of the article of the words "unless the rules and practice of the organ or conference otherwise provide".

15. The Special Rapporteur recognizes the validity of the suggestion of the Government of Canada (para. 2 above) that article 83 could be redrafted so as not to exclude double representation when permitted by the organ or the organization concerned.

16. The Special Rapporteur does not consider it possible to adopt the position suggested by the Government of Finland (para. 3 above) to the effect that as a general rule a delegation should be entitled to represent two or more States if necessary. In his fifth report, the Special Rapporteur referred to the practice in the United Nations bodies and the conferences convened by the United Nations.<sup>334</sup> This practice revealed a number of problems encountered in voting as a result of double representation. He also cited from the Study by the Secretariat where it is stated that

<sup>333</sup> UPU, *Constitution et Règlement général de l'Union* (Berne, Bureau de l'Union, 1965).

<sup>334</sup> *Yearbook of the International Law Commission, 1970*, vol. II, p. 18, document A/CN.4/227 and Add.1 and 2, chap. II, article 63, commentary.

<sup>332</sup> See foot-note 327 above.

It has been the consistent position of the Secretariat and of the organs concerned that such representation is not permissible unless clearly envisaged in the rules of procedure of the particular body.<sup>335</sup>

17. The Special Rapporteur concurs with the statement of the Government of Japan (para. 4 above) that progressive development of law on international conferences should not preclude a delegation to an organ or a conference from representing more than one State. Article 83 lays down a general residual rule. In interpreting this rule, it should be borne in mind that article 83 is subject to the provisions of articles 3 to 5 of this draft. Therefore, the inclusion of article 83 in the draft would not preclude the possibility of a delegation representing more than one State to an organ or a conference if this is allowed by the rules and practice of the organ or conference concerned. These considerations should also allay the apprehensions expressed by ITU and UPU concerning the contradiction between article 83 and certain provisions of their regulations.

18. The Special Rapporteur wishes to express his appreciation for the number of cases of multiple representation cited in the comments of Governments and international organizations. He agrees that the commentary should refer to these cases in order to give a more comprehensive and balanced account of the practice of international organizations.

19. In view of the foregoing the Special Rapporteur proposes the two following alternatives for article 83:

**Article 83. Principle of single representation**

ALTERNATIVE A

As a rule, a delegation to an organ or to a conference may represent only one State.

ALTERNATIVE B

A delegation to an organ or to a conference may represent only one State, unless the rules and practice of the organ or conference otherwise provide.

**Article 84. Appointment of the members of the delegation**

*(a) Observations of Governments and international organizations*

1. The Government of the Netherlands refers to its comments on article 55 (Appointment of the members of the permanent observer mission), where it indicates that it "would like to see the position of the host State invested with further guarantees".

2. The Government of Switzerland also refers to its comments on preceding articles, namely article 10 (Appointment of the members of the permanent mission) and article 55 (Appointment of the members of the permanent observer mission), where it suggests that the host State

should be empowered to formulate objections to the presence of a given individual as a member of a permanent mission or as a member of a permanent observer mission.

3. The secretariat of the ILO states that its comments concerning article 81<sup>336</sup> apply equally to article 84.

*(b) Observations of the Special Rapporteur*

4. As regards the comments reflected in the three preceding paragraphs, the Special Rapporteur wishes to refer to his observations on comments made in the context of articles 55<sup>337</sup> and 81<sup>338</sup> respectively.

5. In the light of the foregoing, the Special Rapporteur proposes that article 84 be retained in its present form. Article 84, would, therefore, read as follows:

**Article 84. Appointment of the members of the delegation**

Subject to the provisions of articles 82 and 85, the sending State may freely appoint the members of its delegation to an organ or to a conference.

**Article 85. Nationality of the members of the delegation**

*(a) Observations of Governments and international organizations*

1. The Government of Canada suggests that consideration be given to including in the category of persons that cannot be appointed without the consent of the host State the persons having permanent residence in the host State; to that effect, the words "or persons having permanent residence in the host State" should be included after the words "persons having the nationality of the host State".

2. In the opinion of the Government of Finland, it should be possible to compose a delegation of persons of different nationality; the functions of a delegation often require special knowledge and expertise which all States do not have at their disposal.

3. The Japanese Government favours the view of some of the members of the Commission that the consent of the host State can be withdrawn only if that would not seriously inconvenience the delegation in carrying out its functions. It points out that unlike in the case of permanent missions, sudden withdrawal of the consent of the host State in the course of the session of an organ or conference might place the sending State in an awkward situation.

4. The secretariat of WHO states that WHO has no rule on the question of the nationality of members of a

<sup>336</sup> See above, Article 81, para. 2 of the observations.

<sup>337</sup> See above, p. 95, document A/CN.4/241/Add.4, Article 55, para. 4 of the observations.

<sup>338</sup> See above, Article 81, paras. 4-5 of the observations.

<sup>335</sup> Study by the Secretariat, op. cit. (see foot-note 47), p. 169, para. 40.

delegation, although the principle laid down in article 85 always seems to have been observed, at least so far as delegations to the Assembly are concerned. It notes, however, that in the Executive Board, which is made up not of delegates but of "persons" designated by twenty-four States selected by the Assembly (Constitution, article 24),<sup>339</sup> a State has sometimes chosen a person who was not one of its nationals—for example the members of the Benelux Union.

5. The secretariat of ITU observes that it is the practice of some States members of the Union to include in their delegations from time to time nationals of other States.

#### (b) *Observations of the Special Rapporteur*

6. As regards the suggestion, reflected in paragraph 1 above, to reword the last sentence of the article through the addition of a reference to "persons having permanent residence in the host State", the Special Rapporteur wishes to refer to his observations on comments made in the context of article 55<sup>340</sup> which he considers equally applicable in the case of delegations to organs or conferences.

7. As regards the case of the persons mentioned in paragraph 4 above, the Special Rapporteur wishes to point out that such particular cases for which a certain practice develops within an organization are covered by article 3 of these draft articles.

8. As regards the comments reflected in paragraphs 2 and 3 above, the Special Rapporteur himself has favoured in his fifth report to the Commission a less restrictive rule than the one laid down in article 85. In paragraph 2 of his "Note on nationality of members of a delegation" the Special Rapporteur stated:

The Special Rapporteur is of the opinion that the sending State should have a wider freedom of choice with respect to the members of its delegations to organs of international organizations and to conferences convened by such organizations. One of the salient features of present-day international relations is the increasing number of subsidiary organs set up by international organizations to deal with very specialized matters of highly technical character which require the enlisting of the services of experts possessing the necessary training and experience. This trend is by no means limited to international organizations of technical character (the specialized agencies). It is also increasingly witnessed in general international organizations of predominantly political character such as the United Nations and the regional organizations which have a general rather than specialized character. Similarly, conferences for the promotion of institutionalized international co-operation are convened at a rate which exceeds by far that of international conferences prior to the era of the United Nations. For these reasons it is highly desirable, if not indispensable, that the sending State should enjoy the widest possible freedom in the choice of the members of its delegations to such organs and conferences.

Furthermore, it should be noted that such organs and conferences meet temporarily and for short periods. Given this fact, the question of the requirement of the consent of the host State to the appointment of one of its nationals in the delegation of another State

should be seen in a light different from that in which the Commission viewed the question in relation to members of permanent missions.<sup>341</sup>

9. In the light of the foregoing, the Special Rapporteur proposes that article 85 be amended to read as follows:

#### *Article 85. Nationality of the members of the delegation*

The representatives and members of the diplomatic staff of a delegation to an organ or to a conference should in principle be of the nationality of the sending State. They may not be appointed from among persons having the nationality of the host State, if the host State objects, which it may do at any time.

#### **Article 86. Acting head of the delegation**

##### (a) *Observations of Governments and international organizations*

1. The Government of Sweden is of the opinion that this article should be omitted and that it is unnecessary and in any case too rigid.

2. The Government of Switzerland points out that it would be preferable for the acting head to be designated in advance, before any case of unavoidable absence can occur.

3. The secretariat of the ILO states that its comments on article 81<sup>342</sup> apply equally to article 86.

4. The secretariat of ITU indicates that it is the practice in ITU conferences that if a head of a delegation is going to be absent, he informs the President or Chairman of the Conference through the secretariat and indicates which member of the delegation will act in his absence.

5. In its editorial observations (A/CN.4/L.162/Rev.1, section B) the Secretariat of the United Nations suggests the following points:

(i) In the fourth line of paragraph 1, the words "in case he is unable to do so" should be replaced by "if he is unable to do so", which are clearer and more precise.

(ii) In paragraph 2, the word "provided" should be inserted before "in paragraph 1"; the phrase would then read "... another person may be designated as provided in paragraph 1 of this article".

##### (b) *Observations of the Special Rapporteur*

6. As regards the observation reflected in paragraph 1 above, the Special Rapporteur does not think that article 86 is unnecessary or too rigid.

7. With respect to the suggestion reflected in paragraph 2 above, the Special Rapporteur fears that its adoption might inject in the article some undue rigidity.

8. As to the observation reflected in paragraph 3 above, the Special Rapporteur wishes to refer to his corresponding comment in the context of article 81.<sup>343</sup>

<sup>339</sup> For the WHO Constitution, see United Nations, *Treaty Series*, vol. 14, p. 185 and *ibid.*, vol. 377, p. 380.

<sup>340</sup> See above, p. 96, document A/CN.4/241/Add.4, Article 56, para. 6 of the observations.

<sup>341</sup> *Yearbook of the International Law Commission*, 1970, vol. II, p. 19, document A/CN.4/227 and Add.1 and 2, chap. II.

<sup>342</sup> See above, Article 81, para. 2 of the observations.

<sup>343</sup> *Ibid.*, paras. 4-5.

9. The Special Rapporteur agrees with the editorial points reflected in paragraph 5 above.

10. In the light of the foregoing, the Special Rapporteur proposes that article 86 be drafted to read as follows:

**Article 86. Acting head of the delegation**

1. If the head of a delegation to an organ or to a conference is absent or unable to perform his functions, an acting head may be designated from among the other representatives in the delegation by the head of the delegation or, if he is unable to do so, by a competent authority of the sending State. The name of the acting head shall be notified to the Organization or to the conference.

2. If a delegation does not have another representative available to serve as acting head, another person may be designated as provided in paragraph 1 of this article. In such case credentials must be issued and transmitted in accordance with article 87.

**Article 87. Credentials of representatives**

*(a) Observations of Governments and international organizations*

1. The secretariat of WHO refers to rule 22 of the rules of procedure of the World Health Assembly<sup>344</sup> which states that credentials shall be issued by the Head of State or by the Minister for Foreign Affairs or by the Minister of Health or by any other competent authority. It notes that the Health Assembly's practice has been to regard as a "competent authority", apart from those mentioned above, the ministerial departments responsible for health matters, embassies and permanent delegations.

2. The secretariat of ITU refers to its comment on article 78.<sup>345</sup>

*(b) Observations of the Special Rapporteur*

3. As regards the observation reflected in paragraph 2 above, the Special Rapporteur wishes to refer to his comment on the similar observation made in the context of article 78.<sup>346</sup>

4. The Special Rapporteur does not propose to make any change in article 87. The article would therefore read as follows:

**Article 87. Credentials of representatives**

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

2. The credentials of a representative in the delegation to a conference shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent authority if that is allowed in relation to the conference in question, and shall be transmitted to the conference.

<sup>344</sup> For the text of the rules of procedure of the World Health Assembly, see WHO, *Basic Documents*, 22nd ed. (Geneva, April 1971), p. 97.

<sup>345</sup> See above, Article 78, para. 5 of the observations.

<sup>346</sup> *Ibid.*, para. 11.

**Article 88. Full powers to represent the State in the conclusion of treaties**

*(a) Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee it was observed that

A representative to an organ or to a conference should be in possession of full powers for the purpose of signing a treaty and that paragraph 3 of [article 88] was therefore redundant.<sup>347</sup>

2. In its written comments the Government of the Netherlands expresses the view that paragraph 3 of article 88 is redundant. With regard to the article as a whole it states that it is questionable whether in this case the repetition of what is already laid down in the Vienna Convention on the Law of Treaties<sup>348</sup> is to be recommended.

*(b) Observations of the Special Rapporteur*

3. The Special Rapporteur is not convinced that paragraph 3 is redundant. Nor does he share the doubts expressed concerning the advisability of retaining article 88. He believes that for the purpose of making these draft articles as complete as possible, it would be useful to include a provision on full powers of representatives to organs and conferences and that such a provision should be co-ordinated with article 7 of the Vienna Convention on the Law of Treaties.

4. The Special Rapporteur does not propose to make any change in article 88. The article would therefore read as follows:

**Article 88. Full powers to represent the State in the conclusion of treaties**

1. Heads of State, Heads of Government and Ministers for Foreign Affairs, in virtue of their functions and without having to produce full powers, are considered as representing their State for the purpose of performing all acts relating to the conclusion of a treaty in a conference or in an organ.

2. A representative to an organ or in a delegation to a conference, in virtue of his functions and without having to produce full powers, is considered as representing his State for the purpose of adopting the text of a treaty in that organ or conference.

3. A representative to an organ or in a delegation to a conference is not considered in virtue of his functions as representing his State for the purpose of signing a treaty (whether in full or *ad referendum*) concluded in that organ or conference unless it appears from the circumstances that the intention of the Parties was to dispense with full powers.

**Article 89. Notifications**

*(a) Observations of Governments and international organizations*

1. The Government of Sweden is of the opinion that the provisions of article 89 seem unduly detailed.

<sup>347</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 66.

<sup>348</sup> See foot-note 36 above.

2. The Government of Turkey states that paragraph 4 of article 89 seems inadequate from the practical standpoint. It suggests that, since it is the host State which grants privileges and immunities, it is to the host State that the notifications should be sent first.

3. The secretariat of the ILO makes the following observations on article 89:

It would indeed be desirable if organizations could be told of the dates of arrival and departure of the persons referred to in article 81 and so inform the Government of the country in which the conference meets of the period in which those persons will fall under the system established in the draft convention.

However, this provision might face almost insurmountable difficulties when it came to be implemented. In the first place, it is easy to imagine that some delegates, not to say members of their family, will fail to inform the organization of their arrival or departure; equally some delegates, including the employers' and workers' delegates in the ILO, will prolong their stay at the place in which the conference meets beyond the closing date. In that case, should the Government be informed of the actual date of departure of the persons concerned? Alternatively (and, it would seem, more logically) should the period of application of the draft convention cease on the closing date of the conference?

4. The secretariat of WHO points out that WHO is notified of the members of the delegation, but notification is not required in the other instances set out in article 89, paragraph 1 (persons belonging to the family of a member of the delegation, persons employed by members of a delegation, etc.).

5. The secretariat of ITU states that ITU does not accept responsibility for notifying to host States the information envisaged in paragraph 3 of article 89 and is not therefore interested to have information regarding arrival and departure of delegates and their families or the movements of other persons employed in delegations.

#### (b) *Observations of the Special Rapporteur*

6. As regards the observation reflected in paragraph 1 above, the Special Rapporteur agrees that article 89 is detailed. However, he does not think it is possible to make it less detailed without impairing the elaborate system it seeks to lay down.

7. As regards the observation reflected in paragraph 2 above, the Special Rapporteur wishes to point out that article 89 is modelled on the provisions of article 17. In paragraph 7 of its commentary on article 17, the Commission stated that the rationale of the rule formulated in that article is that since the direct relationship is between the sending State and the organization, notifications are to be made by the sending State to the organization which in turn transmits them to the host State.

8. As regards the observations reflected in paragraphs 3, 4 and 5 above, the Special Rapporteur wishes to state that article 89 seeks to elaborate a general pattern. This does not, however, preclude the application of a practice which had developed or may develop within a given organization and which may differ in one way or another from the general pattern as laid down in article 89. Such possibility is provided for in articles 3 to 5.

9. In the light of the foregoing, the Special Rapporteur does not propose to make any change in the text of article 89. The article would therefore read as follows:

#### *Article 89. Notifications*

1. The sending State, with regard to its delegation to an organ or to a conference, shall notify the Organization or, as the case may be, the conference, of:

(a) The appointment, position, title and order of precedence of the members of the delegation, their arrival and final departure or the termination of their functions with the delegation;

(b) The arrival and final departure of a person belonging to the family of a member of the delegation and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the delegation;

(c) The arrival and final departure of persons employed on the private staff of members of the delegation and the fact that they are leaving that employment;

(d) The engagement and discharge of persons resident in the host State as members of the delegation or persons employed on the private staff entitled to privileges and immunities;

(e) The location of the premises occupied by the delegation and of the private accommodation enjoying inviolability under articles 94 and 99, as well as any other information that may be necessary to identify such premises and accommodation.

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

3. The Organization or, as the case may be, the conference, shall transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

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

#### *Article 90. Precedence*

##### (a) *Observations of Governments and international organizations*

1. The Government of Finland observes that it remains to some extent unclear by what alphabetical order the precedence among delegates shall be determined in countries which have several official languages.

2. The secretariat of the ILO states that in the ILO the problem of precedence among member States does not really arise since, in practice, the order in which Governments are called in roll-call votes and seated in the conference room is alternately forward and reverse French alphabetical order. These are the only cases in which some precedence is observed.

3. The secretariat of WHO states that in WHO precedence among delegations is determined by using English or French alphabetical order in alternate years, in accordance with the rules of procedure.

4. The secretariat of ITU states that it is the practice of ITU to seat delegations in the alphabetical order of the French names of the countries represented. It is in this order that the delegations are called in case of a roll-call vote. These are the only cases in which it is the practice of the Union to invoke an order of precedence between delegations.

*(b) Observations of the Special Rapporteur*

5. As regards the observation reflected in paragraph 1 above, the Special Rapporteur wishes to point out that what is envisaged in article 90 is the alphabetical order used in the Organization. The Special Rapporteur proposes that this be reflected clearly in the text of the article.

6. As regards the observations reflected in paragraphs 2, 3 and 4, the Special Rapporteur has taken note of the practices referred to therein and does not believe that they call for any comment on his part.

7. In the light of the foregoing, the Special Rapporteur proposes that article 90 be reworded to read as follows:

*Article 90. Precedence*

**Precedence among delegations to an organ or to a conference shall be determined by the alphabetical order used in the Organization.**

\* \* \*

**DOCUMENT A/CN.4/241/ADD.6****NOTE**

The present addendum is based on the comments of Governments and international organizations referred to in the introduction to the report.<sup>349</sup> It is arranged along the same lines as explained in the introduction.<sup>350</sup>

***Part IV. Delegations of States to organs and to conferences (continued)*****SECTION 2. FACILITIES, PRIVILEGES AND IMMUNITIES OF DELEGATIONS****General comments*****(a) Observations of Governments and international organizations***

1. In the course of the debate in the Sixth Committee,<sup>351</sup> most of the views expressed on the facilities, privileges and immunities of delegations were similar to those expressed on the facilities, privileges and immunities of permanent observer missions to international organizations, an account of which has already been given in the present report.<sup>352</sup> In addition, some representatives

<sup>349</sup> See above, p. 10, document A/CN.4/241 and Add.1 and 2, paras. 5-7.

<sup>350</sup> *Ibid.*, p. 11, para. 8.

<sup>351</sup> For all references to the Sixth Committee's discussion of the draft articles, see foot-note 39 above.

<sup>352</sup> See above, p. 84, document A/CN.4/241/Add.4, Part. III in general, paras. 1-3 of the observations.

shared the opinion that the privileges and immunities of delegations to organs and to conferences should, in view of the representative character of such delegations and the temporary nature of their tasks, be formulated in the light of the privileges and immunities of "special missions" and, after any adjustments necessitated by their temporary nature, by reference to the law of international organizations.

Other representatives, however, considered that delegations to organs and conferences did not have the same functions as did special missions nor did they have the same character. It was also said that

In their present form the draft articles could produce the anomalous situation in which delegations to organs and conferences of lesser importance would be accorded a higher scale of privileges and immunities than delegations to United Nations organs or conferences convened under its auspices.

... Finally, attention was drawn to the question of the application of the privileges and immunities provided for in the draft articles to the large numbers of regional or technical conferences convened by international organizations of a universal character. The view was expressed that "it would be advisable to limit the application of the draft articles to the more important conferences and organs of such organizations".<sup>353</sup>

2. In its written comments,<sup>354</sup> one Government [Israel] stated its inclination

towards a broad formulation of facilities, privileges and immunities for the official representatives of States; it considers that uniformity of treatment is preferable to the many ambiguities and obscurities now encountered. If, however, that view is not adopted, it suggested that the Commission might wish to consider presenting the material in a series of separate instruments. At all events the present opportunity should be taken to introduce the greatest possible degree of unification and systematization into the law governing the official representatives of States, and to co-ordinate the provisions governing representatives to universal international organizations with those governing direct and inter-State representatives, now consolidated in the 1961 Convention on Diplomatic Relations, in the 1963 Convention on Consular Relations and in the 1969 Convention on Special Missions.<sup>[355]</sup>

3. Another Government [Poland] expressed the view that the codification of the matters dealt with in part IV of the draft articles "should primarily aim at systematizing the existing rules and filling the existing gaps". It indicated that it would

support such solutions as will afford delegates of States to organs and to conferences the best possible conditions necessary for the performance of their functions.

4. A number of Governments emphasized the "functional necessity" element as regards the facilities, privileges and immunities of delegations. In this connexion, the Government of Australia expressed agreement

with those States which consider that the draft articles on the delegations of States to organs and conferences go well beyond the level required for effective performance of their functions.

Likewise, the Government of Turkey considered that

Acceptance of the text as it stands would represent a considerable departure from the principle that privileges and immunities should

<sup>353</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 28-35.

<sup>354</sup> See foot-note 12 above.

<sup>355</sup> For the references to the Convention on Diplomatic Relations, the Convention on Consular Relations and the Convention on Special Missions, see above foot-notes 38, 50 and 41 respectively.

be accorded to the extent necessary for the performance of the respective functions.

The Government of France expressed in general its belief that

In its study of the question of relations between States and international organizations, the Commission should be guided essentially by considerations of functional necessity and should not lose sight of the need to strike a balance between the interests of the host State and the independence of the organization.

In its opinion, therefore, "privileges and immunities should be granted only to the extent that they satisfy the criterion of functional necessity". For the Government of Canada "the extent of privileges and immunities to be granted should be based on the actual needs of the delegations in respect of the performance of their duties". Similar views were expressed by the Governments of Japan, the Netherlands and the United Kingdom.

5. On the basis of the "functional necessity" element, some governments emphasized the need to take into account the existing body of rules and practice referred to by the Commission in its general comments on section 2 of part IV. Thus, the Government of the United Kingdom noted that

the privileges and immunities of delegations to meetings of organs of the United Nations and the specialized agencies and to conferences convened by them are provided for in the General Convention on the Privileges and Immunities of the United Nations<sup>[366]</sup> and in the Convention on the Privileges and Immunities of the Specialized Agencies.<sup>[367]</sup> The relevant provisions are Article IV (Sections 11 to 16) of the General Convention and Article V (Sections 13 to 17) read with the definition in Section 1 (vi) of the Specialized Agencies Convention. There is also a considerable body of international practice based on these agreements.

Express reference to the above-mentioned conventions was also made by the Governments of Canada, the Netherlands and France. The Government of the United Kingdom further observed that "underlying these agreements and this practice is the principle, embodied in paragraph 2 of Article 105 of the United Nations Charter, of functional need". A similar consideration was made by the Government of France. Also, in the view of the Government of the United Kingdom

Any attempt to codify and develop the law must have regard to existing agreements and practice. The correctness of this approach appears to have been recognized by the Commission in paragraph 1 of its commentary on draft article 3 where the Commission explains its general aim [ . . . ]

[ . . . ]

Consistently with this approach, the Government of the United Kingdom would have expected that articles 78 to 116 would reflect existing agreements and practice. The Conventions referred to above purported to lay down the scale of privileges and immunities considered necessary for the exercise of the functions of the United Nations and of the specialized agencies. They have been in force and have been applied in practice for some twenty years. The Government of the United Kingdom are aware of no evidence to suggest that this aspect of the Conventions is in any substantial way inadequate or unsatisfactory.

The Government of France likewise considered that the agreements at present in force seemed in fact to have proved satisfactory. In its view, the

Commission might usefully reconsider the articles of this part of its draft in the light of the agreements at present in force and, as regards problems which are not dealt with in these agreements, in the light of the actual practice of States and organizations.

It emphasized that it was

highly desirable for the Commission to give due consideration to provisions [of the Convention on the Privileges and Immunities of the United Nations] and of similar texts which strike the necessary balance between the various interests involved in the life of an international organization.

The Government of the United Kingdom indicated that it did

not see how it would be possible to justify abandoning at this stage the principles underlying the General Convention on the Privileges and Immunities of the United Nations and the Specialized Agencies Convention merely to gain the convenience of having further texts based on the Vienna Convention on Diplomatic Relations.

The Government of the Netherlands questioned whether it was desirable to deviate from these existing rules to any considerable extent.

The Government of Canada suggested that

*mutatis mutandis*, taking into account comments made on particular articles, the Convention on the Privileges and Immunities of the Specialized Agencies be used as the main point of reference in the redrafting of part IV.

6. The Australian Government considered "particularly disturbing the degree to which the present articles go beyond the level of the privileges and immunities accepted in the past in relation to most international organizations". It observed that of some thirty such organizations which the Australian Government has had reason to consider in relation to its own legislation on the matter, the highest level of privileges and immunities for a representative accredited to, or attending a conference convened by an international organization is as follows:

- (1) Immunity from personal arrest or detention;
- (2) Immunity from suit and from other legal process in respect of acts and things done in his capacity as a representative;
- (3) Inviolability of papers and documents;
- (4) The right to use codes and to send and receive correspondence and other papers and documents by couriers or in sealed bags;
- (5) Exemption (including exemption of the spouse of the representative) from the application of laws relating to immigration, the registration of aliens and the obligation to perform national service;
- (6) Exemption from currency or exchange restrictions to such an extent as is accorded to a representative of a foreign Government on a temporary mission on behalf of that Government;
- (7) The like privileges and immunities, not being privileges and immunities of a kind referred to in any of the preceding paragraphs, as are accorded to an envoy, other than exemption from:
  - (a) Excise duties;
  - (b) Sales taxes; and
  - (c) Duties on importation or exportation of goods not forming part of personal baggage.

The Australian Government took the view that "such a scale is adequate on the basis of functional necessity: furthermore it is consistent with that applied to other international organizations in the past".

7. The Government of France considered that, after analysing the existing body of rules referred to in its

<sup>366</sup> See foot-note 20 above.

<sup>367</sup> See foot-note 45 above.



general comments on section 2 of part IV, the Commission then departs from them and grants diplomatic status to all the persons referred to in its draft, although it admits that this is not in keeping with the usual practice of States, as it appears from the conventions at present in force, including the General Convention on the Privileges and Immunities of the United Nations. The Commission has preferred to assimilate delegations of this kind to special missions rather than follow the line laid down by the Committee on Legal Questions of the San Francisco Conference

likewise referred to by the Commission in its general comments on section 2. The French Government expressed the opinion that the Commission should reconsider the question along that line. Similarly, the Government of the United Kingdom considered that

In formulating this group of draft articles, the Commission appears to have departed substantially from the Conventions. Instead it has adopted a different approach which bears little relationship to existing practice and consists of applying *mutatis mutandis* the provisions of the Convention on Special Missions. The United Kingdom Government can set no justification for this. They continue to share the view expressed by the General Assembly of the United Nations in resolution 22 D (I) of 13 February 1946.

#### 8. In the opinion of the Government of the Netherlands,

The third and last category of representatives of States to international organizations [delegations] differs from the two previous categories in more than one respect: the length of their stay is by nature limited; their task is specific and limited; and the host State is not necessarily the State in which the organization has its headquarters. By the first two of these characteristics the delegations are comparable to special missions. On the other hand, their business is not connected with the relations between the sending State and the host State, as in the case of special missions, but with the aims and procedures of an organization.

#### 9. The Government of the United Kingdom stated that

It is no doubt true that in some ways a delegation to an organ of an organization or to a conference convened by an organization is comparable to a special mission (within the meaning of the Convention on Special Missions) sent by one State to another. They both temporarily represent a State in the territory of another State. But the special status of a special diplomatic mission also reflects the fact that it is merely another form and, as a matter of historical fact, an older form of diplomatic mission. As between adopting the law relating to diplomatic missions between States and adopting the law relating to delegations to international organizations, the Government of the United Kingdom consider it correct to place special diplomatic missions in the framework of the law relating to diplomatic missions (as does the Convention on Special Missions and as customary international law perhaps already does) and to place delegates to organs and conferences of international organizations in the framework of the law and practice which has already developed in relation to such persons. A special mission is sent by one State to another State and under the Convention on Special Missions, a State may only send a special mission to another State with the consent of the latter. It is one matter to accord extensive immunities and privileges to a special mission; but it is quite another matter to do so in respect of large numbers of persons attending meetings of international organizations.

#### 10. For the Government of France "due account also must be taken of the temporary character of delegations". It noted that

In the discussion on special missions which have the same temporary character, the French Government has already had occasion to draw attention to the serious difficulties which might arise for administrations if they were obliged to accord certain diplomatic

privileges to persons whose presence in their territory was essentially transitional. The Convention on Special Missions, in accordance with the definition adopted, applies only to well-defined missions. However, the articles now being proposed would apply to delegations to conferences and (article 78 (a) and (c)) to delegations to the principal or subsidiary organs of an international organization and to any commission, committee or sub-group of any such organ, in which States are members. It would seem very difficult in practice, and hardly justifiable in principle, to apply the described status indiscriminately to all persons who—according to the terms of the draft—would be able to avail themselves of it.

#### The Government of France did not consider it

self-evident that delegations to organs of international organizations or to conferences convened under the auspices of international organizations should have exactly the same status in the host State as missions sent directly to the host State by a foreign State.

#### In its view it was

impossible to extend diplomatic law, as it stands, to temporary delegations to international organizations.

#### 11. The Government of Japan stated that it was

not fully convinced that, because of the temporary character of their task, the privileges and immunities of delegations to organs of international organizations and to conferences convened by international organizations should be determined in the light of those granted to special missions. In the view of the Japanese Government, privileges and immunities of delegations should be determined bearing in mind the fact that the principle of reciprocity, which functions as a balancing factor between the interests of the sending States and those of the receiving States with regard to privileges and immunities of special missions, does not exist in the case of multilateral relations.

#### For the Japanese Government

It would seem that the Commission takes the position that the delegations to organs of international organizations and conferences convened by such organizations should, irrespective of their nature and functions, be accorded the same extent of privileges and immunities on the ground that they represent sovereign States.

The Japanese Government hesitates to concur fully with this view, since, in its opinion, representatives to conferences which are of purely technical character and of relatively secondary importance need not enjoy some of the privileges and immunities (personal inviolability and protection, in particular), which may be indispensable to the representatives to conferences of highly political character.

It may be sometimes difficult to distinguish between conferences of technical nature and those of political nature. However, this does not mean that the difference of character may be lightly dismissed.

#### For the Government of Japan

It should also be borne in mind that, because of the temporariness of the task of delegations to organs of international organizations and conferences convened by international organizations, the question of their privileges and immunities will give rise, for the host State, to particular difficulties which might not be known to States where the seat of international organizations is permanently placed. For example, the host State of an international conference convened by an international organization might be required to take special and temporary administrative and legislative measures in order to assure privileges and immunities provided for in the draft articles.

#### 12. In the opinion of the Government of Australia, the magnitude of the problem might well be emphasized by considering also the number of conferences to which these articles are intended to apply. Although they concern only international organizations of a universal character, they apply to all meetings convened under the aegis of such organizations. Very many of these meetings are regional



in their composition or are narrowly technical in their range of interests. As an example, FAO during 1970 scheduled some 120 conferences involving more than twenty host States. The calendar of conferences of other agencies is probably no less extensive or less diverse in its range of technical interests. There are therefore literally hundreds of conferences each year to which the broad range of privileges and immunities envisaged in the draft articles will apply.

### 13. The Government of the United Kingdom expressed the view that

Draft articles 78 to 116 could produce the anomalous situation that members of delegations to other organizations of a lesser importance would be accorded a higher scale of privileges and immunities than delegations to organs of the United Nations. In many countries, there is already much parliamentary and public criticism of the extent to which privileges and immunities are accorded to international organizations and persons connected with them, and it is very difficult to see how the additional privileges and immunities provided by the Commission's draft articles could be justified as necessary in the light of the experience of the last twenty years. It must be borne in mind that the conferring of privileges and immunities on one person deprives others of their normal legal rights and remedies. This is justifiable within certain limits. Nevertheless, care must be taken not to recommend extensions of these privileges beyond what is strictly justifiable. Rather the effort should be made to seek acceptable limitations of those privileges which already exist and appropriate means of protecting the interests of third parties.

In conclusion, the Government of the United Kingdom stated that it was "not able to accept the principles underlying part IV of the Commission's draft articles" and expressed the hope that the Commission will revise part IV with the considerations it had made in mind.

### 14. The Government of Turkey indicated that it

does not support the view that the same privileges and immunities should be accorded without distinction to delegations of States to organs and to delegations of States to conferences.

### 15. The Japanese Government also stated that it

would favour the inclusion of a provision for the effective settlement of difficulties which might arise between the sending States and the host State regarding privileges and immunities.

### 16. General comments were also submitted by the secretariats of four international organizations concerning section 2 of part IV. The secretariat of WHO stated the following:

The facilities, privileges and immunities of delegations participating in WHO conferences are established in a number of texts. Article 67 (b) of the Constitution [388] provides that representatives of member States, persons designated to serve on the Board and technical and administrative personnel of the Organization shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization. The Convention on the Privileges and Immunities of the Specialized Agencies also contains a number of special provisions which require no comment. So far as WHO Headquarters is concerned, these provisions were supplemented in the headquarters agreement concluded with the Swiss Federal Council in 1948. [389] Similar agreements have also been envisaged for each of the six regional offices and for the International Agency for Research on Cancer. When conferences are held in countries with which there is

no special agreement, an *ad hoc* agreement is concluded. It either contains a number of special provisions or refers to an existing agreement—most often the Convention on the Privileges and Immunities of the Specialized Agencies. The legal system laid down in such agreements is well known and needs no special comment.

### 17. The secretariat of IBRD stated the following:

[...] even to the extent that the draft articles are relevant to the operations of the IBRD Group, any impact of the proposed instrument is likely to be delayed for a considerable time because for the present most relevant questions appear to be adequately regulated by a number of existing instruments: the Articles of Agreement of IBRD, [390] IFC [391] and IDA [392] (and the SID Convention in relation to ICSID), the Convention on the Privileges and Immunities of the Specialized Agencies and the United Nations Headquarters Agreements [393]—the provisions of all of which are, by draft articles 3-5 and 79-81, to be preserved from supersession by the proposed instrument; in addition, reference must be made to national legislation, in particular the Bretton Woods Agreement Act and the International Organizations Immunities Act of the host State of the IBRD Group. However, in the long run it is likely that certain of these instruments may be interpreted or even altered to conform to the provisions of the proposed instrument, if, as is intended, that instrument comes to be accepted as expressing the consensus of the world community as to the questions to which it is to relate."

### 18. Some of the comments made by the secretariat of ITU have been already reproduced in the context of article 78.<sup>394</sup> The secretariat of ITU also remarked that

In addition to delegations of States the following may be admitted to ITU conferences:

- (a) Observers of the United Nations, the specialized agencies and IAEA;
- (b) Observers of certain other international organizations;
- (c) Representatives of certain recognized private operating agencies.

The provisions of the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies respectively accord the necessary facilities, privileges and immunities to persons in category (a) where the host State is a party to them.

There is no provision for any facilities for persons in categories (b) and (c) in the Headquarters Agreement between the United Nations and the Swiss Confederation [395] which is applied by analogy to ITU, but in practice no difficulties have arisen in connexion with ITU conferences held in Switzerland.

The final draft of the Headquarters Agreement now under negotiation between the Union and the Confederation contains the following article which would be applicable in such cases:

"The Swiss authorities shall take the necessary measures to facilitate the entry into, sojourn in and departure from Swiss territory of all persons, irrespective of nationality, summoned by the Union in their official capacity." [*Provisional translation*]

As for ITU conferences outside Switzerland, such observers and representatives could enjoy special status only by virtue of any relevant provisions which might be included in *ad hoc* agreements between the Union and host States.

The secretariat of the ITU indicated further that

<sup>380</sup> *Ibid.*, vol. 2, p. 134.

<sup>381</sup> *Ibid.*, vol. 264, p. 117.

<sup>382</sup> *Ibid.*, vol. 439, p. 249.

<sup>383</sup> *Ibid.*, vol. 11, p. 11.

<sup>384</sup> See above, p. 111, document A/CN.4/241/Add.5, Article 78, para. 5 of the observations.

<sup>385</sup> United Nations, *Treaty Series*, vol. 1, p. 163 and *ibid.*, vol. 509, p. 309.

<sup>388</sup> For the text of the WHO Constitution, see United Nations, *Treaty Series*, vol. 14, p. 185 and *ibid.*, vol. 377, p. 380.

<sup>389</sup> United Nations, *Treaty Series*, vol. 26, p. 331.

The term "representative" as used in the Montreux Convention [366] refers to a "person sent by a recognized private operating agency". Such agencies may, with the approval of the members of ITU which have recognized them, become members of the CCIs (Montreux Convention, No. 769) and, under certain circumstances, they may vote in Plenary Assemblies (*idem*, No. 789).

"Furthermore, scientific and industrial organizations engaged in telecommunication work may participate in an advisory capacity in meetings of the study groups of the CCIs (*idem*, No. 773).

"These agencies and organizations contribute towards defraying the expenses of the CCIs (*idem*, No. 224).

"International organizations which co-ordinate their work with ITU and which have related activities may be admitted to participate in the work of the CCIs.

The secretariat of ITU finally observed that it had

commented at some length on the draft articles as we feel that the International Law Commission should be aware of the extent to which the provisions of part IV depart from the practice in organizations such as the Union. We believe that the draft in its final form will be widely accepted and that difficulties may well arise in connexion with ITU conferences and meetings, despite the provisions of articles 5 and 79, if so great a discrepancy between its provisions and ITU practice remains.

#### 19. The secretariat of UPU stated that

We are inclined to believe that, despite the reservation in article 80, some of the suggested provisions would complicate existing practice, without meeting any real need. In addition, so far as UPU is concerned, the regulations on the subject embodied in the Convention on the Privileges and Immunities of the Specialized Agencies (article V) and the Switzerland/United Nations agreement on the privileges and immunities of the United Nations (article IV), which is applied *mutatis mutandis* to UPU, have not proved to be in any way inadequate or imperfect. Moreover, they cover the case of observers to organs and conferences, which is not dealt with in the draft articles.

#### (b) *Observations of the Special Rapporteur*

20. The Special Rapporteur in order to facilitate the discussion in the Commission, deemed it appropriate to include in the preceding paragraphs a systematic and full account of the observations of a number of governments and international organizations critical of the Commission's approach to the question of the facilities, privileges and immunities of delegations. In this respect, he wishes to observe that the arguments advanced in support of such a position, which relate to a great extent to the Commission's general comments on section 2 of part IV, reproduce in general those which were made during the discussion at the twenty-second session of the Commission. As for himself, the Special Rapporteur wishes to point out that the view he expressed on the question in his own commentary to the then draft article 69 in the fifth report he submitted on the topic<sup>367</sup> received the endorsement of the Commission, as it is reflected in paragraph 16 of the above-mentioned general comments in the following terms:

As regards the nature and extent of privileges and immunities of members of delegations to organs of international organizations and

to conferences convened by international organizations, the Commission takes the position that these should be based upon a selective merger of the pertinent provisions of the Convention on Special Missions and the provisions regarding permanent missions to international organizations provided for in Part II of these articles. This position is derived from a number of recent developments which have taken place in the codification of diplomatic law. One of these developments is the evolution of the institution of permanent missions to international organizations and the assimilation of their status and immunities to diplomatic status and immunities. Another factor is that during the discussion and in the formulation of its provisional draft articles on special missions, the Commission expressed itself in favour of: (a) making the basis and extent of the immunities and privileges of special missions more or less the same as that of permanent diplomatic missions, and (b) taking the position that it was impossible to make a distinction between special missions of a political nature and those of a technical nature; every special mission represented a sovereign State in its relations with another State. The Commission is of the view that, owing to the temporary character of their task, delegations to organs of international organizations and to conferences convened by international organizations occupy, in the system of diplomatic law of international organizations, a position similar to that of special missions within the framework of bilateral diplomacy. It follows that the determination of their privileges and immunities should be made in the light of those of special missions. However, after taking into account adjustments required by the fact that their task is temporary, privileges and immunities of these delegations should reflect the essential role that the law of international organizations must play in their formulation.<sup>368</sup>

The Special Rapporteur remains of the same opinion. He wishes further to point out that in their comments, governments and international organizations made concrete reference to most of the provisions of the articles included in section 2 of part IV of the Commission's draft. In these circumstances, the Special Rapporteur does not consider it necessary, for the purposes of the present report, to alter the Commission's approach in the presentation of the articles on facilities, privileges and immunities with which he is to furnish the Commission for consideration and final decision.

21. The Special Rapporteur does not deem it pertinent to express an opinion on the suggested distinction between the privileges and immunities to be accorded to delegations to organs and those to be accorded to delegations to conferences as no reasons were given to explain it.

22. As regards the comment of the Government of Japan reproduced in paragraph 15 above, the Special Rapporteur wishes to refer to the provisions of article 50 which, as explained by the Commission in the report on the work of its twenty-first session

was put provisionally at the end of the group of articles adopted by the Commission at its twenty-first session. Its place in the draft as a whole will be determined by the Commission at a later stage.<sup>369</sup>

He wishes also to recall paragraph 5 of the Commission's commentary on article 50 and his observation on the question of the inclusion in the draft articles of provisions on the settlement of disputes.<sup>370</sup>

<sup>366</sup> For the text of the International Telecommunication Convention, see United Nations, *Juridical Yearbook*, 1965 (United Nations publication, Sales No. 67.V.3), p. 173.

<sup>367</sup> *Yearbook of the International Law Commission*, 1970, vol. II, p. 22-23, document A/CN.4/227 and Add.1 and 2, chap. II.

<sup>368</sup> *Ibid.*, pp. 291-292, document A/8010/Rev.1, chap. II, B.

<sup>369</sup> *Ibid.*, 1969, vol. II, p. 221, document A/7610/Rev.1, footnote 44.

<sup>370</sup> See above, p. 83, document A/CN.4/241/Add.3, Article 50, para. 16 of the observations.

23. The Special Rapporteur takes note of the information given by international organizations regarding their rules and practice on the subject. In this respect he wishes to refer to the provisions of articles 3 and 4 which, as the Commission indicated in its commentary to article 79, are intended to apply generally to part IV of the draft.

### **Article 91.<sup>371</sup> Status of the Head of State and persons of high rank**

#### **(a) Observations of Governments and international organizations**

1. In the course of the debate in the Sixth Committee, the Commission

was commended for having included in the draft this provision, which is based on article 21 of the Convention on Special Missions.<sup>372</sup>

2. In its written comments, the Government of Finland expressed the view that

The status of the persons of high standing mentioned in this article should be defined in the draft articles but it is doubtful whether the references to official visits and international law are enough in this respect.

3. The Government of the United Kingdom stated that as in the case of the comparable provision in the Convention on Special Missions (in connexion with the adoption of which the *United Kingdom* delegation made a statement of its position),<sup>373</sup> they

[...] find it difficult to accept the implication in paragraph 2 that persons other than the Head of State and his suite have privileges and immunities under international law, as opposed to those which may be accorded as a matter of courtesy, going beyond those contemplated in the succeeding articles.

4. Some Governments criticized the inclusion of the article in the draft. The Government of Sweden considered that the article was "superfluous". In its view, "in substance it only provides that the rules of international law regarding the status of heads of State and persons of high rank should be respected". The Government of Turkey was of the opinion that the article "is out of place in the convention. This matter should be left to international law to be dealt with in accordance with custom."

5. The Government of the United States expressed its belief that

This draft article is unnecessary since the privileges and immunities covered in the article are already accorded by international law. However, we have no difficulty with the article.

#### **(b) Observations of the Special Rapporteur**

6. The Special Rapporteur is of the opinion that, to paraphrase the Commission's observation in paragraph 1

<sup>371</sup> For reference to the draft articles and the Commission's commentaries, see foot-note 34 above.

<sup>372</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 67.*

<sup>373</sup> *Ibid.*, *Twenty-fourth Session, Annexes, agenda item 87, document A/7799, paras. 177-178.*

of the commentary to article 21 of its final draft on Special Missions,<sup>374</sup> in international law, rank may confer on the person holding it exceptional facilities, privileges and immunities which he retains on becoming a member of a delegation. In this connexion he wishes to point out that, as regards the Head of the sending State, the facilities, privileges and immunities which he is to enjoy are, in the words of paragraph 2 of the above-mentioned commentary, those accorded by international law to Heads of State "on an official visit".<sup>375</sup> In these circumstances, in the Special Rapporteur's view, the provision of article 91, which reproduces with the requisite adaptations the provision of article 21 of the Convention on Special Missions, would appear to be called for even more in the context of relations between States and international organizations than in that of relations between States.

7. In view of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 91 would, therefore, read as follows:

### **Article 91. Status of the Head of State and persons of high rank**

1. The Head of the sending State, when he leads a delegation to an organ or to a conference, shall enjoy in the host State or in a third State the facilities, privileges and immunities accorded by international law to Heads of State on an official visit.

2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a delegation of the sending State to an organ or to a conference, shall enjoy in the host State or in a third State, in addition to what is granted by the present part, the facilities, privileges and immunities accorded by international law.

### **Article 92. General facilities, assistance by the Organization and inviolability of archives and documents**

No comments were made by Governments or international organizations concerning article 92. The Special Rapporteur has no observations to make on the text of the article and consequently, he proposes that the article be retained in its present form. Article 92 would, therefore, read as follows:

### **Article 92. General facilities, assistance by the Organization and inviolability of archives and documents**

The provisions of articles 22, 24 and 27 shall apply also in the case of a delegation to an organ or to a conference.

### **Article 93. Premises and accommodation**

#### **(a) Observations of Governments and international organizations**

1. In its written comments the Government of the Netherlands stated that it did not see

<sup>374</sup> *Yearbook of the International Law Commission, 1967, vol. II, p. 359, document A/6709/Rev.1, chap. II, D.*

<sup>375</sup> Italics supplied by the Special Rapporteur.

the analogy drawn in the Commission's commentary with article 23 of the 1969 Convention on Special Missions. A special diplomatic mission entertains relations with the host State, whilst the relations referred to in this article are multilateral, or else are relations with an organization. In practice, too, as far as is known, in finding accommodation for delegates to conferences or assemblies of an organ, assistance is often given by the secretariat of the organization. To make this the responsibility of the host State seems to impose an unnecessary extra burden on the latter's hospitality. It is therefore proposed that the provision be reversed to the effect that the organization provides assistance and that, where necessary, it is assisted therein by the host State.

2. The secretariats of WHO and ITU considered inapplicable to their organizations the provisions of the article. The secretariat of WHO observed that "to date, WHO has not followed [the] practice" referred to in the article. The secretariat of the ITU observed that "ITU accepts no responsibility for finding premises and accommodation for delegations".

3. The Secretariat of the United Nations referred to its editorial observations concerning article 23.<sup>376</sup> It added that to bring this article into line with article 23, paragraph 2, the word "delegation" should be replaced by "delegations" throughout. With the necessary consequential changes the article would then read:

The host State shall assist *delegations* to an organ or to a conference, if *they* so request, in procuring the necessary premises and obtaining suitable accommodation for *their* members. The organization shall, where necessary, assist *delegations* in this regard. (A/CN.4/L.162/Rev.1, section B.)

#### (b) *Observations of the Special Rapporteur*

4. The Special Rapporteur wishes to point out that in the present draft, article 66 on accommodation and assistance makes the provisions of articles 23 and 24 applicable also in the case of permanent observer missions. For the sake of consistency, therefore, he cannot agree to the suggestion made by the Government of the Netherlands.

5. As to the comments made by the secretariats of WHO and ITU, the Special Rapporteur wishes to refer to the provisions of articles 3 and 4 of the present draft and to his observations in the context of those articles.<sup>377</sup>

6. As regards the editorial suggestions of the United Nations Secretariat, the Special Rapporteur wishes to refer, on the question of titles, to his general observation in the context of article 23.<sup>378</sup> He agrees to the replacement of the word "delegation" by "delegations" and consequential changes.

7. In view of the foregoing the Special Rapporteur proposes that, subject to the drafting changes referred to in the preceding paragraph, the article be retained in its present form. Article 93 would therefore read as follows:

<sup>376</sup> See above, p. 46, document A/CN.4/241/Add.3, Article 23, para. 2 of the observations.

<sup>377</sup> See above, p. 25, document A/CN.4/241 and Add.1 and 2, Articles 3 and 4, paras. 102 *et seq.* of the observations.

<sup>378</sup> See above, p. 46, document A/CN.4/241/Add.3, Article 23, para. 7 of the observations.

#### *Article 93. Premises and accommodation*

The host State shall assist delegations to an organ or to a conference, if they so request, in procuring the necessary premises and obtaining suitable accommodation for their members. The Organization shall, where necessary, assist delegations in this regard.

#### *Article 94. Inviolability of the premises*

##### (a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee some representatives urged that

Paragraph 1 of this article should be brought into line with the corresponding provision of the Vienna Convention on Diplomatic Relations of 1961. They expressed serious reservations with regard to the last sentence of that paragraph. In their view, the sentence should be deleted and they argued that the provision set out in it imposed limitations on the principle of inviolability of the premises that might result in practice in its virtual negation; the legal prerogative of inviolability was subject "in case of fire or other disaster that seriously endangers public safety" to the subjective evaluation of the host State in detriment of the rights of the sending State. Apart from the fact that it opened the way to abuses, the provision was ambiguously worded and might consequently lead to misunderstandings and disputes. It was noted that the words "that seriously endangers public safety" referred only to "other disaster", from which it would appear that "in case of fire" local authorities could enter the premises of the delegation even if there was no serious danger to public safety. Furthermore, the words "and only in the event that it has not been possible to obtain the express consent of the head of the delegation or of the head of the permanent diplomatic mission" could be interpreted to mean that local authorities were allowed to enter the premises of the delegation even if the head of the delegation or of the permanent diplomatic mission expressly refused to admit them because in his view there was no serious danger to public safety.<sup>379</sup>

2. In its written comments, the Government of Pakistan pointed out that

It attaches great importance to the inviolability of the premises where a delegation to an organ or to a conference is established.

It expressed its concern in respect of the last sentence of paragraph 1 of the article as it believed that "the inviolability should be strictly maintained and no relaxation should be allowed without express consent". The Government of Hungary considered that the last sentence of paragraph 1 of the article ought to be deleted since in this way

The paragraph would reflect exactly the right principle accepted by a large majority of States in article 22 of the Vienna Convention on Diplomatic Relations.

3. The Government of the United Kingdom expressed the view that the obligations which would be imposed by the article

go beyond the provisions in the existing Conventions. It is very difficult to conceive how such general obligations could be carried out in practice in the case of all delegations and delegates to organs and conferences of international organizations, except of course where a special situation called for special protection.

<sup>379</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 68.*

The Government of the United States questioned "the wisdom of paragraph 1" of the article. The Government of Sweden expressed doubts whether

the provisions regarding the inviolability of the premises of a delegation are realistic, especially when extended, in accordance with articles 99 and 105, to the private accommodation of delegation members.

The Government of Turkey considered that paragraphs 1 and 2 "would be very difficult to apply, although in appearance they may be worth retaining".

#### 4. The Government of Turkey added that paragraphs 1 and 2

would seem to relate mainly to hotels. The provisions relating to the premises occupied by the mission cannot be applied to commercial buildings.

The Government of Canada stressed that "delegations are often located in commercial buildings". The Governments of the United States and Sweden observed that most members of delegations would commonly be housed in hotels often for short periods of time in different parts of a conference site. The United States Government then asked

Is this what is meant by "premises where a delegation [...] is established"? As suggested in the commentary, [...] a definition would be necessary. It would seem unreasonable to make such hotel rooms inviolable. The normal functioning of a hotel necessitates that service personnel enter the room. One cannot expect that a hotel will permit its routine to be disrupted because a delegation member is there. On the other hand, if the "premises" turn out to be those of the permanent mission, draft article 25 already provides the necessary protection.

The Government of Sweden considered that

in the case of a fairly big conference, the task imposed upon the authorities of the host State [...] might well be impossible to fulfil. Much depends of course on what precise meaning is given to the term "all appropriate steps".

5. In connexion with paragraph 3 of the article, the Government of the Netherlands referred to its comments on article 25,<sup>380</sup> and to its position as regards the analogy drawn by the Commission with special missions.<sup>381</sup>

6. In the opinion of the Government of Sweden, "it would be advisable to reconsider the [article] in order to formulate the obligations imposed by [it] to what it is possible to fulfil". The Government of Turkey suggested that "to avoid any possible dispute, [...] the [first] two paragraphs be either deleted or at least redrafted so as to diminish the obligation therein laid down". The Government of Canada likewise favoured the redrafting of the article.

#### (b) *Observations of the Special Rapporteur*

7. The Special Rapporteur wishes to point out that the provision of article 94 is based on that of article 25 of the Convention on Special Missions. In addition to recalling his observations in the context of the general comments on section 2 of part IV,<sup>382</sup> the Special Rapporteur wishes

<sup>380</sup> See above, p. 48, document A/CN.4/241/Add.3, Article 25, para. 12 of the observations.

<sup>381</sup> See above, Article 93, para. 1 of the observations.

<sup>382</sup> See above, Section 2, General comments, para. 20.

to refer to the Commission's commentary on the present article, to the effect that

The problems involved in the inviolability of the premises of delegations and those of the inviolability of the premises of the special missions are identical since both are usually housed in hotels or other temporary quarters such as office space in the premises of a permanent diplomatic mission.

He wishes further to note that the Convention on Special Missions does not include a definition of the "premises of the special mission", an omission which might find its justification in the temporary character of those missions.

8. As regards the general question raised by the comments made concerning the provision of the last sentence of paragraph 1, the Special Rapporteur wishes to refer to his observations on similar comments made in the context of articles 25 and 67.<sup>383</sup>

9. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 94 would, therefore, read as follows:

#### *Article 94. Inviolability of the premises*

1. The premises where a delegation to an organ or to a conference is established shall be inviolable. The agents of the host State may not enter the said premises, except with the consent of the head of the delegation or, if appropriate, of the head of the permanent diplomatic mission of the sending State accredited to the host State. Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the head of the delegation or of the head of the permanent diplomatic mission.

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

3. The premises of the delegation, their furnishings, other property used in the operation of the delegation and its means of transport shall be immune from search, requisition, attachment or execution.

#### *Article 95. Exemption of the premises of the delegation from taxation*

##### *(a) Observations of Governments and international organizations*

1. In its written comments, the Government of Switzerland considered that

The reference to the nature of the functions performed by delegations introduces an element which might lead to difficulties of interpretation and one which is not perhaps indispensable. This reference could be deleted and the article could start with the words "For the duration of the functions . . .".

2. The Government of the United States expressed its belief that the article "needs clarification".

3. The Government of Canada stated that the article offered an example of "practical administrative problems that would arise for a country subscribing to its text" and

<sup>383</sup> See above, p. 49, document A/CN.4/241/Add.3, Article 25, paras. 15 and 20 of the observations, and p. 105, document A/CN.4/241/Add.4, Article 67, para. 6 of the observations.

added that its "redrafting should be guided by the functional approach".

(b) *Observations of the Special Rapporteur*

4. In connexion with the comment made by the Government of Canada (para. 3 above), while recalling his observation in the context of the general comments on section 2 of part IV,<sup>384</sup> the Special Rapporteur wishes to observe that, as explained by the Commission in its commentary to the article, article 95

differs from article 26 on permanent missions in that the exemption from taxation is related to the nature and duration of the functions performed by the delegation.

The Special Rapporteur is, however, in agreement with the United States Government that the article "needs clarification", a view similarly held by the Government of Switzerland as far as the reference to the nature of the functions performed is concerned. As the adoption of the suggestion made by the Swiss Government would imply that a similar provision would be couched, in the context of delegations, in different language from that used in the context of permanent missions (and permanent observer missions) and of special missions, the Special Rapporteur proposes to revert to the model of article 26 of the present draft, to maintain uniformity and consistency among the various parts of the same draft. Article 95 would, therefore, read as follows:

**Article 95. Exemption of the premises of the delegation from taxation**

1. The sending State of the members of a delegation to an organ or to a conference acting on behalf of the delegation shall be exempt from all national, regional or municipal dues and taxes in respect of the premises occupied by the delegation, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State or with a member of the delegation.

**Article 96. Freedom of movement**

(a) *Observations of Governments and international organizations*

1. The secretariat of WHO noted that

As a general rule WHO has always refused to allow any discrimination to be practised by the host country among the delegates attending a conference. In one most unusual case, however, it agreed to a certain restriction on the movements of a delegation from a particular country, but the situation never materialized because the conference was later transferred as a result of important political changes in the country where it was originally to have been held.

(b) *Observations of the Special Rapporteur*

2. The Special Rapporteur takes note of the information given by the secretariat of WHO, which does not seem to call for any observation on his part. He proposes that the

article be retained in its present form. Article 96 would, therefore, read as follows:

**Article 96. Freedom of movement**

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure to all members of a delegation to an organ or to a conference such freedom of movement and travel in its territory as is necessary for the performance of the functions of the delegation.

**Article 97. Freedom of communication**

(a) *Observations of Governments and international organizations*

1. The Secretariat of the United Nations indicated that the editorial suggestion it had made with respect to article 29, paragraph 7, applied to article 97, paragraph 8 (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

2. The Special Rapporteur wishes to recall his observation on the suggestion referred to by the United Nations Secretariat, made in the context of article 29.<sup>385</sup> In these circumstances, he proposes that the article be retained in its present form. Article 97 would, therefore, read as follows:

**Article 97. Freedom of communication**

1. The host State shall permit and protect free communication on the part of a delegation to an organ or to a conference for all official purposes. In communicating with the Government of the sending State, its diplomatic missions, consular posts, permanent missions, permanent observer missions, special missions and delegations, wherever situated, the delegation may employ all appropriate means, including couriers and messages in code or cipher. However, the delegation may install and use a wireless transmitter only with the consent of the host State.

2. The official correspondence of the delegation shall be inviolable. Official correspondence means all correspondence relating to the delegation and its functions.

3. Where practicable, the delegation shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission, of the permanent mission or of the permanent observer mission of the sending State.

4. The bag of the delegation shall not be opened or detained.

5. The packages constituting the bag of the delegation must bear visible external marks of their character and may contain only documents or articles intended for the official use of the delegation.

6. The courier of the delegation, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

7. The sending State or the delegation may designate couriers *ad hoc* of the delegation. In such cases the provisions of paragraph 6 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the delegation's bag in his charge.

8. The bag of the delegation may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port

<sup>384</sup> See above, Section 2, General comments, para. 20.

<sup>385</sup> See above, p. 55, document A/CN.4/241/Add.3, Article 29, para. 9 of the observations.

of entry. The captain shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the delegation. By arrangement with the appropriate authorities, the delegation may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

## Article 98. Personal inviolability

### (a) *Observations of Governments and international organizations*

1. In the opinion of the Government of Finland "the provisions of this article have gained additional significance as a result of the recent kidnappings of diplomats".
2. The Government of the United Kingdom observed that

The corresponding provision in the United Nations and Specialized Agencies Conventions does not confer such a general personal inviolability

and that it did "not see any justification for the change".

3. The Governments of Canada and the Netherlands made applicable to article 98 their comments included under article 95<sup>386</sup> and 100<sup>387</sup> respectively.

### (b) *Observations of the Special Rapporteur*

4. With respect to the comment of the United Kingdom Government (para. 2 above), the Special Rapporteur wishes to refer to his observation in the context of the general comments on section 2 of part IV.<sup>388</sup>

5. As regards the comments of the Governments of Canada and the Netherlands (para. 3 above), the Special Rapporteur wishes to refer to his observations on the applicable comments made in the context of the general comments on section 2<sup>389</sup> and of article 95.<sup>390</sup>

6. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 98 would, therefore, read as follows:

## Article 98. Personal inviolability

The persons of the representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

## Article 99. Inviolability of the private accommodation

### (a) *Observations of Governments and international organizations*

1. The Governments of the United Kingdom, Sweden, the United States, Canada and the Netherlands made

applicable to article 99 their comments included under articles 94,<sup>391</sup> 95,<sup>392</sup> and 100.<sup>393</sup>

2. The Government of Japan expressed the view that the article

seems to impose too great a burden on the host State by requiring that State to give special protection to members of delegations. The Commission might reconsider the formulation in the light of the temporariness of the task and accommodation of members of delegations.

### (b) *Observations of the Special Rapporteur*

3. The Special Rapporteur, while pointing out that article 99 reproduces with the requisite adaptations the provisions of article 30 of the Convention on Special Missions, wishes to refer to his observations in the context of the general comments on section 2 of part IV<sup>384</sup> and on the applicable comments made in the context of articles 94,<sup>395</sup> and 95.<sup>396</sup>

4. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Subject to the filling of the blank in paragraph 2 in accordance with the decision to be reached concerning article 100, article 99 would, therefore, read as follows:

## Article 99. Inviolability of the private accommodation

1. The private accommodation of the representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff shall enjoy the same inviolability and protection as the premises of the delegation.

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

## Article 100. Immunity from jurisdiction

### (a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee, some representatives "expressed a preference for alternative A of this article as being broader and being based directly on the corresponding article of the Convention on Special Missions of 1969. Others stated that they favoured alternative B, because they considered that it set out all the safeguards that were needed for the proper functioning of delegations or because they felt that the future convention must be acceptable to the largest possible number of States. Other representatives expressly reserved their positions for the time being."<sup>397</sup>

2. In their written comments, the Governments of Madagascar and Hungary and the secretariat of IAEA

<sup>386</sup> See above, Article 95, para. 3 of the observations.

<sup>387</sup> See below, Article 100, para. 3 of the observations.

<sup>388</sup> See above, Section 2, General comments, para. 20.

<sup>389</sup> *Ibid.*

<sup>390</sup> See above, Article 95, para. 4 of the observations.

<sup>391</sup> See above, Article 94, paras. 3, 4 and 6 of the observations.

<sup>392</sup> See above, Article 95, para. 2 of the observations.

<sup>393</sup> See below, Article 100, para. 3 of the observations.

<sup>394</sup> See above, Section 2, General comments, para. 20.

<sup>395</sup> See above, Article 94, para. 7 of the observations.

<sup>396</sup> See above, Article 95, para. 4 of the observations.

<sup>397</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 69.*



expressed preference for alternative A. In support of their position, the Government of Madagascar took the view that alternative B

would raise the same difficulties of interpretation regarding the definition of "acts performed outside official functions" as have already been noted in the analysis of article 32 of the draft,<sup>398</sup>

while alternative A was "clearer and more specific". The Government of Hungary considered that

alternative B narrows down, with no reason, the immunity from civil and administrative jurisdiction of the representatives of States members of an international organization.

The secretariat of IAEA observed that alternative A is based on the Vienna Convention on Diplomatic Relations and the Convention on Special Missions which we assume to reflect more closely the current thinking on the subject than the earlier Convention on the Privileges and Immunities of the United Nations.

3. The Governments of Canada, Finland, France, Japan, the Netherlands, Pakistan, Sweden, Switzerland, Turkey and the United States expressed preference for alternative B. In support of their position the Government of Switzerland drew attention to "the fairly loose ties delegates have in the host State—where their stay is only temporary"—and added that "in the circumstances, this wording of the text ensures adequate protection". The Government of Finland observed that

Delegations are usually composed of various categories of persons and [...] ensuring the proper performance of their functions is the purpose of provisions in several other articles (reference is made to articles 82, 95 and 96).

The Government of the Netherlands stressed its preference for "provisions limiting the immunity to acts carried out during the performance of the duties of the delegations". The Government of the United States referred to its comments on draft articles 30, 32 and 45. The Government of France emphasized the "current practice in the matter" and the "proper sphere of application of the draft".

4. The Government of France, however, did not regard alternative B as

entirely satisfactory since it would enable persons benefiting from it to enjoy total immunity from jurisdiction, which is not provided for by article IV of the Convention on the Privileges and Immunities of the United Nations.

The Government of the United Kingdom likewise stated that

The two alternatives offered by the Commission are substantially different from the existing position under the United Nations and Specialized Agencies Conventions. Alternative A is based on the Convention on Special Missions which, as already explained, is not considered to be the appropriate precedent. But even alternative B would confer immunity from criminal jurisdiction in respect of the non-official acts of a representative. Under the United Nations and Specialized Agencies Conventions, the immunity is only from arrest and detention in connexion with such matters and not immunity from jurisdiction as such. The Government of the United Kingdom do not consider that the proposed departure from existing practice is justifiable.

5. The Government of the Netherlands offered for consideration

A supplementary provision permitting the host State to require that the representatives and members of delegations be covered by third-party insurance according to the laws of the host State, such insurance to include accidents occurring whilst on their official business. This is especially important in the case of those States where legal responsibility for damages depends on the establishment of guilt under criminal law.

In this respect, the Government of Madagascar indicated that

The comments already made on the subject of the provision concerning actions arising out of a traffic accident [<sup>399</sup>] are also applicable to article 100 (alternative A), paragraph 2 (d).

6. The Government of the Netherlands also considered that

A provision on the settlement of civil claims, such as the Commission envisages in paragraph 4 of its commentary on article 100, should be included.

#### (b) *Observations of the Special Rapporteur*

7. The Special Rapporteur notes that in ten of their written comments on the point, governments and international organizations expressed preference for alternative B, while three were in favour of alternative A. Without trying to prejudice the conclusions that the Commission may wish to draw therefrom, the Special Rapporteur considers it only appropriate, for the purposes of the present report, to include the two alternatives for the text of article 100 with which he is to furnish the Commission for its consideration and final decision.

8. As regards the comments of the Governments of France and the United Kingdom reproduced in paragraph 4 above, the Special Rapporteur wishes to refer to his observation made in the context of the general comments on section 2 of part IV.<sup>400</sup>

9. With respect to the comments of the Governments of the Netherlands and Madagascar concerning the inclusion of a provision on insurance, the Special Rapporteur wishes to reiterate his approach to similar comments made in the context of article 32.<sup>401</sup>

10. As to the comment of the Government of the Netherlands regarding a provision on the settlement of civil claims, the Special Rapporteur wishes to indicate that, as stated in paragraph 4 of its commentary to the article, the Commission did not reach any decision regarding the inclusion of such a provision, pending a decision on the two alternatives for article 100.

11. The texts of the two alternatives adopted by the Commission for submission to Governments and international organizations were as follows:

#### *Article 100. Immunity from jurisdiction*

##### ALTERNATIVE A

1. The representatives in a delegation to an organ or to a conference and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the host State.

<sup>398</sup> *Ibid.*

<sup>400</sup> See above, Section 2, General comments, para. 20.

<sup>401</sup> See above, p. 58, document A/CN.4/241/Add.3, Article 32, paras. 19, 21 and 23 of the observations.

<sup>399</sup> See above, p. 57, document A/CN.4/241/Add.3, Article 32, para. 12 of the observations.



2. They shall also enjoy immunity from the civil and administrative jurisdiction of the host State, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the delegation;

(b) An action relating to succession in which the person concerned is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the person concerned in the host State outside his official functions;

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

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

4. No measures of execution may be taken in respect of a representative in the delegation or a member of its diplomatic staff except in the cases coming under sub-paragraphs (a), (b), (c), and (d) of paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person or his accommodation.

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

#### ALTERNATIVE B

1. The representatives in a delegation to an organ or to a conference and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the host State.

2. (a) The representatives and members of the diplomatic staff of the delegation shall enjoy immunity from the civil and administrative jurisdiction of the host State in respect of all acts performed in the exercise of their official functions.

(b) No measures of execution may be taken in respect of a representative or a member of the diplomatic staff of the delegation unless the measures concerned can be taken without infringing the inviolability of his person or his accommodation.

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

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

### Article 101. Waiver of immunity

#### (a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee,<sup>402</sup> views were expressed on article 101 similar to those mentioned in connexion with article 71 in part III of the draft.<sup>403</sup>

2. In its written comments the Government of the United Kingdom observed that

This draft article omits the provision requiring the sending State to waive the immunity in certain circumstances which is contained in the United Nations and Specialized Agencies Conventions. This provision is useful in practice.

<sup>402</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 62.

<sup>403</sup> See above, p. 108, document A/CN.4/241/Add.4, Article 71, para. 1 of the observations.

3. The Government of Turkey considered that

Seeing that immunity is granted in the interest of the functions performed a further paragraph should be added providing for waiver of immunity where immunity is not warranted by the function performed.

4. The Government of Switzerland referred to its comments on articles 33<sup>404</sup> and 34.<sup>405</sup>

#### (b) *Observations of the Special Rapporteur*

5. With respect to the views expressed in the Sixth Committee referred to in paragraph 1 above, the Special Rapporteur wishes to recall his observation thereon in the context of article 71.<sup>406</sup>

6. As regards the comments of the Governments of the United Kingdom and Turkey (para. 3), the Special Rapporteur wishes to refer to his observation in the context of the general comments on section 2 of part IV.<sup>407</sup>

7. The Special Rapporteur wishes to recall his observations on the comments of the Swiss Government made in the context of article 33.<sup>408</sup>

8. In view of the foregoing, the Special Rapporteur proposed that the article be retained in its present form. Article 101 would, therefore, read as follows:

#### *Article 101. Waiver of immunity*

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

2. Waiver must always be express.

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

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

### Article 102. Exemption from dues and taxes

#### (a) *Observations of Governments and international organizations*

1. The Government of Switzerland considered that

The detailed provisions of this article do not seem destined for broad practical application, since delegates do not in principle have a domicile in the host State or, if they do, they generally have diplomatic status. Consequently, it might be desirable to attempt to

<sup>404</sup> See above, p. 59, document A/CN.4/241/Add.3, Article 33, para. 2 of the observations.

<sup>405</sup> *Ibid.*, p. 60, Article 34, para. 3 of the observations.

<sup>406</sup> See above, p. 108, document A/CN.4/241/Add.4, Article 71, para. 3 of the observations.

<sup>407</sup> See above, Section 2, General comments, para. 20.

<sup>408</sup> See above, p. 60, document A/CN.4/241/Add.3, Article 33, para. 8 of the observations.

simplify the wording of this article and reduce it to a simple statement of principle. The wording might be something similar to the following:

"The sojourn in the host State of representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff shall never make the persons concerned liable to dues and taxes, personal or real, national, regional or municipal to which such persons would not have been liable if they did not have such status."

The idea underlying this text is that delegates shall be liable to the taxes which affect all persons who are in the territory for any purpose, even if they are merely passing through (for example, the indirect purchase taxes referred to in sub-paragraph (a) or those referred to in sub-paragraph (e), and the taxes to which they are liable regardless of their presence in the territory of the country (sub-paragraphs (b) to (d))—i.e. precisely the exceptions listed in the present draft—whilst they are exempted from all other taxes which are generally based on the existence of a domicile or sojourn in the territory of the host country.

## 2. The Government of the United States took the view that

To exempt members of a delegation from sales taxes and other taxes of this nature is impractical. The relatively brief period of time most delegations spend in the host country and the small amounts involved do not warrant the significant administrative burden that would be required to arrange for the refund of such taxes.

The Government of Canada made applicable to the article its comment included under article 95.<sup>409</sup>

3. The Government of the United Kingdom considered that the article is "substantially different from the provisions in the United Nations and Specialized Agencies Conventions" and indicated that it did "not accept that the proposed departure from the provisions of those Conventions is justified".

### (b) *Observations of the Special Rapporteur*

4. With respect to the comments of the Governments of Switzerland (para. 1 above) and the United States (para. 2), the Special Rapporteur wishes to emphasize in general the decision of the Commission referred to in its commentary to the article that "it was desirable to adhere to the pattern originally laid down in the Convention on diplomatic Relations". He wishes to add that that pattern has been followed in the Convention on Special Missions and in article 36 of the present draft on permanent missions, the provisions of which have been made applicable to permanent observer missions by paragraph 1 of article 69.

5. As regards the comments of the Governments of Canada (para. 2) and the United Kingdom (para. 3), the Special Rapporteur wishes to refer to his observation made in the context of the general comments on section 2 of part IV.<sup>410</sup>

6. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 102 would, therefore, read as follows:

## Article 102. *Exemption from dues and taxes*

The representatives in a delegation to an organ or to a conference and the members of its diplomatic staff shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

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

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

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

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

(e) Charges levied for specific services rendered;

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

## Article 103. *Exemption from customs duties and inspection*

### (a) *Observations of Governments and international organizations*

1. The Government of the United States considered it "important that the language of articles 38 and 103 be uniform".

2. The Government of Canada expressed the view that the article

could be summarized by stating that: "The host State shall do all that is necessary to facilitate the entry of and to grant exemption from all customs duties [...] on articles for the official use of a delegation including the personal baggage of a representative in a delegation."

3. The Government of Finland considered that

The status of a representative should be stated in his passport or in an additional document given to him, as the implementation of the provision could otherwise be difficult.

4. The Government of Japan was of the view that paragraph 1 (b) should be deleted. It stated that

Because of the temporariness of the task of delegations, exemption from customs duties and inspection of articles for the personal use of the members of the delegation does not seem justified.

5. The Government of the United Kingdom made applicable to article 103 its comment included under article 102.<sup>411</sup>

6. In its editorial suggestions the Secretariat of the United Nations recalled the Commission's commentary to the article and stated that it "therefore submits no suggestions with respect to article 103" (A/CN.4/L.162/Rev.1, section B).

### (b) *Observations of the Special Rapporteur*

7. The Special Rapporteur wishes to point out that the provision of article 103 reproduces, with the requisite adaptations, the provision of article 35 of the Convention on Special Missions. In this connexion he wishes to recall

<sup>409</sup> See above, Article 95, para. 2 of the observations.

<sup>410</sup> See above, Section 2, General comments, para. 20.

<sup>411</sup> See above, Article 102, para. 3 of the observations.

his observations in the context of the general comments on section 2 of part IV.<sup>412</sup> The Special Rapporteur wishes also to refer to his observation in the context of article 102<sup>413</sup> which he considers generally applicable.

8. In view of the fact that, as stated in its commentary to the article, the Commission intends to review in the course of the second reading certain differences in formulation between the article and article 38 on permanent missions, the Special Rapporteur does not consider it appropriate to introduce any drafting changes in the text of the article with which he is to furnish the Commission for its consideration and final decision. As far as one of those differences is concerned, he merely wishes to recall that for article 38 he accepted the editorial suggestion of the United Nations Secretariat to replace the word "such" by "in such cases" in the second sentence of paragraph 2, thus bringing it into line with the corresponding text in article 103.<sup>414</sup>

9. In the light of the foregoing and subject to the review referred to in the preceding paragraph, the Special Rapporteur proposes that the article be retained in its present form. Article 103 would, therefore, read as follows:

**Article 103. Exemption from customs duties and inspection**

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

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

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

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

**Article 104. Exemption from social security legislation, personal services and laws concerning acquisition of nationality**

*(a) Observations of Governments and international organizations*

1. The Government of Canada considered that

Instead of referring to articles 35, 37 and 39, article 104 could simply state that members of delegations shall be exempted from social security legislation, personal services and laws concerning acquisition of nationality.

<sup>412</sup> See above, Section 2, General comments, para. 20.

<sup>413</sup> See above, Article 102, para. 4 of the observations.

<sup>414</sup> See above, p. 65 and 66, document A/CN.4/241/Add.3, Article 38, paras. 3 and 7 of the observations.

2. The Secretariat of the United Nations suggested that "the capital letters in the title should be reduced to lower case as in all the other titles". (A/CN.4/L.162/Rev.1, section B.)

*(b) Observations of the Special Rapporteur*

3. The Special Rapporteur, while recalling his observations made in the context of the general comments on section 2 of part IV<sup>415</sup> and of article 102,<sup>416</sup> is of the view that the suggested wording would render the text vague and imprecise.

4. The Special Rapporteur notes that the editing change suggested by the United Nations Secretariat is already incorporated in the printed version of the report of the Commission on the work of its twenty-second session.<sup>417</sup>

5. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 104 would, therefore, read as follows:

**Article 104. Exemption from social security legislation, personal services and laws concerning acquisition of nationality**

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

**Article 105. Privileges and immunities of other persons**

*(a) Observations of Governments and international organizations*

1. The Government of Japan deemed it

sufficient that members of the families of representatives and the diplomatic staff be accorded the privileges and immunities provided for in article 104 (Exemption from social security legislation, personal services and laws concerning acquisition of nationality).

2. The Government of Sweden referred to its comments on article 94.<sup>418</sup>

3. The Government of the United States referred to its comments on draft article 40 and indicated that "if the preferable alternative B of article 100 is adopted, paragraph 2 of article 105 will require revision". A similar observation was made by the Government of Finland.

4. In its editorial observations the Secretariat of the United Nations made the following suggestions concerning paragraph 2 of the article:

In the third line, the word "immunities" should be replaced by "immunity" (singular), as in paragraph 2 of article 100 (both alternatives), and in the corresponding passage of article 36 of the Convention on Special Missions.

<sup>415</sup> See above, Section 2, General comments, para. 20.

<sup>416</sup> See above, Article 102, para. 4 of the observations.

<sup>417</sup> *Yearbook of the International Law Commission, 1970*, vol. II, p. 296, document A/8010/Rev.1, chap. II, B.

<sup>418</sup> See above, Article 94, paras. 3, 4 and 6 of the observations.

The words "specified in paragraph 2 of article 100" in the third line should be transferred to the fourth line, and placed after the words "host State". This is the natural order, and it is followed in article 36 of the Convention on Special Missions.

In the second sentence, the word "mentioned" should be replaced by "specified", which is the word used everywhere else in this article for such references (A/CN.4/L.162/Rev.1, section B).

*(b) Observations of the Special Rapporteur*

5. The Special Rapporteur wishes to point out that article 105 is based on articles 36 to 39 of the Convention on Special Missions and article 40 of the present draft and, in that connexion, to refer to his observations made in the context of the general comments on section 2 of part IV.<sup>419</sup> He wishes also to recall his observations on the comment referred to in paragraph 2 above, made in the context of article 94.<sup>420</sup>

6. The Special Rapporteur agrees with the editorial suggestions of the United Nations Secretariat (para. 4 above). However, pending the Commission's decision on the two alternative texts proposed for article 100, he does not deem it appropriate to introduce any further drafting changes in the text of the article with which he is to furnish the Commission in the present report.

7. Subject to the decision on the final text of article 100 and to the drafting changes referred to in the preceding paragraph, the Special Rapporteur proposes that the article be retained in its present form. Article 105 would, therefore, read as follows:

**Article 105. Privileges and immunities of other persons**

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

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

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

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

<sup>419</sup> See above, Section 2, General comments, para. 20.

<sup>420</sup> See above, Article 94, para. 8 of the observations.

**Article 106. Nationals of the host State and persons permanently resident in the host State**

No comments were made by governments or international organizations concerning article 106. The Special Rapporteur has no observations to make on the text of the article and, consequently, he proposes that the article be retained in its present form. Article 106 would, therefore, read as follows:

**Article 106. Nationals of the host State and persons permanently resident in the host State**

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

**Article 107. Privileges and immunities in case of multiple functions**

*(a) Observations of Governments and international organizations*

1. The Government of the Netherlands referred to its comments in relation to article 59, paragraph 2.<sup>421</sup>

2. In its editorial observations, the Secretariat of the United Nations suggested that

in the third line the words "the privileges" should be replaced by "their privileges" as in article 9, paragraph 2, of the Convention on Special Missions and article 59, paragraph 2, on permanent observer missions. (A/CN.4/L.162/Rev.1, section B.)

*(b) Observations of the Special Rapporteur*

3. The Special Rapporteur wishes to recall his observation on the comment of the Netherlands Government made in the context of article 59.<sup>422</sup>

4. The Special Rapporteur notes that the drafting change suggested by the Secretariat of the United Nations has already been incorporated in the printed version of the report of the Commission on the work of its twenty-second session.<sup>423</sup>

5. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 107 would, therefore, read as follows:

**Article 107. Privileges and immunities in case of multiple functions**

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

<sup>421</sup> See above, p. 99, document A/CN.4/241/Add.4, Article 59, para. 4 of the observations.

<sup>422</sup> *Ibid.*, p. 99, para. 6.

<sup>423</sup> *Yearbook of the International Law Commission, 1970, vol. II, p. 296, document A/8010/Rev.1, chap. II, B.*

## Article 108. Duration of privileges and immunities

### (a) *Observations of Governments and international organizations*

#### 1. The Government of Switzerland considered that

In paragraph 2, the words "in which to do so" might be interpreted as meaning that the privileges and immunities would subsist so long as the host State had not fixed a time-limit for the delegate to leave the territory. Since such a practice is not followed at the present time and there would be no advantage in encouraging its introduction, it would seem preferable to adopt the following version [ . . . ]:

"When the functions of a person entitled to privileges and immunities under this part have come to an end, the privileges and immunities of such a person shall normally cease at the moment when he leaves the territory of the host State or on the expiry of a reasonable period after the functions have come to an end."

#### 2. The Government of the Netherlands referred to its comment on article 42<sup>424</sup> and stated that it

supports the notion, expressed by the Commission in paragraph 3 of its commentary, that a "reasonable time-limit" should be set in paragraph 1 on the enjoyment of the privileges and immunities. It is proposed that this should be one week before the date set for the commencement of the meeting.

#### 3. The Secretariat of the United Nations observed that

Paragraph 2 of article 108 is based on the provisions of the Convention on Special Missions (paragraph 2 of article 43) which reproduce *mutatis mutandis* the language of paragraph 2 of article 39 of the Convention on Diplomatic Relations including the phrase "but shall subsist until that time, even in case of armed conflict". Since that phrase does not appear in paragraph 2 of article 108, the words "continue to" in the last line should be deleted for the reasons indicated [ . . . ] in paragraph 3 of the suggestions concerning article 42<sup>425</sup> (A/CN.4/L.162/Rev.1, section B).

### (b) *Observations of the Special Rapporteur*

4. The Special Rapporteur is of the view that the English expression "in which to do so", which is the one used in the corresponding provisions of the Vienna Conventions on Diplomatic and Consular Relations, in the Convention on Special Missions and in article 42 of the present draft, the provisions of which have been made applicable to permanent observer missions by article 73, does not necessarily admit of the interpretation suggested by the Swiss Government (para. 1 above). He therefore sees no compelling reason to depart from a well-established precedent on the subject.

5. As to the suggestion of the Government of the Netherlands (para. 2 above), the Special Rapporteur considers that its acceptance would unduly restrict the flexibility which characterizes the text as presently drafted.

6. Concerning the observation made by the United Nations Secretariat (para. 3), the Special Rapporteur would refer to his reply to the suggestion relating to article 42.<sup>426</sup>

7. The Special Rapporteur wishes to recall that pursuant to the replies of governments to the question raised by the Commission on the matter, he proposed in the present report a text for article 42 modelled on the corresponding provision of the Vienna Convention on Consular Relations.<sup>427</sup> However, having had the benefit of the Commission's discussion on his proposed text for article 42,<sup>428</sup> he deemed it appropriate to revert to the Commission's original pattern as regards article 108.

8. In the light of the foregoing, and subject to the drafting change referred to in paragraph 6 above, the Special Rapporteur proposes that the article be retained in its present form. Article 108 would, therefore, read as follows:

### *Article 108. Duration of privileges and immunities*

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

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

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

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

1. No comments were made by Governments or international organizations concerning article 109.

2. The Special Rapporteur wishes to point out that, as explained by the Commission in its commentary to the article, the corresponding provisions in part II of the Commission's present draft are paragraphs 3 and 4 of article 42. He wishes also to recall that in the text proposed by him in the present report for article 42, the former paragraphs 3 and 4 of article 42 were renumbered 5 and 6 and that in the light of comments made by the United Nations Secretariat he introduced a change in wording for the second sentence of the former paragraph 4 which, in his view, would render its meaning clearer.<sup>429</sup> Having had the benefit of the Commission's discussion on the text he submitted for article 42, paragraphs 5 and 6 of which appeared to have given rise to no difficulties,<sup>430</sup> the Special Rapporteur, for the sake of consistency,

<sup>427</sup> *Ibid.*, pp. 70-72, paras. 12, 22 and 23.

<sup>428</sup> *Yearbook of the International Law Commission, 1971*, vol. I, pp. 67-70, 1097th meeting, paras. 10-45.

<sup>429</sup> See above, pp. 70 and 71, document A/CN.4/241/Add.3, Article 42, paras. 10 and 21-23 of the observations.

<sup>430</sup> *Yearbook of the International Law Commission, 1971*, vol. I, p. 70, 1097th meeting, para. 43.

<sup>424</sup> See above, p. 70, document A/CN.4/241/Add.3, Article 42, para. 12 of the observations.

<sup>425</sup> *Ibid.*, p. 70, para. 6.

<sup>426</sup> *Ibid.*, p. 71, para. 17.

cy and uniformity, proposes to introduce in paragraph 2 of the text for article 109 with which he is to furnish the Commission a change in wording similar to that made in the second sentence of the former paragraph 4 of article 42. Article 109 would, therefore, read as follows:

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

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

2. Estate, succession and inheritance duties shall not be levied on movable property which, at the time of the death of a member of the delegation or of a member of the family of a member of the delegation, was in the host State solely because of the presence there of the deceased.

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

***(a) Observations of Governments and international organizations***

**1. The Government of the Netherlands considered that**

There is room for uncertainty about the meaning of the term "third State" in the relationship between a sending State on the one hand and an international organization on the other hand. Assuming that "third State" means any State which is neither the sending State, nor the State in which the organization has its headquarters, nor the State in which the organ is assembling or the conference is convened, the question still arises whether the provision under review also considers as "third States" States which are not members of the organization concerned. A state which becomes a party to the convention under review will not necessarily be a member of all the international organizations covered by the convention and may even be strongly opposed to some of the organizations. Would such a State nevertheless have to grant all the facilities mentioned in article 110?

The Netherlands Government further observed that

The concluding words of paragraph 4—"and has raised no objection to it"—completely undermine the provisions contained in paragraphs 1, 2 and 3. The Netherlands Government is of the opinion that the third State ought not, in principle, to object to transit on subjective grounds. The reasons for refusing transit should be such as can be tested against an objective criterium, and this should be laid down in the article under review. If no objective criterium can be formulated for refusing transit, there seems to be little point in retaining the article.

**2. In its editorial observations the Secretariat of the United Nations suggested that**

In the second line of paragraph 4, the word "*respectively*" might be added before "in paragraphs 1, 2 and 3". If this word is considered necessary in paragraph 5, and in article 43, paragraph 4, it may also be necessary here. If it is not necessary, it could be omitted from all these paragraphs.

It pointed out, however, that "the same inconsistency in the use of the word '*respectively*' occurs in article 42 of the Convention on Special Missions on which article 110 is based." (A/CN.4/L.162/Rev.1, section B).

***(b) Observations of the Special Rapporteur***

3. The Special Rapporteur does not share the doubts expressed by the Government of the Netherlands (para. 1 above) as regards the meaning of the term "third State". He is of the view that for the purposes of part IV a third State is any State which is neither a sending State nor a host State within the meaning of article 78, irrespective of membership in an international organization. The obligation of a third State to grant the facilities, privileges and immunities referred to in article 110 would be consequential upon its having become a party to the future convention embodying such a provision. He wishes further to observe that in the absence of an express provision such as that of article 110 in the draft, the persons concerned would not be entitled to enjoy the facilities, privileges and immunities provided for therein while in transit through a third State which had been informed in advance of such transit and had raised no objection to it. In his opinion the words "and has raised no objection to it" which appear in the corresponding provision of the Convention on Special Missions are intended to protect the interests of the third State and its suppression would alter the balance achieved in the text as presently drafted.

4. As regards the editorial comment of the United Nations Secretariat (para. 2 above), the Special Rapporteur ventures to suggest that perhaps the omission of the word "*respectively*" in the second line of paragraph 4 might have resulted from the use in the same line of the words "*in respect*" which do not appear in the text of the other articles cited by the Secretariat.

5. The Special Rapporteur wishes also to note that of the drafting changes he introduced in the text of article 43 as proposed by him in the present report,<sup>431</sup> only one would be applicable to the text of article 110, namely the replacement of the words "the person" by "one of the persons" in the last sentence of paragraph 1. For the sake of consistency and uniformity he therefore proposes to make a similar drafting change in the text of article 110 with which he is to furnish the Commission.

6. In the light of the foregoing, and subject to the modification referred to in the preceding paragraph, the Special Rapporteur proposes that the article be retained in its present form. Article 110 would therefore read as follows:

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

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

<sup>431</sup> See above, p. 72, document A/CN.4/241/Add.3, Article 43, paras. 3-5 and 7-9 of the observations.

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

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

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

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

### Article 111. Non-discrimination

#### (a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee, views were expressed on article 111<sup>432</sup> similar to those mentioned in connexion with article 75.<sup>433</sup>

2. In its written comments, the Government of the United States referred to its comments on article 44. The Government of the Netherlands likewise referred to its comments on articles 44<sup>434</sup> and 75.<sup>435</sup>

#### (b) *Observations of the Special Rapporteur*

3. The Special Rapporteur wishes to recall his observations made in the context of articles 44<sup>436</sup> and 75.<sup>437</sup>

4. The Special Rapporteur notes that unlike the texts of article 44 and 75, the text of article 111 does not include the word "as" before "between States". For the sake of consistency and uniformity he therefore proposes to add the word "as" to the text for article 111 with which he is to furnish the Commission in the present report.

5. In the light of the foregoing, the Special Rapporteur proposes that the article he retained in its present form, subject to the drafting change referred to in the preceding paragraph. Article 111 would, therefore, read as follows:

<sup>432</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 62.

<sup>433</sup> See above, p. 109, document A/CN.4/241/Add.4, Article 75, para. 1 of the observations.

<sup>434</sup> See above, p. 74, document A/CN.4/241/Add.3, Article 44, para. 5 of the observations.

<sup>435</sup> See above, p. 109, document A/CN.4/241/Add.4, Article 75, para. 3 of the observations.

<sup>436</sup> See above, p. 74, document A/CN.4/241/Add.3, Article 44, para. 11 of the observations.

<sup>437</sup> See above, p. 110, document A/CN.4/241/Add.4, Article 75, para. 5 of the observations.

### Article 111. Non-discrimination

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

### SECTION 3. CONDUCT OF THE DELEGATION AND ITS MEMBERS

### Article 112. Respect for the laws and regulations of the host State

#### (a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee some representatives were of the opinion that

The article did not fully guarantee the freedom of delegations' members, since on occasion they might have to perform functions of the delegation outside the premises where the organ or conference was meeting or outside the premises of the delegation.

Also, observations similar to those mentioned in connexion with article 76<sup>438</sup> were made with regard to protection of the host State generally and to accidents caused by vehicles owned by the delegation or its members. Other representatives holding the views already referred to in connexion with article 50,<sup>439</sup> considered that provisions such as those contained in article 112 were "inadequate". Also, some representatives said that the sending State should be obliged to withdraw from its delegation "any person who had interfered in the internal affairs of the host State, if the latter so requested". Others agreed with the view, provided that the organization concerned would determine whether interference in internal affairs had occurred. The commission of a grave and manifest violation of the criminal law of the host State and engaging in professional or commercial activities in that State were also mentioned as legitimate grounds for requesting the recall of a member of a delegation.<sup>440</sup>

2. In their written comments, the Governments of Sweden, the Netherlands and the United States referred to their comments concerning article 45.<sup>441</sup>

3. One Government [Israel] referred to its comments concerning article 76.<sup>442</sup>

4. The Secretariat of the United Nations expressed the opinion that

The obligation of the sending State, envisaged by reference in article [...] 112 of part IV, to recall or otherwise to remove a member of [...] its delegation to an organ or conference, if it does not waive his immunity, should be extended to cover any serious abuse of the privilege of resident.

<sup>438</sup> *Ibid.*, p. 110, Article 76, paras. 1 and 2 of the observations.

<sup>439</sup> See above, p. 81, document A/CN.4/241/Add.3, Article 50, para. 2 of the observations.

<sup>440</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 70-71 and 23-24.

<sup>441</sup> See above, p. 74, document A/CN.4/241/Add.3, Article 45, paras. 6, 7 and 17 of the observations.

<sup>442</sup> See above, p. 110, document A/CN.4/241/Add.4, Article 76, para. 4 of the observations.

5. The Secretariat of the United Nations, recalling its editorial suggestion concerning article 45, paragraph 2,<sup>443</sup> expressed the view that "In the second sentence of paragraph 2 the words 'in the premises' should be replaced by 'on the premises', which is the accepted English expression" (A/CN.4/L.162/Rev.1, section B.)

(b) *Observations of the Special Rapporteur*

6. The Special Rapporteur wishes to refer to his observations on the views expressed and the comments made in the context of articles 45,<sup>444</sup> 50<sup>445</sup> and 76,<sup>446</sup> which he considers applicable in the context of the present article. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 112 would, therefore, read as follows:

**Article 112. Respect for the laws and regulations of the host State**

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

2. In the case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from criminal jurisdiction, the sending State shall, unless it waives this immunity, recall the person concerned, terminate his functions with the delegation or secure his departure, as appropriate. This provision shall not apply in the case of any act that the person concerned performed in carrying out the functions of the delegation in the premises where the organ or conference is meeting or the premises of the delegation.

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

**Article 113. Professional activity**

(a) *Observations of Governments and international organizations*

1. The Government of Finland considered that

If this article purports to prohibit all professional or economic activities of both diplomatic and non-diplomatic members of a delegation, it seems to go too far.

2. In its editorial observations the Secretariat of the United Nations, recalling its suggestion on article 46,<sup>447</sup> expressed the view that the title should be amended to read "professional or commercial activity".

(b) *Observations of the Special Rapporteur*

3. The Special Rapporteur wishes to point out that article 113 makes applicable to delegations the provisions of article 46 on permanent missions, which were likewise

made applicable to permanent observer missions by article 76.

4. The Special Rapporteur wishes to recall his observation on the editorial suggestion of the United Nations Secretariat made in the context of article 46.<sup>448</sup> He therefore proposes that, subject to his general observation concerning titles made in the context of article 23,<sup>449</sup> the words "or commercial" also be inserted in the title of article 113.

5. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, subject to the change in title referred to in the preceding paragraph. Article 113 would, therefore, read as follows:

**Article 113. Professional or commercial activity**

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

SECTION 4. END OF FUNCTIONS

**Article 114. End of the functions of a member of a delegation**

(a) *Observations of Governments and international organizations*

1. The Government of Switzerland was of the view that "it would be desirable for the notification referred to in sub-paragraph (a) to be sent to the host State as well".

2. The Government of Finland was of the opinion that

The wording of this article should be reconsidered to the effect that the functions of a member of a delegation shall come to an end *inter alia* upon the conclusion of the meeting of the organ or the conference and of all measures arising directly therefrom. The provisions could perhaps be enlarged by reviewing the language used.

3. In its editorial observations the Secretariat of the United Nations indicated that the two suggestions concerning article 47<sup>450</sup> apply to article 114. It considered, further, that "in sub-paragraph (b) of article 114 the word 'upon' should be replaced by 'on', to match sub-paragraph (a)" (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

4. Having in mind that, as in the case of article 47 of the present draft, the notification referred to in sub-paragraph (a) concerns the end of functions and not the duration of privileges and immunities which is dealt with in article 108, the Special Rapporteur does not see a compelling reason to accept the suggestion of the Swiss Government (para. 1 above).

5. The Special Rapporteur is also unable to agree to the suggestion of the Government of Finland in that it implies

<sup>443</sup> See above, p. 74, document A/CN.4/241/Add.3, Article 45, para. 15 of the observations.

<sup>444</sup> *Ibid.*, p. 77, paras. 18, 20 and 22-25.

<sup>445</sup> *Ibid.*, p. 83, Article 50, para. 17 of the observations.

<sup>446</sup> See above, p. 110, document A/CN.4/241/Add.4, Article 76, paras. 7-8 of the observations.

<sup>447</sup> See above, p. 78, document A/CN.4/241/Add.3, Article 46, para. 2 of the observations.

<sup>448</sup> *Ibid.*, p. 69, para. 4.

<sup>449</sup> *Ibid.*, p. 46, Article 23, para. 7 of the observations.

<sup>450</sup> *Ibid.*, p. 78, Article 47, para. 3 of the observations.



the deletion of sub-paragraph (a) since in his view the provision of that sub-paragraph covers the frequent cases when the functions of a member of a delegation come to an end before the conclusion of the meeting of the organ or the conference. As to the reference to "all measures arising directly therefrom", he is of the view that its inclusion would introduce an element of imprecision and vagueness in the text.

6. Regarding the observation contained in paragraph 3, the Special Rapporteur wishes to reiterate his observation on the editorial suggestion of the Secretariat of the United Nations regarding the words "to this effect" in sub-paragraph (a) made in the context of article 47.<sup>451</sup> He does not see, however, a compelling reason to replace the word "upon" by "on" in sub-paragraph (b).

7. In the light of the foregoing, and subject to the drafting change referred to in the preceding paragraph, the Special Rapporteur proposes that the article be retained in its present form. Article 114 would, therefore, read as follows:

**Article 114. End of functions of a member of a delegation**

The functions of a member of a delegation to an organ or to a conference shall come to an end, *inter alia*:

(a) On notification of their termination by the sending State to the Organization or the conference;

(b) Upon the conclusion of the meeting of the organ or the conference.

**Article 115. Facilities for departure**

**(a) Observations of Governments and international organizations**

1. No comments were made by governments or international organizations concerning the text of article 115. Their comments related rather to the question of entry into the territory of the host State referred to by the Commission in its commentary to the article.

2. The Government of the Netherlands noted that

It is mentioned in the commentary that the Commission wishes to make further investigations to determine whether there is need for a provision governing the obligation of the host State to allow members of a delegation to enter the country. It would seem that this obligation already follows from articles 22 and 92, so that there is no need for a separate provision.

3. In connexion with the question of "entry", the Secretariat of the United Nations expressed its belief that

Express provision should be made [...] to ensure to members of [...] delegations of States to organs or conferences of international organizations, and to members of their families, the right of entry into and sojourn in the territory of the host State and the freedom of transit to and from the premises of the international organization, or to and from the site of the organ or the conference concerned.

<sup>451</sup> *Ibid.*, p. 79, para. 6.

It added that

The reasons for the foregoing suggestions may be found in the Secretariat's observations on part II of the provisional draft, [462] which are applicable, *mutatis mutandis*, to those on [...] delegations to organs and conferences.

**(b) Observations of the Special Rapporteur**

4. As regards the question of entry into the host State, the Special Rapporteur wishes to refer to his observations reflected under the new article 27 *bis* <sup>453</sup> which he made applicable in the case of permanent observer missions <sup>454</sup> and which he considers to be applicable as well in the case of delegations. In the light of those observations and, in particular, of his proposal for the inclusion in the draft of a new article 27 *bis* and of a reference to that article in article 67, the Special Rapporteur considers that, without prejudice to the final decision to be taken on those proposals, part IV of the present draft should also contain a provision on the matter, either as a separate new article or by reference to the provisions of the new article 27 *bis* to be made in the text of article 92, under an appropriate heading. The text of a new article, whose place in part IV of the draft should be determined on the basis of the corresponding decision to be taken regarding the new article 27 *bis*, should be along the lines of this latter article, as follows:

**Article Z. Entry into the host State**

1. The host State shall ensure entry into its territory (and freedom of transit to and from the premises of the Organization) to members of a delegation to an organ or to a conference and members of their families forming part of their respective households.

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

The Special Rapporteur has included in brackets the phrase "and freedom of transit to and from the premises of the Organization" in the light of the discussion held in the Commission on his proposed new article 27 *bis*.<sup>455</sup>

5. As regards the text of article 115, the Special Rapporteur proposes that it be retained in its present form. Article 115 would, therefore, read as follows:

**Article 115. Facilities for departure**

The provisions of article 48 shall apply also in the case of a delegation to an organ or to a conference.

**Article 116. Protection of premises and archives**

**(a) Observations of Governments and international organizations**

1. The Government of the United States questioned "whether it is reasonable to require protection of the

<sup>452</sup> *Ibid.*, p. 51, Article 27 *bis*, para. 5 of the observations.

<sup>453</sup> *Ibid.*, p. 52, paras. 7-13.

<sup>454</sup> See above, p. 105, document A/CN.4/241/Add.4, Article 67, para. 8 of the observations.

<sup>455</sup> *Yearbook of the International Law Commission*, 1971, vol. I, pp. 44-48, 1094th meeting, paras. 22-79.

premises of a delegation after the end of a conference". It considered that

As noted in previous comments on other draft articles in part IV [<sup>456</sup>], the premises of a delegation will normally be a hotel room and the archives, one would assume, would consist of a briefcase full of documents.

2. In its editorial observations the Secretariat of the United Nations indicated that its suggestion concerning the title of article 49 <sup>457</sup> applies to the title of article 116. It expressed further the view that

In the last line of paragraph 1 of article 116, the word "to" before the "host State" should be replaced by "of". This is probably a typing error (A/CN.4/L.162/Rev.1, section B).

### (b) *Observations of the Special Rapporteur*

3. The Special Rapporteur wishes to observe that the obligation to respect and protect the premises, which has been provided for in the Convention on Special Missions as well as in the context of permanent missions and permanent observer missions by articles 49 and 77 of the present draft, exists for the host State under article 116 so long as those premises are assigned to a delegation. Furthermore, while recalling his observation on the comment of the United States Government made in the context of article 94,<sup>458</sup> the Special Rapporteur considers that the archives of a delegation, which are not defined in article 78 on the use of terms, but which do not necessarily have to "consist of a briefcase full of documents", should, even if that were the case, be given protection in a manner similar to that provided for archives of the special mission in the Convention on Special Missions.

4. Regarding the observation quoted in paragraph 2 above, the Special Rapporteur wishes to reiterate his observation on the editorial suggestion of the United Nations Secretariat concerning the title made in the context of article 49,<sup>459</sup> subject to his general observation on the question of titles made in the context of article 23.<sup>460</sup> He wishes further to point out that the replacement of the word "to" by "of" in the last line of

paragraph 1 has already been made in the text of the article as it appears in the printed version of the report of the Commission on the work of its twenty-second session.<sup>461</sup>

5. The Special Rapporteur wishes also to recall that for the text of article 49 which he proposed in the present report, he replaced the word "must" by "shall" wherever it appeared in paragraph 1 and inserted a third sentence to the same paragraph making express reference to one of the ways in which the sending State may discharge its obligation under the article, namely entrusting the premises, property and archives to the custody of a third State. For the sake of consistency and uniformity the Special Rapporteur proposes to introduce similar changes to the text of article 116 with which he is to furnish the Commission for its consideration and final decision. Having had the benefit of the Commission's discussion on article 49,<sup>462</sup> the Special Rapporteur has deemed it appropriate to include within brackets the words "In the discharge of its obligations under the present paragraph" at the beginning of the proposed new third sentence. Finally, for the sake of symmetry with the text proposed by him for article 49, the Special Rapporteur proposes to suppress the word "the" before "archives" in the second paragraph.

6. In the light of the foregoing, the Special Rapporteur proposes that the text of the article be retained in its present form, subject to the addition and terminological changes referred to in the two preceding paragraphs. Article 116 would, therefore, read as follows:

### *Article 116. Protection of premises, property and archives*

1. When the meeting of an organ or a conference comes to an end, the host State shall respect and protect the premises of a delegation so long as they are assigned to it, as well as the property and archives of the delegation. The sending State shall take all appropriate measures to terminate this special duty of the host State within a reasonable time. [In the discharge of its obligations under the present paragraph,] the sending State may entrust the custody of the premises, property and archives of the delegation to a third State.

2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and archives of the delegation from the territory of the host State.

<sup>456</sup> See above, Article 94, paras. 3-4 of the observations.

<sup>457</sup> See above, p. 80, document A/CN.4/241/Add.3, Article 49, para. 4 of the observations.

<sup>458</sup> See above, Article 94, para. 7 of the observations.

<sup>459</sup> See above, p. 81, document A/CN.4/241/Add.3, Article 49, para. 8 of the observations.

<sup>460</sup> *Ibid.*, p. 46, Article 23, para. 7 of the observations.

<sup>461</sup> *Yearbook of the International Law Commission*, 1970, vol. II, p. 299, document A/8010/Rev.1, chap. II, B.

<sup>462</sup> *Ibid.*, 1971, vol. I, pp. 81-82, 1098th meeting, paras. 85-100.

## SUCCESSION OF STATES

### (a) Succession in respect of treaties

[Agenda item 2 (a)]

#### DOCUMENT A/CN.4/249

Fourth report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur

[Original text : English]  
[24 June 1971]

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## I. Introduction

### A. THE BASIS OF THE PRESENT REPORT

1. The Special Rapporteur's first report on this topic,<sup>1</sup> submitted to the International Law Commission at its twentieth session, was of a preliminary character. At that session, in conjunction with Mr. Mohammed Bedjaoui's first report on succession of States in respect of matters other than treaties,<sup>2</sup> it was the subject of a preliminary examination by the Commission.<sup>3</sup> No formal decisions were taken by the Commission at that session in regard to succession in respect of treaties. A summary of views expressed on such questions as the title of the topic, the dividing line between the two topics of succession and the nature and form of the work was, however, included in the Commission's report to the General Assembly.<sup>4</sup>

2. A second report on succession in respect of treaties<sup>5</sup> was submitted by the Special Rapporteur at the twenty-first session, containing an introduction and four draft articles designed to be a first group of substantive articles setting out general rules on succession in respect of treaties. Owing to lack of time this report was not taken up by the Commission at that session.<sup>6</sup>

3. The Special Rapporteur's third report on the same topic<sup>7</sup> was submitted at the twenty-second session and took the form of a continuation of his second report. It contained certain provisions on the use of terms and eight additional draft articles with commentaries. These additional articles embraced two further general rules and a set of six rules concerning succession in respect of multilateral treaties.

4. At its twenty-second session, the Commission considered the second and third reports of the Special Rapporteur together<sup>8</sup> but, owing to lack of time, only in a preliminary manner. The two reports combined contained, in addition to substantial introductory explanations, twelve articles with commentaries, which covered the use of certain terms, the case of territory passing from one State to another (the so-called principle of moving treaty-frontiers), devolution agreements, unilateral declarations by successor States, and rules governing the position of "new States"<sup>9</sup> in regard to multilateral treaties. In presenting his two reports to the Commission, the Special Rapporteur explained the proposals which they contained and also his proposals for completing his draft on succession in respect of treaties. Having regard to the preliminary nature of the discussion, the Commission confined itself to endorsing the Special Rapporteur's

general approach to the topic and did not take any formal decisions regarding the substance of the drafts.<sup>10</sup> The Commission did, however, include in its 1970 report to the General Assembly extensive summaries both of the Special Rapporteur's proposals and of the views expressed by members who took part in the discussion on succession in respect of treaties. Accordingly, for an account of the proceedings of the Commission on this topic at its twenty-second session, the Special Rapporteur thinks it sufficient here to refer members of the Commission to the relevant paragraphs of that report.<sup>11</sup>

5. The Commission's report on the work of its twenty-second session was considered by the Sixth Committee at the twenty-fifth session of the General Assembly in 1970, and a number of representatives made observations on the part concerned with succession in respect of treaties. A summary of these observations is contained in the Sixth Committee's report to the General Assembly on the work of the Commission.<sup>12</sup> Some of the observations relate to matters dealt with in the present report and the Special Rapporteur draws particular attention to the views expressed by representatives in the Sixth Committee on the question of so-called "dispositive", "territorial" or "localized" treaties. Certain representatives emphasized that their approval of the general rule, proposed in article 6, that new States should not be considered as automatically bound by their predecessor's treaties, did not mean that they regarded it as an absolute rule; and they urged the Commission now to give thorough consideration to these and other special categories of treaties with a view to determining the pertinent exceptions to the general rule. Certain other representatives, indeed, considered that the proposed general rule could be acceptable only if it was clearly established that the successor State was bound by certain categories of treaties. These representatives reserved their final positions on the question until the Commission had considered the nature and scope of exceptions to the general rule, particularly with regard to "dispositive", "territorial" or "localized" treaties. Some representatives, on the other hand, expressed the view that the general rule applied especially to "territorial" or "dispositive" treaties, and that the Commission should avoid giving legal endorsement to situations created by old treaties relating to colonial boundaries.

In general, the debate in the Sixth Committee, like that in the Commission at its twenty-second session, underlined the importance of the question of "dispositive", "territorial" or "localized" treaties as potential exceptions to the general rule that a new State is not under any obligation to assume the treaties of its predecessor.

### B. THE SCHEME OF THE DRAFT ARTICLES

6. Under the basic scheme of the draft, as explained in the third report,<sup>13</sup> the articles are arranged in three parts:

<sup>10</sup> *Ibid.*, p. 303, document A/8010/Rev.1, para. 49.

<sup>11</sup> *Ibid.*, pp. 301-305, paras. 37-63.

<sup>12</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 73-97.

<sup>13</sup> *Yearbook of the International Law Commission, 1970*, vol. II, pp. 27-28, document A/CN.4/224 and Add.1, paras. 7-10.

<sup>1</sup> *Yearbook of the International Law Commission, 1968*, vol. II, p. 87, document A/CN.4/202.

<sup>2</sup> *Ibid.*, p. 94, document A/CN.4/204.

<sup>3</sup> *Ibid.*, pp. 216-222, document A/7209/Rev.1, paras. 44-91.

<sup>4</sup> *Ibid.*, pp. 221-222, paras. 82-91.

<sup>5</sup> *Ibid.*, 1969, vol. II, p. 45, document A/CN.4/214 and Add.1 and 2.

<sup>6</sup> *Ibid.*, p. 225, document A/7610/Rev.1, para. 33.

<sup>7</sup> *Ibid.*, 1970, vol. II, p. 25, document A/CN.4/224 and Add.1.

<sup>8</sup> *Ibid.*, vol. I, 1067th, 1068th and 1070th-1072nd meetings.

<sup>9</sup> An expression used as a term of art in the draft articles and defined in article 1, paragraph 1 (e) (*ibid.*, vol. II, p. 28, document A/CN.4/224 and Add.1).

part I containing certain general rules, part II the rules applicable in the case of "new States", and part III the rules applicable in the case of particular forms of succession. (This arrangement is without prejudice to the addition of other articles designed to relate the provisions of the present draft to the general law of treaties embodied in the Vienna Convention on the Law of Treaties.)<sup>14</sup> The twelve draft articles presented in the Special Rapporteur's second and third reports, as already indicated in paragraph 4 above, contain the general rules to be included in part I and the rules governing the position of "new States" in regard to multilateral treaties which form the first section of part II. There remain two other important matters for inclusion in part II: (a) the rules governing the position of new States in regard to bilateral treaties; and (b) the special rules, if any, governing so-called "dispositive", "territorial" or "localized" treaties. The present report, therefore, continues part II at the point where the third report left off and begins with section 2 comprising five articles dealing with the position of new States in regard to bilateral treaties. The question of "dispositive", "territorial" or "localized" treaties will then be covered in section 3.

7. Although in the present report the text of the draft in substance begins with the articles of part II concerning succession in respect of bilateral treaties (articles 13-17), it is necessary first to explain a particular term—"other State party"—used as a term of art in those articles. Accordingly, the text of the draft articles and commentaries opens with this addition to the provisions of article 1 regarding the use of terms in the draft.

## II. Text of draft articles with commentaries<sup>15</sup>

### PART I. GENERAL PROVISIONS (*continued*)

#### Article 1. Use of terms

##### (Additional provision)

[For the purposes of the present articles:]

##### 1. [...]

(g) "Other State party" means in relation to a successor State another party to a treaty concluded by its predecessor and in force with respect to its territory at the date of the succession.

<sup>14</sup> For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

<sup>15</sup> The texts of the previous draft articles, together with the commentaries, have been published as follows:

Article 1 (para. 1 (a), (b) and (c)) and articles 2-4: *Yearbook of the International Law Commission, 1969*, vol. II, pp. 50 *et seq.*, document A/CN.4/214 and Add.1 and 2;

Article 1 (para. 1 (d), (e) and (f)) and articles 5-12: *Ibid.*, vol. II, pp. 28 *et seq.*, document A/CN.4/224 and Add.1.

### Commentary

(1) In drafting rules regarding succession in respect of bilateral treaties there is a need for a convenient expression to designate the other parties to treaties concluded by the predecessor State and in respect of which the problem of succession arises. The expression "third State" is not available since it has already been made a technical term in the Vienna Convention on the Law of Treaties denoting "a State not a party to the treaty" (article 2, para. 1 (h)). Simply to speak of "the other party to the treaty" does not seem entirely satisfactory because the question of succession concerns the *triangular* position of the predecessor State, the successor State and the other State which concluded the treaty with the predecessor State. Moreover, the expression "other party" has too often to be used—and is too often used in the Vienna Convention—in its ordinary general sense for its use as a term of art in the present articles with a special meaning to be acceptable. It therefore seems necessary to find another expression to use as a term of art denoting the other parties to a predecessor State's treaties. It is suggested that the expression "other States party" may be appropriated for this purpose and defined as having that special meaning without giving rise to any drafting inconveniences. Accordingly, it is proposed to add a new provision to article 1 stating that the term "other State party" is used in the present articles with this special meaning.

(2) If this addition is accepted by the Commission, corresponding changes will be made in the drafting of articles 3 and 4, where the expression "third State" at present appears. It may also be desirable, for the sake of consistency, to use the term "other States parties", instead of "the parties" in article 7, although the latter expression does not present any difficulties in the case of multilateral treaties.

### PART II. NEW STATES (*continued*)

#### SECTION 2. THE POSITION OF NEW STATES IN REGARD TO BILATERAL TREATIES

#### Article 13. Consent to consider a bilateral treaty as continuing in force

1. A bilateral treaty in force in respect of the territory of a new State at the date of the succession shall be considered as in force between the new State and the other State party to the treaty when:

(a) They expressly so agree; or

(b) They must by reason of their conduct be considered as having agreed to or acquiesced in the treaty's being in force in their relations with each other.

2. A treaty in force between a new State and the other State party to the treaty in accordance with paragraph 1 is considered as having become binding between them on the date of the succession, unless a different intention appears from their agreement or is otherwise established.

### Commentary

(1) Article 6 of the present draft lays down as the general rule that a new State is not *ipso jure* bound by its predecessor State's treaties nor under any obligation to take steps to become a party to them; and the reasons for so stating the general rule are given in the commentary to that article. The commentary at the same time emphasizes that the question whether a successor State may have a *right* to consider itself a party in its own name to treaties in force at the date of the succession is separate and different from the question whether it is under an *obligation* to do so. Furthermore, in the commentaries to articles 7 and 8 the view is put forward that, under certain conditions and subject to some exceptions, a successor State does have the right to consider itself a party in its own name to multilateral treaties in force with respect to its territory at the date of the succession. Article 13 considers the position of a successor State in regard to bilateral treaties.

(2) The "clean slate" metaphor, as already noted in paragraph 6 of the commentary to article 6, is admissible only in so far as it expresses the basic principle that a new State begins its international life free of any general obligation to take over the treaties of its predecessor. The evidence is plain that a treaty in force with respect to a territory at the date of a succession is frequently applied afterwards as between the successor State and the other party or parties to the treaty; and this indicates that the former legal nexus between the territory and the treaties of the predecessor State has at any rate some legal implications for the subsequent relations between the successor State and the other parties to the treaties. If in the case of many multilateral treaties that legal nexus appears to generate an actual right for the successor State to establish itself as a party, this does not appear to be so in the case of bilateral treaties.

(3) The reasons are twofold. First, the personal equation—the identity of the other contracting party—although an element also in multilateral treaties, necessarily plays a more dominant role in bilateral treaty relations; for the very object of most bilateral treaties is to regulate the mutual rights and obligations of the parties by reference essentially to their own particular relations and interests. In consequence, it is not possible automatically to infer from a State's previous acceptance of a bilateral treaty as applicable in respect of a territory its willingness to do so after a succession in relation to a wholly new sovereign of the territory. Secondly, in the case of a bilateral treaty there is no question of the treaty's being brought into force *between the successor State and its predecessor*, as happens in the case of a multilateral treaty. True, in respect of the predecessor State's remaining territory the treaty will continue in force bilaterally as between it and the other party to the treaty. But should the treaty become applicable as between that other party and the successor State, it will do so as a new and purely bilateral relation between them which is independent of the predecessor State. Nor will the treaty come into force at all as between the successor and predecessor States. No doubt, the successor and predecessor States may decide to regulate the matter in question—e.g. extradition or

tariffs—on a similar basis. But if so, it will be through a new treaty which is exclusive to themselves and legally unrelated to any treaty in force prior to independence. In the case of bilateral treaties, therefore, the legal elements for consideration in appreciating the rights of a successor State differ in some essential respects from those in the case of multilateral treaties.

(4) The International Law Association derives from the considerable measure of continuity found in practice a general presumption that bilateral treaties in force with respect to a territory and known to the successor State continue in force unless the contrary is declared within a reasonable time after the new State's attainment of independence.<sup>16</sup> Some writers even see in it a general principle of continuity implying legal rights and obligations with respect to the maintenance in force of a predecessor State's bilateral treaties. In some categories of treaties, it is true, continuity in one form or another occurs with impressive regularity. This is, for example, the case with the air transport and trade agreements examined in the second and third Secretariat studies on "Succession of States in respect of bilateral treaties".<sup>17</sup>

(5) The prime cause of the frequency with which some measure of continuity is given to such treaties as air transport and trade agreements in the event of a succession seems to be the practical advantage of continuity to the interested States in present conditions. Air transport is as normal a part of international communications today as railway and sea transport; and as a practical matter it is extremely likely that both the successor State and the other interested State will wish any existing air services to continue at least provisionally until new arrangements are made. It is therefore not surprising that in 1966 the position in regard to air transport agreements should be summarized by the International Law Association's Committee on the succession of new States to the treaties and certain other obligations of their predecessors as follows:

"Usually no alteration is effected in respect of air traffic until the new State negotiates a new exchange of rights and routes. In some instances no negotiation has been requested at all; in other instances it has been requested after a period of time. No new State has immediately following independence terminated traffic".<sup>18</sup>

The summary of the practice in the Secretariat study also underlines the prevalence of continuity in the case of air transport agreements:

"At least fourteen new States and twenty-four parties to bilateral air transport agreements—other than predecessor States—have taken the position that for one reason or other airlines designated by the new State and the party concerned could continue, at least for a certain period, to provide services in accordance with

<sup>16</sup> International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967) pp. xiii and 557-595, and *idem*, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), pp. xiii and 589-632. See also the summary of the International Law Association's proceedings given by the Special Rapporteur in his second report on succession in respect of treaties, in *Yearbook of the International Law Commission, 1969*, vol. II, pp. 47-49, document A/CN.4/214 and Add.1 and 2, paras. 13-18.

<sup>17</sup> *Yearbook of the International Law Commission, 1971*, vol. II, Part Two, document A/CN.4/243 and Add.1.

<sup>18</sup> International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 576.

agreements concluded before independence between that party and the predecessor State and involving the exercise of air traffic rights.

“... .

“Cases of formal denial of continuity which have been collected are limited. In one instance the denial was made in bilateral exchanges on the basis of the non-exercise of rights before independence (Madagascar and the United Kingdom). In another instance the position of the new State was acknowledged by the other State (the United States with regard to Israel).”<sup>19</sup>

(6) Again, international trade is an integral part of modern international relations; and as a practical matter both the successor State and the other interested States will find it convenient in many instances to allow existing trade arrangements to run on provisionally until new ones are negotiated. This is reflected in the practice, as appears from the following appreciation of the position by the above-mentioned Committee of the International Law Association:

“Since the operation of these agreements ordinarily affects a new State’s tariff structure, and hence its pattern of trade, the tendency is to regard them as remaining in force. Many agreements, upon examination, will be found to be obsolete. Since all commercial agreements are terminable on notice, it has been found advantageous, where desired, to denounce them and give the trading community time to adjust to the change, rather than treat them as having lapsed. However, very difficult questions of interpretation have been raised, and it may be that in strict law some of these agreements may be regarded as having lapsed. Some new States feel that wholesale denunciations of commercial agreements, even when permitted by termination clauses, may be embarrassing politically because the impression may be given that commercial policy is being drastically changed.”<sup>20</sup>

The summary of the practice given in the Secretariat study of trade agreements is certainly no less suggestive of a large measure of continuity:

“In the light of the relevant materials collected in the present study, about forty new States and thirty-four original parties, other than predecessor States, have taken a position concerning the continued force of bilateral trade agreements which were applicable to former non-metropolitan territories before independence. In most of the recorded cases continuity has been achieved or recognized at least during a certain period of time after independence.

“... .

“The recorded practice denying continuity has occurred mainly in a bilateral context (Venezuela to Australia; Canada and New Zealand; Argentina to India; Thailand to Pakistan; USSR to States formerly under French administration which became independent in 1960). In all those cases, the denial of continuity has been invoked by the interested original party to the pre-independence agreement. Only one of the forty new States referred to in paragraph 169 above seems to have taken it as a general view that pre-independence bilateral trade agreements applicable to its territory were no longer in effect after independence (Tanganyika). It is possible, however, that other new States also take this position; for instance, Algeria and Guinea have not participated in the renewal, etc., of the short-term trade agreements concluded by France.”<sup>21</sup>

<sup>19</sup> *Yearbook of the International Law Commission*, 1971, vol. II, Part Two, document A/CN.4/243, paras. 177 and 182. Cf. for Senegal, J.-C. Gautron, “Sur quelques aspects de la succession d’Etats au Sénégal”, *Annuaire français de droit international*, 1962 (Paris, C.N.R.S.), vol. VIII, pp. 845-846.

<sup>20</sup> International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 576.

<sup>21</sup> *Yearbook of the International Law Commission*, 1971, vol. II, Part Two, document A/CN.4/243/Add.1, paras. 169 and 172.

(7) Agreements for technical or economic assistance are another category of treaties where the practice shows a large measure of continuity. Thus the International Law Association’s Committee commented in 1966:

Where such agreements affect the territory concerned and its economy, or where the territory derives advantages from them, the tendency is to keep them in operation. Certain administrative difficulties, mainly concerning personnel, have arisen in this connection, but there is no instance of such an agreement automatically lapsing.<sup>22</sup>

An example may be seen in an exchange of notes between the United States and the Democratic Republic of the Congo in 1962 concerning the continuance in force of certain United States—Belgian treaties of economic co-operation with respect to the Congo, which is reproduced in *Materials on Succession of States*.<sup>23</sup> In general, the view of the United States, the interested other party in the case of many such treaties, has been stated to be that an economic co-operation agreement

should be regarded as continuing in force with a newly independent State if that State continues to accept benefits under it.<sup>24</sup>

(8) The International Law Association’s Committee also found a measure of “*de facto* continuity” in certain other categories of treaties:

Frequently action is delayed with respect to treaties which might be considered as having lapsed, such as those concerning abolition of visas, migration, or powers of consuls, and a *de facto* continuity thereby sometimes occurs for a limited period. Agreements for the avoidance of double taxation fall into an intermediate category, and there is a tendency to deal with them in a manner similar to that with respect to commercial treaties.<sup>25</sup>

The Committee’s statement in regard to tax agreements finds some support from material contained in the United Nations publication on international tax agreements.<sup>26</sup>

This is summarized by a recent writer as follows:

The practice collected in this volume shows that Indonesia considers that the pre-independence agreements with Canada and the United States remained in force, that Ghana considers that all nine tax agreements which were applicable to it remain binding; that Malaya considers itself bound by at least four of the five tax agreements that applied to it before independence [...].<sup>27</sup>

<sup>22</sup> International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 576.

<sup>23</sup> United Nations publication, Sales No. E/F.68.V.5, pp. 219-220. See also an exchange of notes between the United States and the Somali Republic in 1961 (*ibid.*, pp. 216-217).

<sup>24</sup> Note by Ch. I. Bevans (Assistant Legal Adviser, Department of State), in *American Journal of International Law* (Washington D.C., 1965), vol. 59, No. 1 (January 1965), p. 96. Cf. the observation of I. I. Lukashuk (USSR):

“[...] economic agreements are also not succeeded to automatically by new States. But this must not lead to unjust enrichment and to infringement of lawful interests and rights of other States.”

(International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 564).

<sup>25</sup> International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 577.

<sup>26</sup> United Nations, *International Tax Agreements*, vol. VIII: *World Guide*.

<sup>27</sup> K. J. Keith, “Succession to bilateral treaties by seceding States”, *American Journal of International Law* (Washington D.C., 1967), vol. 61, No. 2 (April 1967), p. 524. Keith also notes the continued operation of a number of pre-independence treaties concluded between the then dependent territory and its parent State—a somewhat different case.

This writer's further statement that "only one State, Israel, has denied succession"<sup>28</sup> may, however, put the continuity factor in the case of tax agreements rather too high.

(9) Continuity is also a conspicuous feature of the practice in regard to bilateral treaties of a "territorial" or "localized" character. But these categories of treaties raise special issues and will be examined separately in the commentary to article 18.

(10) If, therefore, State practice shows a tendency towards continuity in the case of certain categories of treaties,<sup>29</sup> it may be doubted whether the practice justifies the conclusion that the continuity derives from a customary legal rule rather than the will of the States concerned (the successor State and the other party to its predecessor's treaty). At any rate, it does not seem to support the existence of a unilateral right in a new State to consider a bilateral treaty as continuing in force with respect to its territory after independence *regardless of the wishes of the other party to the treaty*. This is clear from some of the State practice already set out in commentaries to previous articles. Thus, the numerous unilateral declaration by new States examined in the commentary to article 4 have unmistakably been based on the assumption that, as a general rule, the continuance in force of their predecessor's bilateral treaties is a matter on which it would be necessary to reach an accord with the other party to each treaty. True, those declarations envisage that some categories of treaties may continue in force automatically under customary law. But apart from these possible exceptions they clearly contemplate bilateral treaties as continuing in force only by mutual consent. Again, as pointed out in paragraphs 22-23 of the commentary to article 3, even when a predecessor State purports to transmit rights under its treaties to its successor State, the express or tacit concurrence of the other contracting party has still been regarded as necessary to make a bilateral treaty enforceable as between it and the successor State.

(11) Further State practice to the same effect is contained in the Secretariat publication *Materials on Succession of States*.<sup>30</sup> Argentina, for example, which did not accept Pakistan's claim that the Argentine-United Kingdom Extradition Treaty should be considered as continuing in force automatically with respect to Pakistan, afterwards assented to the extension of that treaty to Pakistan "by virtue of a new agreement signed in 1953 and formalized by an exchange of notes."<sup>31</sup> Similarly, correspondence between Ghana and the United States in 1957-1958 shows that the continuance of former United Kingdom treaties in respect of Ghana was regarded by them as a matter to be dealt with by the conclusion of an agreement.<sup>32</sup> It is true that occasionally, as in the case of a United States *Aide-Mémoire* to the Federation of Malaya

in 1958, language is used which might seem to imply that a new State was considered to have effected the continuance of a treaty by its unilateral act alone.<sup>33</sup> But such language generally occurs in cases where the other party was evidently in agreement with the successor State as to the desirability of continuing the treaty in force, and does not seem to have been based on the recognition of an actual right in the successor State. Moreover, in the particular case mentioned the successor State, Malaya, seems in its reply to have viewed the question as one of concluding an agreement rather than of exercising a right:

Your *Aide-Mémoire* of 15 October 1958 and this Note are to be regarded as constituting the agreement in this matter.<sup>34</sup>

The technique of an exchange of Notes or Letters regarding the continuance of a bilateral treaty, accompanied by an express statement that it is to be regarded as constituting an agreement, has indeed become very common—a fact which in itself indicates that, in general, the continuance of bilateral treaties is a matter not of right but of agreement. Instances of the use of the technique in connexion with such categories of bilateral treaties as air transport, technical co-operation and investment guarantee agreements, are to be found in documents supplied by the United States and published in *Materials on Succession of States*.<sup>35</sup> Numerous examples can also be seen in the first of the Secretariat studies on "Succession of States in respect of bilateral treaties",<sup>36</sup> which is devoted to extradition treaties.

(12) Continuity of bilateral treaties, as is emphasized in the Secretariat studies,<sup>37</sup> has been recognized or achieved on the procedural level by several different devices, a fact which in itself suggests that continuity is a matter of the attitudes and intentions of the interested States. True, in certain categories of treaties, e.g. air-transport agreements, continuity has quite often simply occurred; and this might be interpreted as indicating recognition of a right or obligation to maintain them in force. But even in these cases the continuity seems in most instances to be rather a tacit manifestation of the will of the interested States. Some instances can certainly be found where one or other interested State sought to place the continuity on the basis of a legal rule. An example is Japan's claim as of right to the continuance of its traffic rights into Singapore which had been granted to it in the Agreement between Japan and the United Kingdom for Air Services (Tokyo, 1952). This claim was made first against Malaysia and then, after the separation of Singapore from Malaysia, against Singapore itself.<sup>38</sup> But the successor States, first

<sup>28</sup> *Ibid.*

<sup>29</sup> Cf. K. Zemanek, "State succession after decolonization", in *Recueil des cours de l'Académie de droit international de La Haye, 1965-III* (Leyden, Sijthoff, 1965), vol. 116, p. 243.

<sup>30</sup> United Nations publication, Sales No. E/F.68.V.5.

<sup>31</sup> *Ibid.*, p. 7.

<sup>32</sup> *Ibid.*, pp. 211-213.

<sup>33</sup> *Ibid.*, pp. 229-230.

<sup>34</sup> *Ibid.*, p. 230.

<sup>35</sup> *Ibid.*, pp. 211-224.

<sup>36</sup> *Yearbook of the International Law Commission, 1970*, vol. II, p. 102, document A/CN.4/229, paras. 23, 31, 33, 62-66, 68-69, 71-74, and 77-79. Agreements of this kind in the form of exchanges of Notes are in many cases registered with the Secretariat under Article 102 of the Charter (*ibid.*, p. 127, para. 135).

<sup>37</sup> *Ibid.*, p. 127, paras. 134-135; *ibid.*, 1971, vol. II, Part Two, documents A/CN.4/243, paras. 117-187; and A/CN.4/243/Add.1, paras. 169-177.

<sup>38</sup> S. Tabata, "The independence of Singapore and her succession to the Agreement between Japan and Malaysia for Air Services", *The*



Malaysia and then Singapore, underlined in each case the "voluntary" character of their acceptance of the obligations of the United Kingdom under the 1952 Agreement. The position taken by those two States is supported not only by the considerations mentioned in the two preceding paragraphs but by other evidence.

(13) Individual instances of continuity have necessarily to be understood in the light of the general attitude of the States concerned in regard to succession in respect of bilateral treaties. Thus frequent reference is made by writers to the listing of treaties against the name of a successor State in the United States publication *Treaties in Force*,<sup>39</sup> but this procedure has to be understood against the background of the United States' general practice which was authoritatively explained in 1965 as follows:

In practice the United States Government endeavours to negotiate new agreements, as appropriate, with a newly independent State as soon as possible. In the interim it tries, where feasible, to arrive at a mutual understanding with the new State specifying which bilateral agreements between the United States and the former parent State shall be considered as continuing to apply. In most cases the new State is not prepared in the first years of its independence to undertake a commitment in such specific terms. To date the United States—Ghana exchange is the only all-inclusive formal understanding of this type arrived at, although notes have also been exchanged with Trinidad and Tobago and Jamaica regarding continued application of the 1946 Air Services Agreement. An exchange of notes with Congo (Brazzaville) on continuation of treaty obligations is couched only in general terms.<sup>40</sup>

That the United Kingdom regards the continuity of bilateral treaties as a matter of consent on both sides has already been shown in the Special Rapporteur's second report.<sup>41</sup> In addition to the evidence there set out, reference may be made to its reply to an inquiry in 1963 from the Norwegian Government concerning the continuance in force of the Anglo-Norwegian Double Taxation Agreement of 1951 with respect to certain newly independent States:

The Foreign Office replied to the effect that the Inheritance Agreements concluded between the United Kingdom and those countries now independent were thought to show that the Governments of those countries would accept the position that the rights and obligations under the Double Taxation Agreement should still apply to those countries *but that the question whether the Agreement was, in fact, still in force between those countries and*

*Norway was a matter to be resolved by the Norwegian Government and the Governments of those countries.*<sup>42</sup>

A recent statement of Canadian practice indicates that it is similar to that of the United States:

[...] the Canadian approach has been along essentially empirical lines and has been a two stage one. Where a newly independent State has announced that it intends to be bound by all or certain categories of treaties which in the past were extended to it by the metropolitan country concerned, Canada has, as a rule, tacitly accepted such a declaration and has regarded that country as being a party to the treaties concerned. However, when a State has not made any such declaration or its declaration has appeared to Canada to be ambiguous, then, as the need arose we have normally sought information from the government of that State as to whether it considered itself a party to the particular multilateral or bilateral treaty in connection with which we require such information.

The writer then added the comment:

Recent practice supports the proposition that, *subject to the acquiescence of third States*, a former colony continues after independence to enjoy and be subject to rights and obligations under international instruments formerly applicable to it, unless considerations as to the manner in which the States came into being or as to the political nature of the subject-matter render the treaty either impossible or invidious of performance by the new State.

Whether this practice should be regarded as a strict succession to a legal relationship, or as a novation, may still be an open question [...].<sup>43</sup>

(14) Enough evidence has been adduced in the preceding paragraphs to establish the essentially voluntary character of succession in respect of bilateral treaties: voluntary, that is, on the part not only of the successor State but also of the other interested State. On this basis the fundamental rule to be laid down for bilateral treaties would seem to be that their continuance in force after independence is a matter of agreement, express or tacit, between the successor State and the other interested State (the other party to the predecessor State's treaty).

(15) The difficulty remains of determining when and upon what basis (i.e. definitively or merely provisionally) a successor State and the other interested State are to be considered as having agreed to the continuance of a treaty which was in force in respect of the successor State's territory at the date of the succession. Where there is an express agreement, as in the Exchanges of Notes mentioned in paragraph (11) above, no problem arises. Whether the agreement is phrased as a confirmation that the treaty is considered as in force or as a consent to its being so considered, the agreement operates as a novation of the treaty and determines the position of the States concerned in relation to the treaty. There may be a point as to whether they intend the treaty to be in force definitively according to its terms (notably any provision regarding notice of termination) or merely provisionally, pending the conclusion of a fresh treaty. But that is a

*Japanese Annual of International Law* (Tokyo, 1968), No. 12, p. 36. See also *Yearbook of the International Law Commission*, 1971, vol. II, Part Two, document A/CN.4/243, paras. 122-123 and 138-143.

<sup>39</sup> United States, Department of State, *Treaties in Force—A List of Treaties and other International Agreements of the United States in Force* (Washington D.C., U.S. Government Printing Office).

<sup>40</sup> See International Law Association, *The Effect of Independence on Treaties: A Handbook* (London, Stevens & Sons, 1965), pp. 385-386. As pointed out in the Special Rapporteur's second report, the United States practice of seeking to arrive at a common understanding with the new State in regard to the continuance in force of individual treaties appears to apply equally in cases where the new State has entered into a devolution agreement with its parent State (*Yearbook of the International Law Commission*, 1969, vol. II, pp. 60-61, document A/CN.4/214 and Add.1 and 2, para. 23 of commentary to article 3).

<sup>41</sup> *Yearbook of the International Law Commission*, 1969, vol. II, pp. 59-60, document A/CN.4/214 and Add.1 and 2, paras. 21-22 of commentary to article 3.

<sup>42</sup> United Nations, *Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5), p. 192. [Italics supplied by the Special Rapporteur].

<sup>43</sup> A. E. Gotlieb and J. A. Beesley, ed., "Canadian practice in international law during 1968 as reflected mainly in public correspondence and statements of the Department of External Affairs", in *Canadian Yearbook of International Law*, 1969 (Vancouver B.C., 1969), vol. VII, p. 331 [Italics supplied by the Special Rapporteur].

question of interpretation to be resolved in accordance with the ordinary rules for the interpretation of treaties.

(16) The problem arises in the not infrequent case where there is no express agreement. The resolutions of the International Law Association provide that a bilateral treaty is to be considered as continuing in force if "the newly independent State and the other party or parties have applied the terms of the treaty *inter se*".<sup>44</sup> This is an obvious case, since the application of the treaty by both States necessarily implies an agreement to consider it as being in force. But unless a very broad meaning is given to the word "apply", that provision in the International Law Association's resolutions is not apt to cover a number of situations which arise in practice and constitute the real difficulty. These include situations where one State may have evidenced in some manner an apparent intention to consider a treaty as continuing in force—for example by listing the treaty amongst its treaties in force—but the other State has done nothing in the matter; or where the new State has evidenced a general intention in favour of the continuance of its predecessor's treaties but has not manifested any specific intention with reference to the particular treaty; or where neither State has given any clear indication of its intentions in regard to the continuance of bilateral treaties.

(17) The International Law Association sought to cover these types of situations by a general presumption of continuity to which attention has already been drawn in the Special Rapporteur's second report.<sup>45</sup> In its resolutions the International Law Association proposed a general rule under which, subject to one qualification, any bilateral treaty would be considered as continuing in force after independence unless either the new State or the other interested State had declared, within a reasonable time after the date of independence, that the treaty was regarded as no longer in force between them.<sup>46</sup> The qualification was that this general rule would apply only to a treaty in regard to which the new State had been notified or otherwise had knowledge that the treaty had been internationally in force with respect to its territory prior to independence. Whether the proposal is viewed as laying down a general rule of continuity subject to an option for either State to contract out, or as stating a general presumption which may be negated by evidence of a contrary intention, it makes the continuance of the treaty depend on the intentions of both States. This is emphasized by the requirement that the new State should have knowledge of the treaty's having been internationally in force with respect to its territory.

(18) The considerable measure of continuity found in modern practice and the ever-growing interdependence of States may, no doubt, provide some basis for such a general rule or presumption. But the question here in issue is the determination of the appropriate rule in a particular field of law, that of treaty relations where intention and

consent play a major role. State practice, as shown in the preceding paragraphs of this commentary, contains much evidence that the continuance in force of bilateral treaties, unlike multilateral treaties, is commonly regarded by both the new State and the other interested State as a matter of mutual agreement. Accordingly the Commission does not seem called upon to deduce from the frequency with which continuity occurs any general rule or presumption that bilateral treaties continue in force unless a contrary intention is declared. Moreover, as indicated in the second report,<sup>47</sup> a solution based upon the principle not of "contracting out" of continuity but of "contracting in" by some more affirmative indication of the consent of the particular States concerned, may be more in harmony with the principle of self-determination. The Special Rapporteur also feels that the question of the new State's knowledge of the treaty's having been internationally in force prior to independence, which forms an integral part of the rule proposed by the International Law Association, might constitute a somewhat difficult element in the application of that rule.

(19) Accordingly, both the frequency with which the question of continuity is dealt with in practice as a matter of mutual agreement and the principle of self-determination appear to the Special Rapporteur to indicate that the conduct of the particular States in relation to the particular treaty should be the basis of the general rule for bilateral treaties, rather than the general fact that a considerable measure of continuity is found in the practice of many States. It is true that a rule which hinges upon the establishment of mutual consent by inference from the conduct of the States concerned may also encounter difficulties in its application in some types of case. But these difficulties arise from the great variety of ways in which a State may manifest its agreement to consider itself bound by a treaty, including tacit consent; and they are difficulties found in other parts of the law of treaties.<sup>48</sup>

(20) It then becomes a question whether the rule should seek to indicate particular acts or conduct which give rise to the inference that the State concerned has consented to the continuance of a bilateral treaty or whether it should merely be formulated in general terms. Among points which suggest themselves are whether any particular provisions should be inserted concerning the inferences to be drawn from a new State's conclusion of a devolution agreement, or from a unilateral declaration inviting continuance of treaties (provisionally or otherwise) or from a unilateral listing of a predecessor State's treaty as in force in relation to a new State, or from the continuance in force of a treaty in the internal law of a State, or from reliance on the provisions of the treaty by a new State or by the other State party to it in their mutual relations. It may, however, be doubted whether the insertion of any such provisions prescribing the inferences to be drawn from particular kinds of acts would be justified. In the case of devolution agreements and

<sup>44</sup> International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 597.

<sup>45</sup> *Yearbook of the International Law Commission, 1969*, vol. II, p. 50, document A/CN.4/214 and Add.1 and 2, para. 22.

<sup>46</sup> See foot-note 44 above.

<sup>47</sup> See foot-note 45 above.

<sup>48</sup> e.g. articles 12-15 (consent to be bound), article 20 (acceptance of and objection to reservations) and article 45 of the Vienna Convention on the Law of Treaties.

unilateral declarations, much depends both on their particular terms and on the intentions of those who made them. As appears from the commentaries to articles 3 and 4, even where States may appear in such instruments to express a general intention to continue their predecessors' treaties, they frequently make the continuance of a particular treaty a matter of discussion and agreement with the other interested State. Moreover, in all cases it is not simply a question of the intention of one State but of both: of the inferences to be drawn from the act of one and the reaction—or absence of reaction—of the other. Inevitably the circumstances of any one case differ from those of another and it would hardly seem possible to lay down general presumptions without taking the risk of defeating the real intention of one or other State. Of course, one of the two States concerned may so act as to lead the other reasonably to suppose that it had agreed to the continuance in force of a particular treaty, in which event account has to be taken of the principle of good faith applied in article 45 of the Vienna Convention on the Law of Treaties (often referred to as estoppel or *préclusion*). But subject to the application of that principle, the problem is always one of establishing the consent of each State to consider the treaty as in force in their mutual relations either by express evidence or by inference from the circumstances.

(21) In general, although the context may be quite different, the questions which arise under the present article appear to have affinities with those which arise under article 45 of the Vienna Convention on the Law of Treaties (loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty). This suggests that the language used to apply the principle of good faith (estoppel—*préclusion*) in that article may serve a similar purpose in the present context.

(22) Accordingly, *paragraph 1* of the present article provides that a bilateral treaty shall be considered as in force between a successor State and the other party to the treaty when (a) they expressly so agree or (b) when they must by reason of their conduct be considered as having agreed to or acquiesced in the treaty's being in force in their relations with each other. Under the second part of this provision a new State's knowledge of a treaty's having been internationally in force in respect of its territory at the date of the succession might possibly be relevant in a particular case in determining whether it should be considered having consented to that treaty's continuance in force. But the fact that the continuance in force of each particular treaty is made dependent on establishing the consent of both the new State and the other State specifically to the continuation of that treaty greatly reduces the significance of the problem of a new State's knowledge of its predecessor State's treaties.

(23) *Paragraph 2* deals with the question of the date on which a treaty is to be considered as becoming binding between a new State and the other party to it under the provisions of paragraph 1. The very notions of "succession" and "continuity" suggest that this date should, in principle, be the date of the new State's "succession" to

the territory. This is also suggested by terminology found in practice indicating that the States concerned agree to regard the predecessor's treaty as continuing in force in relation to the successor State. Accordingly, it is thought that the primary rule concerning the date of entry into force must be the date of the succession. On the other hand, the continuance of the treaty in force in relation to the successor State being a matter of agreement, there seems to be no reason why the two States should not fix another date if they so wish. Paragraph 2, therefore, admits the possibility of some other date's being agreed upon.

#### ***Article 14. Duration of a bilateral treaty considered as in force***

**1. A bilateral treaty, considered as in force for a new State and the other State party in accordance with article 13, is binding upon them until terminated in conformity with its provisions, unless it appears from their agreement or is otherwise established that they intended the treaty to be applied only:**

- (a) Until a specified date;**
- (b) Pending a decision by either State to terminate its application;**
- (c) Pending the conclusion of a new treaty between them relating to the same subject matter.**

**2. In cases falling under paragraph 1 (b) not less than twelve months' notice shall be given of the State's intention to terminate the application of the treaty, unless the treaty itself provides for a different period of notice in which event this period shall apply.**

**3. In cases falling under paragraph 1 (c) the application of the treaty shall be considered as terminated if the new State and the other State party conclude the new treaty, unless a contrary intention appears from the later treaty or is otherwise established.**

#### ***Commentary***

(1) When a new State and the other State party agree expressly or tacitly to consider a bilateral treaty as in force between them, the natural result would seem to be that the duration of the treaty and any question of its denunciation or suspension should be governed by the provisions of the treaty and also of articles 54 to 72 of the Vienna Convention on the Law of Treaties. In short, if there were no other complication, it would be possible simply to leave these questions to be governed by the general law of treaties; and the Secretariat studies on succession of States in respect of bilateral treaties in fact contain a number of examples of treaties having been terminated after succession by a notice of termination given in accordance with a provision in the particular treaty.<sup>49</sup>

<sup>49</sup> *Yearbook of the International Law Commission*, 1970, vol. II, p. 128, document A/CN.4/229, para. 136, and *ibid.*, 1971, vol. II, Part Two, document A/CN.4/243, para. 179, and document A/CN.4/243/Add.1, para. 171.

(2) But a complication does arise from the fact that the treaty is in force as a result of an *agreement* between the new State and the other State party; for their agreement is not infrequently on the basis merely of applying the treaty provisionally until a specified date or pending a decision by one of them to put an end to the application of the treaty or pending the conclusion of a new treaty. If so, any terms of the treaty relating to its duration or termination are necessarily subject to the specific agreement between the States concerned to apply the treaty only provisionally.

(3) Instances of such agreements are not only quite common in practice but are specifically invited in the unilateral declarations made by Tanganyika, Uganda, Kenya and a number of other States.<sup>50</sup> Many of these declarations specify a period—not infrequently extended by a further declaration—during which the new State makes an offer to any other State party to one of its predecessor's bilateral treaties to apply the treaty provisionally on a reciprocal basis with a view to its replacement by a new treaty or its termination at the end of the period. Then, if the other State party accepts, either expressly or tacitly, the new State's offer, an agreement for the provisional application of the treaty arises. Examples of agreements for the provisional application of bilateral treaties resulting from such unilateral declarations may be seen in the Secretariat study on succession of States in respect of extradition treaties.<sup>51</sup> Other examples can be found in its Studies on succession in respect of air transport agreements<sup>52</sup> and trade agreements.<sup>53</sup> Equally, such agreements may arise in practice simply from the agreement of the new State and the other State party to continue to apply a treaty pending the negotiation of new arrangements.<sup>54</sup>

(4) *Paragraph 1* accordingly lays down as the general rule that a treaty considered as in force between a new State and the other State party in accordance with article 13, is binding upon them until terminated in conformity with its provisions, but underlines that this is subject to the particular terms on which they agreed to consider it as in force. This it does by setting out three specific exceptions to the rule. The first is where the agreement is only to apply the treaty until a specified date, as may happen in the case of a tacit agreement based on a unilateral declaration fixing a specified period for the provisional application of the treaty. The second is where the agreement is only to apply the treaty until either State decides to terminate it. This situation may arise from a unilateral declaration if a new State agrees to apply the treaty until it reaches a decision as to the continuance of the treaty in which case it is thought that the reservation of the right to terminate must be considered as operating

reciprocally. The third is where the agreement is simply to continue to apply the old treaty until a fresh treaty is concluded between the new State and the other State party. Paragraph 1 does not include any reference to the general provisions of the Vienna Convention on the Law of Treaties under which the termination or suspension of a treaty may take place. Such a reference is considered unnecessary since it is a basic assumption of the present draft articles that the rules governing succession in respect of treaties form a special part of or an appendage to the general law of treaties. A treaty considered as in force between a new State and the other State party is clearly a treaty in force for the purposes of the general law of treaties and, therefore, necessarily governed by any relevant rules of the Vienna Convention in addition to the rules governing succession of States.

(5) When the agreement is simply to apply the treaty provisionally pending a decision by either State as to its continuance, it seems desirable that some period of notice should be given of any decision to terminate the treaty. Article 56 of the Vienna Convention, which concerns treaties that contain no provision regarding their termination, admits the possibility of denunciation where such is established to have been the intention of the parties or is to be implied from the nature of the treaty. At the same time, however, it lays down that not less than twelve months notice must be given of the intention to denounce the treaty. Having regard to the kinds of treaties involved—e.g. trade, air transport, tax and extradition treaties—a similar period of notice would seem appropriate. On the other hand, if the treaty itself provides for a period of notice which is different, it would seem logical to apply the period specified in the treaty. *Paragraph 2* of the present article accordingly states the rule in these terms.

(6) When the agreement is on the basis that the treaty is to continue to be applied pending the conclusion of a new treaty, the question of the termination of the earlier treaty clearly seems to fall within the general principles set out in article 59 of the Vienna Convention. Under paragraph 1 of that article—

“A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.”

In the present instance, however, the very fact that under the agreement the earlier treaty is to continue in force pending the conclusion of a new treaty would appear to establish a *prima facie* intention that the conclusion of the later treaty should terminate the earlier one. Certainly, this is normally the intention in practice. In consequence, the principle underlying article 59 of the Vienna Convention may in the present context find its true expression in a rule which provides rather that the conclusion of the later treaty is to be considered as terminating the earlier one unless a contrary intention appears from the later treaty or is otherwise established. For this reason it is thought

<sup>50</sup> *Ibid.*, 1969, vol. II, pp. 62-68, document A/CN.4/214 and Add.1 and 2, commentary to article 4.

<sup>51</sup> *Ibid.*, 1970, vol. II, pp. 116 and 119, document A/CN.4/229, paras. 69, 72, 91 and 92.

<sup>52</sup> *Ibid.*, 1971, vol. II, Part Two, document A/CN.4/243, para. 36.

<sup>53</sup> *Ibid.*, document A/CN.4/243/Add.1, paras. 35 and 38.

<sup>54</sup> *Ibid.*, 1970, vol. II, p. 111, document A/CN.4/229, paras. 41-42. See also *ibid.*, 1971, vol. II, Part Two, document A/CN.4/243, paras. 28, 56 and 122, and document A/CN.4/243/Add.1, para. 57.

that the rule should be so stated in *paragraph 3* of the present article rather than leave the matter to be covered simply by article 59 of the Vienna Convention. A further reason for including a special provision on this point in the present article may be the slight difficulty which arises in article 59 from the phrase "if *all* the parties to it conclude a later treaty relating to the same subject-matter" [*Italics supplied by the Special Rapporteur*]. In cases of succession both the predecessor and successor States may in a sense be parties to the earlier treaty vis-à-vis the other State party, so that the reference in article 59 to "all the parties" is not entirely apt in the present context. It should perhaps be added that the expressions "conclusion of a new treaty" and "conclude the new treaty" are here used in *paragraphs 1* and *3* because this is similar to the wording employed in the Vienna Convention; indeed it is also the wording commonly used by States in making agreements of the kind dealt with in *paragraphs 1 (c)* and *3* of the present article. No doubt, the intention of the States concerned would normally be that the earlier treaty should terminate on the *entry into force* of the new treaty, rather than on the establishment of their consents to the new treaty if its entry into force were fixed for a later date; and *paragraph 3* should be understood in that sense. The intention in these cases clearly is that the earlier treaty should continue to be applied until replaced in its application by a new treaty.

**Article 15. *The treaty not to be considered as in force also between the successor and predecessor States***

A bilateral treaty, considered as in force for a new State and the other State party in accordance with article 13, is not on that account to be considered as also in force in the relations between the new State and the predecessor State which concluded the treaty with the other State party.

*Commentary*

(1) The rule formulated in this article may be thought to go without saying, since the predecessor State is not a party to the agreement between the new State and the other State party which alone brings the treaty into force between these States. Nevertheless, it seems desirable to formulate the rule in an article, if only to remove any possibility of misconception. True, the legal nexus, which arises between a treaty and a new State's territory by reason of the fact that the treaty concluded by its predecessor was in force in respect of its territory at the date of the succession, provides a basis for the subsequent application of the treaty in the bilateral relations between the new sovereign of the territory and the other State party—by agreement between them. But it does not invest the new State with a right to become a party to the actual treaty between its predecessor and the other State party, so as to bring the treaty into force also between itself and its predecessor, as would happen in the case of a multilateral treaty.

(2) The position, as pointed out in *paragraph 3* of the commentary to article 13, is rather that the agreement

between the new State and the other State party gives rise to a second bilateral treaty, which exists *parallel* with the original treaty concluded between the predecessor State and the other State party. The second treaty, even though it may be in all respects the twin of the original treaty, operates between the new State and the other State party as a new and purely bilateral relation between them which is independent of the predecessor State. Furthermore, should the successor and predecessor States decide to regulate the same matter—for example, extradition, tariffs, etc.—on a similar basis, it will be through a new treaty which is exclusive to themselves and legally unconnected with the treaty formerly concluded between the predecessor State and the other State party. Indeed, in many cases (e.g. air transport route agreements), the considerations motivating the provisions of the treaty between the predecessor State and the other State party may be quite different from those relevant in the bilateral relations between the predecessor State and the new State.

(3) The rule is so clear that it is difficult to find any but negative evidence for it in State practice. This consists in the fact that neither successor nor predecessor States have ever claimed that in these cases the treaty is to be considered as in force between them as well as between the successor State and the other State party.

(4) Accordingly, the present article simply provides that a bilateral treaty, considered as in force for a new State and the other State party in accordance with article 13, is not on that account to be considered as also in force between the new State and its predecessor.

**Article 16. *Consent to apply a multilateral treaty on a reciprocal basis with respect to any party thereto***

1. Articles 13 to 15 apply also when a new State, without notifying the parties to a multilateral treaty in accordance with article 7 that it considers itself a party, declares that it is willing to apply the treaty on a reciprocal basis with respect to any party thereto.

2. Any agreement to apply a multilateral treaty in accordance with *paragraph 1* terminates if the new State notifies the parties either that it considers itself a party in accordance with article 7 or that it has become a party in conformity with the provisions of the treaty.

*Commentary*

(1) The purpose of this article is to cover cases of the provisional application of multilateral treaties *on a bilateral basis* which may arise—and are indeed invited—when a new State makes a unilateral declaration on the Tanganyika or Uganda model.<sup>55</sup> These declarations announce the intention of the new State to review its position in regard to multilateral treaties in force prior to independence and its willingness meanwhile to apply any such treaty on a reciprocal basis with respect to any individual party to the treaty. Such a declaration therefore amounts to

<sup>55</sup> *Ibid.*, 1969, vol. II, pp. 62-68, document A/CN.4/214 and Add.1 and 2, commentary to article 4.

an offer to continue the application of the provisions of any of those multilateral treaties *bilaterally* during the interim period of review with respect to any individual party to such treaty wishing to do so. It therefore seems to set up a situation analogous to that which exists in the case of bilateral treaties and which should logically be governed by the same principles. *Paragraph 1* of the present article accordingly so provides.

(2) Clearly, however, any agreement to continue the application of a multilateral treaty provisionally on a bilateral basis would terminate upon the new State's becoming an actual party, either by a notification in accordance with article 7 of the present draft or by ratification, accession etc., under the terms of the treaty itself.<sup>56</sup> This contingency is, therefore, provided for in *paragraph 2* of the present article.

### **Article 17. Effect of the termination or amendment of the original treaty**

**1. A bilateral treaty, considered as in force for a new State and the other State party in accordance with article 13:**

**(a) Does not cease to be in force in the relations between them by reason only of the fact that it has been terminated in the relations between the predecessor State and the other State party;**

**(b) Is not amended in the relations between them by reason only of the fact that it has been amended in the relations between the predecessor State and the other State party.**

**2. Similarly, when a bilateral treaty is terminated or, as the case may be, amended in the relations between the predecessor State and the other State party after the date of a succession:**

**(a) Such termination does not preclude the treaty from being considered as in force between the new State and the other State party in accordance with article 13;**

**(b) Such amendment shall not be considered as having amended the treaty also for the purposes of the application of article 13, unless the new State and the other State party shall have so agreed.**

### *Commentary*

(1) Once it is recognized that, in general, succession in respect of bilateral treaties is a matter of novation and occurs through the express or tacit agreement of the new State and the other State party, it follows that the treaty operates between these States as an independent treaty with a life of its own. The legal source of the obligations of the new State and the other State party *inter se* is their own agreement not the original treaty; and the agreement, as it were, cuts the umbilical cord between those States and the original treaty. Consequently, there is no legal reason why the termination of the original treaty, by agreement or otherwise, in the relations between the

predecessor State and the other State party should necessarily at the same time involve the termination of the treaty in the relations between the new State and the other State party. The termination of the latter treaty relation is a matter which, in principle, concerns the new State and the other State party and them alone.

(2) The expiry of the treaty simply by the force of its own terms may, of course, entail the simultaneous termination of the treaty relations (a) between the predecessor State and the other State party and (b) between the successor State and the other State party. Thus, if the treaty provides for its own termination on a specified date, it will cease to be in force on that date for the successor State and the other State party (unless they specially agree otherwise) because that provision of the treaty forms part of their own agreement. An instance of the expiry of the original treaty by the force of its own terms may be found in the Secretariat study of air transport agreements,<sup>57</sup> which refers to the United States having reminded, first, Trinidad and Tobago and, secondly, Jamaica that an Exchange of Notes of 1961 between the United States and United Kingdom was due to expire very soon. Another appears in the Secretariat study of trade agreements<sup>58</sup> where mention is made of the expiry of Franco-Italian and Franco-Greek Trade Agreements, which were applicable to Morocco and Tunis, some months after the attainment of independence by these countries.

(3) On the other hand, a termination of the treaty as between the predecessor State and the other State party resulting from the initiative of one of them, (e.g. a notice of termination under the treaty or as a response to a breach of the treaty) does not, *ipso jure* affect the separate treaty relations between the successor State and the other State party. This point is made the subject of a specific rule by the International Law Association in its resolution No. 3 on succession of new States, which reads:

Termination of a treaty by notice or otherwise between two original parties does not in itself have the effect of terminating the application of the treaty vis-à-vis the successor States or as between the successor States.<sup>59</sup>

In proposing that rule the relevant Committee of the Association explained in a note:

There are several instances where the original parties to a bilateral treaty have terminated the treaty but where the treaty has remained in force between the successor States of one original party and the other original party. For example, the Webster-Ashburton Treaty arrangements concerning extradition remained in force between New Zealand and the United States after the United Kingdom had negotiated a new extradition treaty with the United States.<sup>60</sup>

The Secretariat study of air transport agreements provides another example in the India—United States

<sup>57</sup> *Yearbook of the International Law Commission, 1971, vol. II, Part Two, document A/CN.4/243, para. 54.*

<sup>58</sup> *Ibid.*, document A/CN.4/243/Add.1, para. 71.

<sup>59</sup> *Ibid.*, 1969, vol. II, p. 48, document A/CN.4/214 and Add.1 and 2, para. 15.

<sup>60</sup> International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969) [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors], p. 601, Notes, para. 3.

<sup>56</sup> Some new States have preferred to accede to multilateral treaties rather than to notify their succession, even when entitled to do so.

Agreement of 1946.<sup>61</sup> After Pakistan's separation from India, she agreed with the United States in an Exchange of Notes that the 1946 Agreement should be considered as in force between Pakistan and the United States. In 1954 India gave notice of termination to the United States and in 1955 the 1946 Agreement ceased to be in force with respect to India herself. With respect to Pakistan, however, it continued in force.

(4) Similarly, the principle finds expression in cases where the other State party, desirous of terminating the treaty in respect of the successor as well as the predecessor State, has taken steps to communicate its notice of termination to the successor State as well as the predecessor. Thus, when Sweden decided in 1951 to terminate the Norway and Sweden—United Kingdom Extradition Treaty of 1873, it gave notice of termination separately to India,<sup>62</sup> Pakistan,<sup>63</sup> and Ceylon.<sup>64</sup> Correspondingly, it also finds expression in cases where the predecessor and successor States have each separately given notice of termination to the other State party. An example is a series of notices of termination given by Malaysia and by Singapore in May 1966 to put an end to Air Transport Agreements by Malaysia respectively with Denmark,<sup>65</sup> Norway,<sup>66</sup> France,<sup>67</sup> the Netherlands<sup>68</sup> and New Zealand.<sup>69</sup> Malaysia's termination of the 1946 United Kingdom—United States Air Transport Agreement does not appear to be any exception.<sup>70</sup> After Malaysia's attainment of independence, this Agreement was considered by it and the United States as continuing in force between them. Then in 1965, some two months before Singapore's separation from Malaysia, Malaysia gave notice of termination to the United States and this was treated by the latter as terminating the Agreement also for Singapore, although the twelve months' period of notice presented in the treaty did not expire until after Singapore had become independent. In this case Malaysia was the State responsible for Singapore's external relations at the time when the notice of termination was given, and the United States presumably felt that fact to be decisive. Whether a notice of termination, which has not yet taken effect at the date of independence, ought to be regarded as terminating the legal norms between the treaty and the new State's territory may raise a question. But it is a question which is not limited to bilateral treaties and does not affect the validity of the principle here in issue.

(5) At first sight, Canada might seem to have departed from the principle in correspondence with Ghana in 1960 concerning the United Kingdom—Canada double-tax agreement which had been applied to the Gold Coast in

1957.<sup>71</sup> Three years later Canada gave notice of termination to Great Britain but not to Ghana, who took the position that the agreement was still in force between itself and Canada. The latter is then reported as having objected that it had understood that Great Britain would communicate the notice of termination to any States interested by way of succession. If such was the case, Canada would not seem to have claimed that its termination of the original treaty *ipso jure* put an end also to its operation as between itself and Ghana. Canada seems rather to have maintained that its notice of termination was intended to be communicated also to Ghana and was for that reason effective against the latter. Although Ghana did not pursue the matter, it may be doubted whether, in the light of article 78 of the Vienna Convention on the Law of Treaties, a notice of termination can be effective against a successor State unless actually received by it. This is on the assumption that when the notice of termination was given by the predecessor State, the treaty was *already in force* between the new State and the other State party. A notice of termination given by the predecessor State or by the other State party *before any agreement has been reached between the successor State and the other State party* would present a situation of a rather different kind.<sup>72</sup>

(6) Paragraph 1 (a) of the article accordingly provides that a treaty considered as in force for a new State and the other State party does not cease to be in force in the relations between them by reason only of the fact that it has terminated in the relations between the predecessor State and the other State party. This, of course, leaves it open to the other State party to send a notice of termination under the treaty simultaneously to both the predecessor and successor States. But it establishes the principle of the separate and independent character of the treaty relations between the two pairs of States.

(7) The same basic principle must logically govern the case of an amendment of a treaty which is considered as in force between a new State and the other State party. An amendment agreed between the predecessor State and the other State party would be effective only between themselves and would be *res inter alios acta* for the new State in its relations with the other State party. It does not, therefore *ipso jure* effect a similar alteration in the terms of the treaty as applied in the relations between the new State and the other State party. Any such alteration is a matter to be agreed between these two States, and it is hardly conceivable that the rule should be otherwise.

(8) In the case of air transport treaties, for example, it frequently happens that after the new State and the other State party have agreed, expressly or tacitly, to consider the treaty as continuing in force, the original treaty is amended to take account of the new air route situation resulting from the emergence of the new State. Such an amendment obviously cannot be reproduced in the treaty as applied between the new State and the other State

<sup>61</sup> *Yearbook of the International Law Commission, 1971*, vol. II, Part Two, document A/CN.4/243, paras. 17-19.

<sup>62</sup> *Ibid.*, 1970, vol. II, p. 109, document A/CN.4/229, para. 25.

<sup>63</sup> *Ibid.*, p. 110, para. 32.

<sup>64</sup> *Ibid.*, p. 111, para. 38.

<sup>65</sup> *Ibid.*, 1971, vol. II, Part Two, document A/CN.4/243, para. 131.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, para. 135.

<sup>68</sup> *Ibid.*, para. 146.

<sup>69</sup> *Ibid.*, para. 147.

<sup>70</sup> *Ibid.*, paras. 125 and 151.

<sup>71</sup> International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969) [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, Annex EJ, p. 632.

<sup>72</sup> See para. 9 below.



party. Numerous instances of such amendments to the original treaty made for the purpose of changing route schedules may be seen in the Secretariat study on succession in respect of air transport agreements.<sup>73</sup> In these cases, although the original air transport agreement itself is considered by the new State and the other State party as in force also in the relations between them, the fact that there are really two separate and parallel treaties in force manifests itself in the different route schedules applied, on the one hand, between the original parties and, on the other, between the new State and the other State party.

(9) The principle also manifests itself in cases which recognize the need for a new State's participation in or consent to an amendment of the original treaty if the amendment is to operate equally in its relations with the other State party. There are several such cases to be found in the Secretariat study of trade agreements.<sup>74</sup> When in 1961 certain Franco-Swedish trade agreements were amended and extended in duration, and again in subsequent years, six new States authorized France to represent them in the negotiations, while a further six new States signed the amending instrument on their own behalf. In other cases of a similar kind<sup>75</sup> sometimes France expressly acted on behalf of the community; more usually, those of the new ex-French African States who desired to continue the application of the French trade agreements signed the amending instruments on their own behalf. The same Secretariat study also mentions a number of Netherlands trade agreements that provided for annual revising instruments in which Indonesia was to have the right to participate. But Indonesia not having exercised this right, its participation in the trade agreements in question ceased. Yet another illustration of the need for a new State's consent, if a revising instrument is to affect it, can be seen in the Secretariat study of extradition treaties, though this is perhaps more properly to be considered a case of termination through the conclusion of a new agreement. In 1931 the United Kingdom and United States concluded a new Extradition Treaty, which was expressed to supersede all their prior extradition treaties, save that in the case of each of the Dominions and India the prior treaties were to remain in force unless those States should accede to the 1931 Treaty or negotiate another treaty of their own.<sup>76</sup>

(10) *Paragraph 1 (b)* of the present article, therefore, further provides that a bilateral treaty considered as in force for a new State and the other State party is not amended in the relations between them by reason only of

the fact that it has been amended in the relations between the predecessor State and the other State party. This again does not exclude the possibility of an amending agreement's having a parallel effect on the treaty relation between the successor State and the other State party if the interested State—in this case the new State—so agrees.

(11) The point remains as to whether any special rule has to be stated for the case where the original treaty is terminated or amended before the new State and the other State party can be considered as having agreed upon its continuance. If the treaty has been effectively terminated before the date of the succession, there is no problem.<sup>77</sup> The treaty is not one which can be said to have been in force in respect of the new State's territory at the date of the succession so that, if the new State and the other State party should decide to apply the treaty in their mutual relations, it will be on the basis of an entirely new transaction between them. The problem concerns rather the possibility that the predecessor State or the other State party should terminate the treaty soon after the date of the succession and before the new State and the other State party have taken any position regarding the continuance in force of the treaty in their mutual relations. In the view of the Special Rapporteur, the necessary legal nexus is established for the purposes of the law of succession if the treaty is in force in respect of the new State's territory at the date of succession. On this basis, there does not seem to be any legal reason why that legal nexus should be affected by any act of the predecessor State after that date.

(12) Although that is thought to be the correct view of the matter, it is arguable that the point is of no great importance since, as article 13 expressly recognizes, the bringing of the treaty into force in the relations between the new State and the other State party is a matter for their mutual agreement. In consequence, it is open to them to disregard the termination or amendment of the treaty between the original parties or to treat it as conclusive as between themselves according to their wishes. On the other hand, the point might possibly have importance in determining the position in the case of an alleged agreement to continue the treaty in force to be implied simply from the conduct of the new State and the other State party—for example, from the continued application of the treaty. At any rate, the Special Rapporteur has thought it better to draft a paragraph dealing with this point for the consideration of the Commission. *Paragraph 2* of the article therefore in effect provides:

(a) That the termination of the treaty between the original parties after the date of the succession does not preclude the new State and the other State party from considering the treaty as in force between them in accordance with article 13; and

(b) That the amendment of the treaty between the original parties after that date does not amend the treaty for the purpose of the application of article 13, unless the new State and the other State party shall have so agreed.

<sup>73</sup> *Yearbook of the International Law Commission, 1971*, vol. II, Part Two, document A/CN.4/243, paras. 20, 26, 35, 40, 42, 58, and 66.

<sup>74</sup> *Ibid.*, document A/CN.4/243/Add.1, paras. 73-76, 77-80 and 97-103.

<sup>75</sup> In many of these cases the object of the amending instrument was essentially to prolong the existing trade agreement.

<sup>76</sup> *Yearbook of the International Law Commission, 1970*, vol. II, pp. 107-108, document A/CN.4/229, para. 13.

<sup>77</sup> Other than the effect of a notice of termination given before that but expiring after the date of the succession.



## SUCCESSION OF STATES

### (b) Succession in respect of matters other than treaties

[Agenda item 2 (b)]

#### DOCUMENT A/CN.4/247 AND ADD.1

Fourth report on succession in respect of matters other than treaties,  
by Mr. Mohammed Bedjaoui, Special Rapporteur

#### *Draft articles with commentaries on succession to public property*

[Original text : French]  
[2 and 19 April 1971]

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#### ABBREVIATIONS

IBRD	International Bank for Reconstruction and Development
IMF	International Monetary Fund

\* \* \*

#### EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the Special Rapporteur.

## Part One

### Text of draft articles on succession to public property

1. In his third report of 24 March 1970,<sup>1</sup> the Special Rapporteur prepared for the twenty-second session of the International Law Commission four draft articles with commentaries on succession to public property. There appear below some further draft articles, which the Special Rapporteur hereby submits for the twenty-third session. These articles, combined with the previous ones, might read, in their initial provisional form, as follows:

#### I. PRELIMINARY PROVISIONS

##### *Article 1. Irregular acquisition of territory*

1. Territorial changes which occur by force or through a violation of international law or of the Charter of the United Nations shall be without legal effect.

2. The State which commits an act of conquest or annexation shall not be deemed to be a successor State and, in particular, shall not acquire possession of the property of the predecessor State.

##### *Article 2. Transfer of the territory and of public property as they exist*

1. The predecessor State may transfer a territory only on the conditions upon which that State itself possesses it.

2. The successor State may not have possession of property of which the predecessor State itself had only precarious or irregular possession.

3. Public property shall be transferred as it exists and with its legal status, in so far as this is compatible with the municipal law of the successor State.

##### *Article 3. Date of transfer of property*

Save where sovereignty, having been terminated irregularly, has been restored and is deemed to be retroactive to the date of its termination, or where the date of transfer is, by treaty or otherwise, made dependent upon the fulfilment of a suspensive condition or simply upon the lapse of a fixed period of time, the date of transfer of public property shall be the date on which the change of sovereignty occurs *de jure*, through the ratification of devolution agreements, or is *effectively* carried out in cases where (a) no agreement exists or (b) reference is made in an agreement to the said effective date.

##### *Article 4. Limitations by treaty on the transfer of public property*

Subject to the application of general international law and of the law of treaties for the purposes of the interpretation or even the invalidation of an agreement regulating a case of State succession, any limitation imposed by treaty on the principle, hereinafter enunciated, of the general and gratuitous transfer of public property shall be interpreted strictly.

#### II. DEFINITION AND DETERMINATION OF PUBLIC PROPERTY

##### *Article 5.<sup>2</sup> Definition and determination of public property*

1. For the purposes of these articles, "public property" means all property, whether tangible or intangible, and rights and interests therein, belonging to the State, a territorial authority thereof or a public body.

2. Save in the event of serious conflict with the public policy of the successor State, the determination of what constitutes public property shall be made by reference to the municipal law which governed the territory affected by the change of sovereignty.

##### *Article 5 bis<sup>3</sup> (Variant to article 5)*

For the purposes of these articles, "public property" means all property, rights and interests which, on the date of the change of sovereignty and in accordance with the law of the predecessor State, were not under private ownership in the territory transferred by that State.

#### III. GENERAL PRINCIPLE OF THE TRANSFER OF ALL PUBLIC PROPERTY

##### *Article 6.<sup>4</sup> Property appertaining to sovereignty*

1. Property appertaining to sovereignty over the territory shall devolve, automatically and without compensation, to the successor State.

2. Property of the territory itself shall pass within the juridical order of the successor State.

#### IV. INTANGIBLE PROPERTY AND RIGHTS

##### *Article 7. Currency and the privilege of issue*

1. The privilege of issue shall belong to the new sovereignty throughout the territory transferred.

2. Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds which are proper to the territory transferred shall pass to the successor State.

3. The apportionment of monetary reserves, in cases where there is more than one successor or in cases of dismemberment, shall be determined by treaty, regard being had in particular to the percentage of currency in circulation in that territory.

##### *Article 8. Treasury and public funds*

1. Public funds, liquid or invested, which are proper to the territory transferred shall pass to the successor State.

2. Upon closure of the public accounts relating to Treasury operations, the successor State shall receive the assets of the Treasury and shall assume responsibility for costs relating thereto and for budgetary and Treasury deficits. It shall also assume the liabilities on such terms and in accordance with such rules as apply to succession to the public debt.

<sup>1</sup> Yearbook of the International Law Commission, 1970, vol. II, p. 131, document A/CN.4/226.

<sup>2</sup> Formerly article 1 (see third report).

<sup>3</sup> Formerly variant to article 1 (see third report).

<sup>4</sup> Formerly article 2 (see third report).

**Article 9. Public debt-claims**

1. Irrespective of the type of succession, public debt-claims which are proper to the territory affected by the change of sovereignty shall remain in the patrimony of that territory.

2. The successor State shall, when the territorial change is effected, become the beneficiary of the public debts of all kinds receivable by the predecessor State by virtue of its sovereignty or its activity in the territory transferred.

**Article 10. Rights in respect of the authority to grant concessions**

Subject to the natural authority of the new sovereign to modify the pre-existing concessionary régime, and subject to such treatment as the successor State may intend to accord to concessions granted previously, that State shall be subrogated to the property rights which belonged to the predecessor State in its capacity as the conceding authority in respect of natural resources in the territory transferred and generally in respect of all public property covered by concessions.

**V. PROPERTY OF THE STATE IN PUBLIC ENTERPRISES OR PUBLIC CORPORATIONS****Article 11. Public enterprises, establishments and corporations**

1. Public enterprises, establishments and corporations which belong entirely to the territory transferred shall not be affected *ipso jure* by the mere fact of the change of sovereignty.

2. Where, as a result of the territorial change, such public property is situated in parts of the territory falling within the jurisdiction of two or more different States, the said property shall be apportioned equitably between the said parts, due regard being had to the viability of the latter and to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset.

3. The successor State shall be automatically subrogated to the rights, and to the costs and obligations pertaining thereto, which the predecessor State possesses in public establishments, enterprises and corporations situated in the territory transferred.

4. Where there are two or more successor States, the said rights of the predecessor State shall be apportioned equitably between them in accordance with the criteria of geography, origin, viability and offset indicated in paragraph 2 above.

**Article 12. Provincial and municipal property**

1. The change of sovereignty shall leave intact the patrimonial property, rights and interests of the provinces and municipalities transferred, which shall be incorporated, in the same manner as the said provinces and municipalities themselves, in the juridical order of the successor State.

2. Where a change of sovereignty affecting a territory has the effect of dividing a province or a municipality by attaching its several parts to two or more successor States, the property, rights and interests of the territorial authority shall be apportioned equitably between the said parts, due regard being had to the viability of the latter and to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset.

3. The share of the predecessor State in the property, rights and interests of a province or a municipality shall pass *ipso jure* to the successor State.

4. Where there are two or more successor States, the said share of the predecessor State shall be apportioned equitably between them in accordance with the criteria of equity, location, origin, viability and offset indicated in article 11, paragraph 2.

**VI. TREATMENT OF FOUNDATIONS****Article 13. Treatment of foundations**

In so far as the public policy of the successor State permits, the legal status of the property of religious, charitable or cultural foundations shall not be affected by the change of sovereignty.

**VII. ARCHIVES AND PUBLIC LIBRARIES****Article 14.<sup>5</sup> Archives and public libraries**

1. Archives and public documents of every kind relating directly or belonging to the territory affected by the change of sovereignty, and public libraries of that territory, shall, wherever they may be situated, be transferred to the successor State.

2. The successor State shall not refuse to hand over copies of such items to the predecessor State or to any third State concerned, upon the request and at the expense of the latter State, save where they affect the security of sovereignty of the successor State.

**VIII. PROPERTY SITUATED OUTSIDE THE TERRITORY****Article 15.<sup>6</sup> Property situated outside the territory**

1. Subject to the application of the rules relating to recognition, public property of the ceded territory itself which is situated outside that territory shall pass within the juridical order of the successor State.

2. The ownership of such property shall devolve to the successor State in cases of total absorption or decolonization.

**Part Two****Draft articles with commentary**

2. Some of the draft articles the text of which is reproduced in part one of the present report have already been the subject of commentaries, to be found in the third report by the Special Rapporteur.<sup>7</sup> Apart from a few additional observations as the occasion arises, the Special Rapporteur would request the members of the International Law Commission to refer primarily to his third report. The task now in hand is to make a presentation of the other draft articles.

3. In a number of respects, draft articles 1, 2, 3 and 4 ("Preliminary provisions") go beyond the strict confines of succession to public property. They touch on the entire question of State succession and thus invite, in particular, comment and embellishment by Sir Humphrey Waldock, Special Rapporteur for succession of States in respect of treaties.

<sup>5</sup> Formerly article 7 (see third report).

<sup>6</sup> Formerly article 8 (see third report).

<sup>7</sup> *Yearbook of the International Law Commission, 1970*, vol. II, p. 131, document A/CN.4/226.

## I. PRELIMINARY PROVISIONS

### *Article 1. Irregular acquisition of territory*

1. Territorial changes which occur by force or through a violation of international law or of the Charter of the United Nations shall be without legal effect.

2. The State which commits an act of conquest or annexation shall not be deemed to be a successor State and, in particular, shall not acquire possession of the property of the predecessor State.

#### COMMENTARY

(1) The following will be discussed in turn below: (a) old forms of acquisition of territory; (b) law and practice under the League of Nations; (c) territorial changes and changes of sovereignty by force, in violation of the Charter of the United Nations and of the right of self-determination.

#### A. *Old, outdated or even prohibited forms of acquisition of territory*

(2) It is clear that some old forms of acquisition of territory are, if not prohibited, at least outdated in view of the evolution of international law.

(3) Even today, it is argued, there are still some lawful forms of acquisition of territory. The discovery and the effective and permanent occupation of territories which are without a ruler are still given space in even the most recent manuals and treaties on international law, having until quite recently provided grist for the decisions of international judicial bodies. The requirement that occupation should be effective and should be notified are still discussed on the basis of the General Act of Berlin (1885), despite the fact that this ancient monument of European diplomacy was binding only on the contracting parties, applied only to Africa, which today is almost entirely independent, and had already been partially abrogated by the Treaty of Saint-Germain-en-Laye of 1919, which relegated the notification system to the shadows. The notion of effectiveness was also for long a subject of dispute in international judicial bodies. All this belongs somewhat to the past, however, and the discussions are of only retrospective interest, since there is little likelihood of their being applied in practice in the world of today. To be more precise, the only present case in which recourse to a theory and form of acquisition of territory would not be nugatory—namely, the Arctic (which in any event is a sea and not a territory) and the Antarctic—shows how inadequate are these old notions, which were replaced by the theory of sectors and quadrants, and in particular by the principle of regulation by treaty.<sup>8</sup>

(4) Most writers regard cession as a form of acquisition of territory that is still valid in international law. Although it usually occurs by treaty, cession is also becoming very dated. Today, its validity is subject to a

number of considerations which, it is generally agreed, render unlawful not only forced cessions of territory but also those which occur without consultation of the population, without the granting of a choice or option as regards nationality, without a guarantee of certain freedoms, and—most of all—in violation of the modern right of self-determination.

(5) This brings us back to the question of forced annexation and conquest. The evolution of international law in this area has been considerable. The judgement of the Permanent Court of International Justice sanctioning conquest, provided that there was a war,<sup>9</sup> has become dated and somewhat fossilized since the international community began progressively outlawing war. Since the end of the nineteenth century, the various Pan-American Conferences and the charters of the States of the New World have, with increasing force and solemnity<sup>10</sup> and with a faith worthy of pioneers breaking new ground for general international law, declared forced cessions of territories invalid.

#### B. *Law and practice under the League of Nations*

(6) The League of Nations, although somewhat timid, if not in its Covenant at least in the implementation of it, attempted to banish war and, as a consequence, forced territorial changes. The League did not lack either encouragements or, it must be admitted, disappointments.

(7) The Kellogg-Briand Pact, signed in Paris on 27 August 1928, proclaimed the renunciation of war as an instrument of national policy, although it did not provide for sanctions. The General Act for the pacific settlement of international disputes adopted by the League of Nations on 26 September 1928<sup>11</sup> made available to States voluntary procedures for the pacific settlement of international disputes. The doctrine of Secretary of State Stimson of the United States, as expressed on 7 January 1932 in a note to Japan, endorsed the banishment of war and added as a deterrent that the United States did not “intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928 [the Kellogg-Briand Pact]”.<sup>12</sup>

<sup>9</sup> “Conquest only operates as a cause of loss of sovereignty when there is war between two States and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious State” (*P.C.I.J.*, Series A/B, No. 53, p. 47).

<sup>10</sup> Some noteworthy stages in this process were: the First International Conference of American States (Washington, 1889-1890); Fifth International Conference of American States (Santiago, 1923); Anti-war Treaty of Non-aggression and Conciliation (Rio de Janeiro, 1933), known as the Saavedra-Lamas Pact; the Charter of Bogotá (30 April 1948), article 17 of which provides that “no territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized \*”, while article 5 (e) sums up the entire philosophy by laying down that “victory does not give rights \*” (United Nations, *Treaty Series*, vol. 119, pp. 56 and 52).

<sup>11</sup> The General Act was later brought into line with the provisions of the United Nations Charter by General Assembly resolution 268 A (III), dated 28 April 1949.

<sup>12</sup> *American Journal of International Law*, Washington D.C., vol. 26, No. 2 (April 1932), p. 342.

<sup>8</sup> See the Antarctic Treaty (1 December 1959) establishing a legal régime for the polar area (United Nations, *Treaty Series*, vol. 402, p. 71).

(8) What this implied was the refusal to recognize any State or any territorial change created by an act of irregular force. Such an act occurred in the *Manchukuo* case. The Japanese attack of 18 September 1931 "to protect the safety and property of Japanese nationals established in Manchuria", the proclamation of 1 March 1932 declaring Manchuria's independence from China through the creation of the State of Manchukuo under a Japanese quasi-protectorate, and the Japanese-Manchurian raids on certain Chinese provinces early in 1933, caused the League of Nations to endorse the Stimson doctrine and, by an Assembly resolution of 24 February 1933, refuse to recognize Manchukuo and call for the withdrawal of Japanese troops. While the Council of the League did not go so far as to apply to Japan article 16 of the Covenant concerning sanctions against an aggressor, it asked States not to recognize the new State and not to accept as valid the passports, postage stamps and currency issued by Manchukuo.

(9) At the end of the Second World War the termination of Manchukuo's existence *had retroactive legal effect*, and the detachment of the Chinese province and transfers of property were considered null and void. The territory was regarded as never having passed out of China's sphere of jurisdiction.

(10) Similarly, after Italy had embarked on its expedition against the Empire of *Ethiopia* on 3 October 1935 (which it annexed by a Mussolinian decree of 9 May 1936) or occupied Albania on 7 and 8 April 1938 with the declared intention of annexing it, the relevant instruments signed at the end of the Second World War laid down that those irregular acts could have no legal existence and no legal consequences.

(11) The annexation of Ethiopia was not, of course, recognized—at least for some time—by a number of Powers, which drew the appropriate legal inferences from the fact that it had not been recognized and could not be relied on before the courts. For instance, Emperor Haile Selassie claimed from a cable and wireless company sums which it owed to him. The company having pleaded in defence that the debt owed to the Emperor in his sovereign capacity had passed into the patrimony of the Italian State which had succeeded the Ethiopian sovereign in respect of all public property, an English trial court ruled on 27 July 1938 that the United Kingdom's *de facto* recognition of the annexation on 21 December 1936 was not sufficient to effect the transfer to Italy of the property situated in England. However, as a result of the *de jure* recognition finally accorded by the United Kingdom on 16 November 1938, the English Court of Appeal took the view that the title to the property situated in England had passed to Italy.<sup>13</sup>

(12) It will be recalled that the same problem arose in the same terms before the French courts for Emperor Haile Selassie, who in his sovereign capacity was the holder of 8,000 shares of the Franco-Ethiopian Djibouti-Addis Ababa Railway Company.<sup>14</sup>

(13) However, after Ethiopia had recovered its sovereignty through the Treaty of Peace with Italy, the Ethiopian courts and international judicial bodies placed the irregular annexation of Ethiopia as it were in parentheses. For instance, the Franco-Italian Conciliation Commission ruled that Ethiopian sovereignty was retroactive to 3 October 1935, the date on which Italian troops had entered Ethiopia.<sup>15</sup>

(14) Similarly, the restoration of *Poland* after the First World War was the occasion for official policy statements to the effect that the various dismemberments suffered by Poland were entirely without legal effect. Poland took the view that it had recovered its sovereignty with retroactive effect.<sup>16</sup>

(15) This position is supported and expanded on by writers on the subjects of "*jus postliminii*" and "reversion to sovereignty".<sup>17</sup>

(16) The internal logic of the Nazi adventure, which began with the "question of Germans abroad" and the quest for living space ("*Lebensraum*"), required the policy of armed annexation. The *Anschluss* of Austria on 13 March 1938, the annexation on 30 September 1938 of the Sudetenland at the expense of Czechoslovakia, the permission given by the Third Reich to Hungary on 13 March 1938 to seize the Sub-Carpathian Ukraine, the occupation of Prague on 15 March 1939 and the proclamation of the German protectorate over Bohemia and Moravia, the occupation of the Territory of Memel on 22 March 1939, and the entire turmoil in the Danubian and Balkan regions of Europe—all these were carried out in an irregular manner, before being effaced by the allied victory in 1945. In order to drive home the principles, the Declaration of Berlin of 5 June 1945<sup>18</sup> proclaimed that the occupation of German territory and the fact that the Third Reich Government no longer existed did not effect the annexation of Germany by the Allies.

<sup>13</sup> Decision No. 201 adopted by the Commission on 16 March 1956 in case concerning the Franco-Ethiopian railway (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 648). For more details on this case and for other similar cases, see below, commentary to article 3, paras. 18 *et seq.*

<sup>14</sup> For further details, see *Yearbook of the International Law Commission*, 1970, vol. II, p. 149, document A/CN.4/226, footnote 99; and below, commentary to article 3, paras. 18-22.

<sup>15</sup> Cf. the writings of Ch. Alexandrowicz on legal history, and in particular the article "New and original states: The issue of reversion to sovereignty", *International Affairs*, London, vol. 45, No. 3 (July 1969), pp. 465-480; see also the interesting expositions of J. Brownlie in his *Principles of Public International Law* (Oxford, Oxford University Press, 1966), p. 152; S. C. Jain, "Reversion to sovereignty: An inquiry", *The Indian Journal of International Law*, New Delhi, vol. 9, No. 4 (October 1969), p. 525; A. I. S. Baddour: "Parallels between postliminium and state succession, with special reference to the cases of Algeria and Ethiopia", *Al-Qanoṭn-wal-Iqtisād*, Cairo, No. 2, 1963, pp. 131-147; M. Bedjaoui, *La révolution algérienne et le droit* (Brussels, International Association of Democratic Lawyers, 1961), *passim*.

Judge Moreno Quintana felt obliged to state in his dissenting opinion in the case concerning right of passage over Indian territory that "India, as the territorial successor, was not acquiring the territory for the first time, but was recovering an independence lost long since" (*I.C.J. Reports* 1960, p. 95).

<sup>18</sup> Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany. United Nations, *Treaty Series*, vol. 68, p. 189.

<sup>13</sup> *Yearbook of the International Law Commission*, 1970, vol. II, p. 167, document A/CN.4/226, Part Two, commentary to article 8, paras. 30-31.

<sup>14</sup> *Ibid.*, para. 32.

*C. Territorial changes and changes of sovereignty by force, in violation of the Charter of the United Nations and of the right of self-determination*

(17) Nowadays, United Nations law is stricter in prohibiting the use of force. It is becoming obligatory to seek a peaceful settlement of disputes. Reference even to the Preamble of the Charter, which calls on the peoples of the United Nations to "live together in peace", "to unite [their] strength to maintain [...] peace" and "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used", would seem to indicate that conquest cannot be recognized as having any validity. Above all, however, according to Article 1, the first purpose of the United Nations is to

maintain [...] peace [...] and to that end: to take [...] collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means [...] adjustment or settlement of [...] disputes or situations which might lead to a breach of the peace.

Preoccupied by this fundamental problem of the outlawing of war, the authors of the Charter did not shrink from repetition and thus, in paragraph 2 of the same article, declared themselves ready "to take other appropriate measures to strengthen universal peace". Similarly, under Article 2, paragraph 4, Members are obliged to

refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

(18) As a result of the endeavours of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, the General Assembly adopted, on 24 October 1970, a Declaration on these principles, the text of which is annexed to its resolution 2625 (XXV). The first principle in the Declaration bears the following title:

The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity of political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

The tenth paragraph of this principle provides that:

*The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.\* Nothing in the foregoing shall be construed as affecting:*

(a) Provisions of the Charter or any international agreement prior to the Charter régime and valid under international law; or

(b) The powers of the Security Council under the Charter.

(19) Despite commendable efforts and encouraging progress, the *Special Committee on the Question of Defining Aggression* has, of course, not yet completed its work.<sup>19</sup> However, the result of its endeavours can only be to strengthen the principles of the prohibition of the use

of armed force, the inviolability of a State's territorial integrity and the non-recognition of annexation. Aggression is a crime against the peace.

(20) The draft proposal made by the USSR in the Special Committee<sup>20</sup> contain the following provision (para. 4): "No territorial gains or special advantages resulting from armed aggression shall be recognized". Similarly, paragraph 8 of the draft proposal submitted by thirteen Powers (Colombia, Cyprus, Ecuador, Ghana, Guyana, Haiti, Iran, Madagascar, Mexico, Spain, Uganda, Uruguay and Yugoslavia)<sup>21</sup> reads:

The territory of a State is inviolable and may not be the object, even temporarily, of military occupation or of other measures of force taken by another State on any grounds whatever, and that such territorial acquisitions obtained by force shall not be recognized.

The six-Power draft proposal (Australia, Canada, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland and the United States of America)<sup>22</sup> does not contain any similar provision on this particular point, simply on the ground that occupation and annexation are *consequences* of aggression and should not, therefore, be dealt with in a *definition* of aggression. However, the other Powers which submitted proposals take the view that military occupation and annexation are in themselves intrinsically acts of aggression.

(21) Writers on the subject agree that territorial changes which occur by force should not be recognized. The State which commits an act of conquest not only does not acquire possession of the property of the State against which the act is directed but, in a broader sense, cannot be deemed to be a successor State.<sup>23</sup>

(22) Nowadays, and to an increasing extent, not only is war prohibited but any attendant territorial consequences benefiting the victor—*whether or not an aggressor*—are illegal. The forcible annexation of a territory following an act of aggression is invalid in international law; however, any acquisition of territory by annexation, even if it is the consequence of a victorious war by a State that was not originally the aggressor, must also be regarded as unlawful. In other words, quite apart from any question of the prohibition of war, the territorial annexation, even when it is the result of an act of self-defence, is regarded as unlawful in contemporary international law. Annexation is no longer a form of acquisition of territory to which the principles of State succession should apply.

(23) In the case of *Rhodesia*, the change of sovereignty took place in violation of the Charter of the United

<sup>19</sup> *Ibid.*, Twenty-fifth Session, Supplement No. 19 (A/8019), annex I, sect. A.

<sup>20</sup> *Ibid.*, sect. B.

<sup>21</sup> *Ibid.*, sect. C.

<sup>22</sup> Cf. in particular P. Guggenheim, *Traité de droit international public* (Geneva, Librairie de l'Université, Georg et Cie S.A., 1953), t. I, p. 466, foot-note 1; O. Debbasch, *L'occupation militaire: Pouvoirs reconnus aux forces armées hors de leur territoire national* (Institut des hautes études internationales de l'université de Paris, Bibliothèque de droit international, t. XVI) [Paris, Librairie générale de droit et de jurisprudence, 1962], pp. 17 *et seq.*, and *passim* (but note the approach adopted by the author, who speaks of military occupation in terms not only of an armed presence in enemy territory but also of the stationing of troops in friendly or allied territory).

<sup>19</sup> For the most recent proceedings of the Committee, see *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 19 (A/8419)*, and in particular the working paper submitted by Mexico (*Ibid.*, annex IV) and the report of the Working Group (*ibid.*, annex III).



Nations and of the right of self-determination, as a result of action by the European minority and the unilateral proclamation of Rhodesian "independence". On 12 November 1965, by resolution 216 (1965), the Security Council condemned the declaration of independence and called upon all States *not to recognize the régime in Southern Rhodesia*. Other Council resolutions recommended an embargo on petroleum products and military equipment, advocated the quelling of the white minority's rebellion, the severing of economic ties and the genuine implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the General Assembly in 1960 [resolution 1514 (XV)], or decided that mandatory economic sanctions were to be applied.<sup>24</sup> So far, the measures taken by the Security Council under Article 41—and Chapter VII generally—of the Charter have been ineffective. What is certain, however, and what concerns us here, is that the white minority's declaration of independence runs counter to the right of peoples to self-determination and the principle of decolonization. The consequences of the change of sovereignty effected in violation of the Charter should not be legally enforceable. In particular, the Rhodesian Government should not be regarded as a successor. The Special Rapporteur does not know, however, whether control of Rhodesian public property, or at least of such property situated abroad and especially in the United Kingdom, has in fact passed to the Rhodesian Government.

(24) In many respects, *the secession of Katanga* and its establishment as a State, which was not recognized by the international community and was ephemeral, resembles the situation with regard to the State of Manchukuo. The attempt to bring about change and secession in order to deprive the Congo, the sole successor State to Belgium, of full possession of all its property and mineral resources was short-lived.

(25) *The attempted annexation of Namibia by the Republic of South Africa* is a violation of the Mandate, of the Charter and of the right of peoples to self-determination. The Union of South Africa did not and could not succeed Germany in Namibia when Germany renounced all its rights to what was known until 1968 as South West Africa. Under Article 22 of the Covenant of the League of Nations, the Union of South Africa assumed a Mandate over the Territory on behalf of the international community. As was stated by the International Court of Justice,<sup>25</sup> one of the "*principles [ . . . ] of paramount importance* \*" on which the Mandate was based was "*the principle of non-annexation* \*". The Court made it clear that

The terms of this Mandate, as well as the provisions of Article 22 of the Covenant and the principles embodied therein, show that the creation of this new international institution *did not involve any cession of territory or transfer of sovereignty* \* to the Union of South Africa. The Union Government was to exercise an international function of administration on behalf of the League. . . .<sup>26</sup>

<sup>24</sup> See in particular resolutions 232 (1966) of 16 December 1966, 253 (1968) of 29 May 1968, and 277 (1970) of 18 March 1970.

<sup>25</sup> Advisory opinion of 11 July 1950: "International Status of South West Africa", *I.C.J. Reports* 1950, p. 131.

<sup>26</sup> *Ibid.*, p. 132.

(26) Similarly, in a written statement submitted to the Court in 1970 pursuant to the request for an advisory opinion contained in Security Council resolution 284 (1970), adopted on 29 July 1970, the Secretary-General of the United Nations noted that

By assuming the responsibilities of the Mandatory Power, South Africa thereby accepted the premises on which the Mandate was founded and was thus precluded from claiming, at any future date, *any territorial or sovereign rights* \* in respect of South West Africa inconsistent with the Mandate, or arising from events anteceding its creation.<sup>27</sup>

(27) The Court had also stated that the nature of the Mandate was such that the international responsibilities assumed by South Africa were not dependent on the existence of the League of Nations and that the United Nations was justified in taking over the functions of supervision and control previously exercised by the League of Nations in respect of the Mandatory Power.<sup>28</sup> However, after many vicissitudes which need not be mentioned here,<sup>29</sup> the Republic of South Africa determined to shake off United Nations control of its actions and, to all intents and purposes, annexed the territory of Namibia. Yet the Court had clearly ruled that the consent of the United Nations was needed for any modification of the international status of South West Africa.<sup>30</sup>

(28) The General Assembly of the United Nations had likewise always regarded the incorporation or annexation of Namibia as a violation of South Africa's international obligations.<sup>31</sup> It had in vain requested the Mandatory Power not to create "territories" on an ethnic basis there

<sup>27</sup> *I.C.J.*, Pleadings, Oral Arguments, Documents, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, vol. I, *Request for Advisory Opinion, Documents, Written Statements*, The Hague, 1971 (Sales No. 356), pp. 211-212, para. 20.

<sup>28</sup> *I.C.J. Reports* 1950, p. 136.

<sup>29</sup> The whole case can be followed in the documents published by the Court (advisory opinions, judgements, memoranda and pleas): (1) International Status of South West Africa, advisory opinion of 11 July 1950, *I.C.J. Reports* 1950, pp. 128-219, and relevant memoranda and pleas; (2) Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, advisory opinion of 7 June 1955, *I.C.J. Reports* 1955, pp. 67-123, and relevant memoranda and pleas; (3) Admissibility of Hearings of Petitioners by the Committee on South West Africa, advisory opinion of 1 June 1956, *I.C.J. Reports* 1956, pp. 23-71, and relevant memoranda and pleas; (4) South West Africa Cases, Preliminary Objections, judgement of 21 December 1962, *I.C.J. Reports* 1962, pp. 319-662, and relevant memoranda and pleas; (5) South West Africa Cases, judgement of 18 July 1966, *I.C.J. Reports* 1966, pp. 6-505, and relevant memoranda and pleas.

<sup>30</sup> "*The Union of South Africa acting alone has not the competence to modify the international status of the Territory of South-West Africa* \* [ . . . ] the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations" (advisory opinion of 11 July 1950, *I.C.J. Reports* 1950, p. 144).

<sup>31</sup> Proposals for the incorporation of Namibia made by the Union of South Africa in a letter of 17 October 1946 from its legation at Washington to the Secretary-General of the United Nations (*Official Records of the General Assembly, Second part of First Session, Fourth Committee*, part one, annex 13); statement made on 4 November 1946 by the Prime Minister of South Africa to the Fourth Committee of the General Assembly (*ibid.*, annex 13a); General Assembly resolution 65 (I) of 14 December 1946 declining to accede to the incorporation of the Territory; cf. also resolution 2625 (XXV).

which would have led to the partitioning and gradual annexation of Namibia; that explained South Africa's policy of foreign immigration, which the General Assembly had condemned. Finally, the Assembly was forced to decide to terminate South Africa's Mandate [resolution 2145 (XXI) of 27 October 1966]. The Security Council (in the preambular paragraphs of its resolutions 245 (1968) and 246 (1968), but primarily and more explicitly in its resolution 264 (1969) of 20 March 1969) confirmed the resolution terminating the Mandate and ordered the recalcitrant Mandatory Power not to tamper with the integrity of Namibia.

(29) Having allowed the former South African administration time to withdraw from Namibia by 4 October 1969 [resolution 269 (1969) of 12 August 1969], the Council, noting South Africa's failure to comply with its instructions, as it had refused to comply with the very many earlier United Nations resolutions, declared South Africa's presence illegal, and called on States to break off economic relations with the former Mandatory Power [resolution 276 (1970) of 30 January 1970]. Finally, it decided [resolution 284 (1970) of 29 July 1970] to request the International Court of Justice for an advisory opinion on the question "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?" The Court's opinion is expected very shortly.<sup>32</sup>

(30) One of the seven fundamental principles adopted by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among

<sup>32</sup> In the opinion of the Special Rapporteur, the Council, in requesting the Court's opinion, has not put to the Court the question whether or not the United Nations was competent to declare the Mandate terminated or asked it to state what are the legal nature and the force of Council resolution 276 (1970). The question that was put is quite different. The Court is asked merely to determine, for all States and for the international community, "the legal consequences [...] of the continued presence of South Africa" despite the Council's injunction in its resolution 276—in other words, *taking as the basic datum and starting-point that injunction and the illegality which it declared*. The Court is also requested—and this is a different but complementary and necessary task—to indicate to States and to the international community *legal ways and means* whereby those consequences may be given full effect. That should be the main purpose of the Court, which must determine the *so to speak operational*, legal consequences available whereby States may put an end to South Africa's continued presence. In other words, the Council's motive in first establishing South Africa's disqualification and the resulting and as yet unenforced legal consequences and then requesting an advisory opinion is to ensure that the legal situation which it, in conjunction with the Assembly, has created (and which the Court is not asked to inquire into) should no longer remain at variance with the factual situation. The Court is therefore merely requested, first, to determine the legal consequences of the situation, and, secondly, to indicate legal ways and means available under the Charter and under general international law whereby those consequences may no longer remain unenforced.

To the extent that it detracts from the direct responsibility assumed by the United Nations in Namibia until such time as the latter attains independence and that it impedes the exercise of this responsibility, South Africa's illegal presence results in a conflict *comparable to an act of aggression* committed by South Africa in a territory that is now within the exclusive jurisdiction of the United Nations.

Where the question of sanctions is concerned, this case is in many respects similar to that which confronted the League of Nations when Manchukuo was created.

States is the principle of equal rights and self-determination of peoples. As formulated by the Committee, this principle embodies the idea of the otherness of a colonial territory. Some important conclusions may be drawn from this.<sup>33</sup>

(31) On 24 October 1970, the General Assembly incorporated the principle in question, without change, in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations [resolution 2625 (XXV), annex]. The sixth paragraph of the principle indicates that there can be no question of annexing a territory like that of Namibia which has

a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter. . .

This is of prime importance both in itself and in relation to our concern about the draft article now under discussion. It is the mature expression of the right of self-determination and, even more, of a prior and imprescriptible right already irreversibly given substance by "otherness" (as Simone de Beauvoir would say)—by the unchangeably "other" and distinct nature of the territory in relation to that of the mandatory (or colonial) Power. This absolutely prohibits any annexation, i.e., any incorporation of one part into another from which it was and must remain distinct. The right of self-determination does not arise only in terms of the future, in connexion with the attainment of future independence; it also finds expression, as a prior right, in terms of the present, with a view to keeping a territory *distinct* from the territory administering it.

(32) It follows from this general analysis that the Republic of South Africa cannot be deemed to be a successor State in Namibia. Until the termination of the Mandate in 1966 it was a trustee for the international community. Now it is nothing more than a *de facto* administration whose presence is irregular. One of the essential elements of the right of self-determination is the principle of the permanent sovereignty of nations over their natural wealth and resources.<sup>34</sup> The Republic of South Africa's acquisition of the public property and natural wealth of Namibia is illegal and cannot find its justification in the principles of State succession.

(33) The case of *Palestine* is similar in some respects to those of Namibia and Rhodesia. In Palestine, as in

<sup>33</sup> One conclusion is that the long-vaunted principle that a colony forms an integral and inseparable part of the metropolitan territory is now demolished. It follows that there is less of a legal foundation than ever for any claim by a metropolitan country to exclusive jurisdiction in internal affairs, on the basis of Article 2, paragraph 7 of the Charter, as a ground for denying the competence of the United Nations in colonial matters. Moreover, where State succession is concerned, a proclaimed independence can no longer be analysed in terms of the secession or partial cession of a territory, since both of these presuppose a territorial oneness of the colony and the metropolitan country, and there is no longer any legal basis for this.

<sup>34</sup> General Assembly resolutions 1314 (XIII), 1515 (XV), 1803 (XVII), 2158 (XXI), 2200 A (XXI) and 2386 (XXIII).

Namibia, there was a Mandate which was entrusted to an administering Power and which strayed from its objective, namely, independence through the implementation of the right of peoples to self-determination, or, in other words, through "the right of the majority within a generally accepted political unit to the exercise of power . . .".<sup>35</sup> In Palestine, as in Rhodesia, a minority of the population seized power on the eve of the withdrawal of the administering Power.

(34) This commentary on draft article 1 will not go into the many legal questions raised by the Palestine affair.<sup>36</sup> Factually, what it consisted of was repeated annexations and repeated condemnations of the perpetrators by the Security Council. Thus, *after* the various Council resolutions (particularly resolution 1169, of 29 December 1948) calling upon Israeli troops advancing on the Gulf of Aqaba to evacuate occupied territories, and *after* the Egyptian-Israeli General Armistice Agreement signed at Rhodes on 24 February 1949, a cablegram dated 22 March 1949 from the United Nations Mediator to the President of the Security Council reported that Umm-Reshresh, known as Port Elat, on the Gulf of Aqaba, had been annexed by force. This rounded off another annexation, namely, that of the Negev. During the same period, from May 1948 to the signing of the Armistices, Israel went beyond what could have been allocated to it under the United Nations plan of partition. Part of Jerusalem was in fact annexed after the signing of the truce agreement of 30 November 1948 followed by the Armistice Agreement of 3 April 1949; by a decision of 22 December 1949, the Knesset made it the capital of Israel. The part of Jerusalem which had remained Arab was annexed after the June 1967 war by a Knesset decision of 27 June 1967. Permanent settlements are being established on the Golan Heights, and Sinai's natural resources, especially petroleum, are being exploited and concessions are being granted by an authority which acts as though it had sovereignty over the territory.

(35) Evidence of intent could be added to this factual evidence. To judge by certain official statements, Sharm el Sheikh, which has been occupied since 1967, will not be returned, nor is the West Bank of the Jordan ready to emerge from occupation-annexation. A map on the pediment of the Knesset shows Eretz Israel as extending from the Nile to the Euphrates.

(36) These successive aggrandizements add one more problem to the case of Palestine and raise in a serious form the question of the forcible annexation of territory, which is now prohibited more strongly than ever under international law. According to sound legal doctrine,

military occupation following a war is essentially precarious in nature and can under no circumstances affect a State's sovereignty over that part of its territory which is occupied by foreign forces.

## *Article 2. Transfer of the territory and of public property as they exist*

1. The predecessor State may transfer a territory only on the conditions upon which that State itself possesses it.

2. The successor State may not have possession of property of which the predecessor State itself had only precarious or irregular possession.

3. Public property shall be transferred as it exists and with its legal status, in so far as this is compatible with the municipal law of the successor State.

### COMMENTARY

A. *The predecessor State may transfer a territory only on the conditions upon which that State itself possesses it*

(1) Article 2 of the Treaty of Turin of 24 March 1860, under which the King of Sardinia consented to the annexation of Savoy and the arrondissement of Nice (*circondario di Nizza*) to France, read as follows:

It is [. . .] understood that His Majesty the King of Sardinia cannot transfer the neutralized parts of Savoy except on the conditions upon which he himself possesses them, and that it will appertain to His Majesty the Emperor of the French to come to an understanding on this subject both with the Powers represented at the Congress of Vienna and with the Swiss Confederation and to give them the guarantees required by the stipulations referred to in this article.<sup>37</sup>

(2) The Special Rapporteur was somewhat hesitant to submit this draft article to the International Law Commission. In the first place, it touches very extensively on the area entrusted to Sir Humphrey Waldock, Special Rapporteur for succession of States in respect of treaties. The question is to what extent, and under what conditions, the successor State is bound by various treaties which limited or circumscribed the sovereignty of the predecessor, and this is a matter with which Sir Humphrey is particularly concerned. The case cited related to the neutralized parts of Savoy. However, the wording used may give the impression that all restrictions on sovereignty which exist in the territory transferred must be accepted by the successor State, once the changes have taken place.

(3) Under articles 3 and 4 of the Treaty of 16 March 1816 between the King of Sardinia and the Canton of Geneva, the former agreed not to exercise jurisdiction in respect of customs duties within a certain area, known as the Sardinian area. When that area came under French sovereignty in 1860, it was agreed that the "servitude" should be assumed by France as the successor.

(4) However, in fact the problem raised here is not the automatic transmission of treaties of whatever kind, or

<sup>35</sup> This is the definition of self-determination, according to United Nations practice, given by R. Higgins (*The Development of International Law through the Political Organs of the United Nations* (London, Oxford University Press, 1963), p. 104).

<sup>36</sup> One question, for instance, is whether the very establishment of the Mandate was not in itself a violation of the Covenant of the League of Nations (cf. *Colloque de juristes arabes sur la Palestine: La question palestinienne*, Alger, 22-27 July 1967 (Algiers, Les Presses I.M.J., 1968), pp. 72-84). Another question is whether the United Nations, and particularly the General Assembly, was competent to partition Palestine (*ibid.*, pp. 84-104).

<sup>37</sup> G. F. de Martens, ed., *Nouveau Recueil général de traités* (Gottingen, Dieterich, 1860), t. XVI, part II, pp. 539-540.

even the transmission of those which establish various restrictions on sovereignty. *The transmission of such treaties to the successor does not appear to be the result of a peremptory rule of law arising out of the succession of States. It derives its origin and justification in each case from a convention, being the consequence of a special, express agreement concluded between the predecessor State and the successor State.*

(5) The same situation occurred when the German Empire, as the successor to France in Alsace-Lorraine in 1871, had to respect the obligations of the Treaty of Paris of 20 November 1815, which required France to dismantle the fortifications of Huningue and prohibited the construction of fortifications within an area of three leagues around Basel. When subsequently, in 1901, the German Empire planned to fortify Tuttlingen in the Grand Duchy of Baden, the answer given to Switzerland, which had become alarmed, was that the German Empire had undertaken to respect a servitude only with regard to the Basel area, and not Tuttlingen.

(6) The problem arose not long ago in connexion with the survival of the *capitulations régime*. Thus, when on 5 February 1885 Italy occupied Massawa, a territory of the Sublime Porte, alleging that Egypt had abandoned it, and when it imposed various taxes, some Governments, including that of France, invoked

the consular immunities and the privileges traditionally accorded [...] in countries under the capitulations régime to the subjects of European Governments and persons under their protection exempting them from all taxation.

Italy took the view, however, that the capitulations, which applied to the territory of the Ottoman Empire as a whole, were no longer necessary in a country under the administration of a Christian Power.<sup>38</sup>

(7) In other cases, when changes of sovereignty occurred in Cyprus, in Bosnia and in Herzegovina, the *capitulations régime* was terminated by treaty—not, however, by agreement between the predecessor and the successor but as the result of a settlement between the successor sovereign and the States which were formerly the beneficiaries of such régimes. In other words, the capitulations were not, apparently, abolished *ipso jure* by the territorial change but by consent of the beneficiary Governments. In other situations which arose (Tunisia,<sup>39</sup> Bulgaria and Tripoli),

<sup>38</sup> Cf. the diplomatic correspondence quoted by A.-Ch. Kiss: *Répertoire de la pratique française en matière de droit international public* (Paris, C.N.R.S., 1966), t. II, pp. 312-318, and in particular the letter of 3 August 1888 from Mr. René Goblet, Minister for Foreign Affairs of France, to the French Chargé d'Affaires at Rome:

"We do not deny that Capitulations are no longer necessary in a country under the administration of a European Power. [...] If the conduct of the Italian Government in this matter should lead to the outright abolition of the Capitulations and of our pre-existing rights in Massawa, the only course open to us would be to take note of this new procedure and of the thenceforth established principle that the Capitulations automatically cease to exist, without any negotiation and without any agreement with countries where a European administration is established . . ."

(*ibid.*, pp. 315-316; and *Archives diplomatiques*, 1889 (octobre, novembre, décembre), Paris, 2nd series, t. XXXII, p. 109).

<sup>39</sup> Although the protectorate did not, of course, make France a successor State.

the *capitulations régime* was deemed to continue automatically. However, the French Government in particular took the view on one occasion that

The entry into force of the Treaty of Lausanne will have the effect of formalizing Turkey's renunciation of its rights of sovereignty over Palestine and over Syria and Lebanon. Therefore any restrictions to which that sovereignty may have been subject become inoperative in relation to those territories.<sup>40</sup>

(8) Thus, it will be noted that:

(a) The problem posed belongs more to the area of State succession in respect of treaties and its solution lies within the compass of Sir Humphrey Waldock's work;

(b) The problem has been settled in the past both by devolution agreements and by agreements between third States and successor States;

(c) Diplomatic practice in this area has been replete with contradictions and reversals;

(d) The capitulations régime, moreover, is in any event dying out completely<sup>41</sup> and is of no interest today except as a historical and legal curiosity;

(e) Mention should be made here of "the vulnerability of treaty settlements which derogate from the common right of sovereignty", in the words of Professor Charles de Visscher.<sup>42</sup> The limitation of sovereignty thus imposed on some countries really poses the problem in terms of *jus cogens*.

B. *The successor State may not have possession of property of which the predecessor State itself had only precarious or irregular possession*

(9) This proposition calls for the following commentaries:

(a) The principles of State succession do not have the effect of effacing any defects in the title of the predecessor State to property which it transfers to the successor State;

(b) The successor State does not possess more rights than the predecessor State over the property transferred;

(c) *A contrario*, what is transferred is property owned by the State, but *only* by the State. One must bear in mind the distinction between the property owned by public authorities in general (property belonging to provinces, municipalities and other territorial authorities and to public corporations) and State property in the strict sense.

<sup>40</sup> France, *Journal officiel de la République française, Débats parlementaires: Chambre des députés*, Paris, 9 January 1924, 12 legislature, No. 1, p. 4 (meeting of 8 January 1924: reply by the Minister for Foreign Affairs to a written question), quoted by A.-Ch. Kiss, *op. cit.*, p. 318.

<sup>41</sup> The problem of capitulations was taken to the International Court of Justice on at least two occasions. The first case was removed from the Court's list (Case concerning the protection of French nationals and protected persons in Egypt, order of 29 March 1950, *I.C.J. Reports* 1950, p. 59). The capitulations régime in Egypt had been abrogated by the Convention of Montreux of 8 May 1937. The second was the Case concerning rights of nationals of the United States of America in Morocco (judgment of 27 August 1952, *I.C.J. Reports* 1952, p. 176). However, the independence of Morocco removed the last vestiges of the capitulations régime in 1956.

<sup>42</sup> Ch. de Visscher, *Théories et réalités en droit international public*, 4th ed. (Paris, Pédone, 1970), p. 358.

### 1. Defects in title

(10) The Supreme Court of Poland took the view that the Polish Treasury could acquire title to property only if the property in question had belonged to the Russian Treasury in the territories ceded to Russia by Poland after the First World War. The Polish State could not benefit from any past confiscation measures which might have been imposed on Polish nationals. The owner of an estate situated in the part of Poland which was under Russian rule had his property confiscated because he had taken part in the Polish insurrection of 1863. The property was sold by the Russian State in 1874 at a nominal price. The Supreme Court of Poland held that the legislative and executive acts of the Russian Government, including the confiscations of 1863, had no legal basis and were "instances of simple violence".<sup>43</sup> The Polish State applied that principle in a situation where it would itself have been the beneficiary of the confiscation measures. The Court held that the Polish Treasury would be able to claim to have acquired the estate (whether *ipso jure* owing to the recovery of independence by Poland, or by virtue of the Peace Treaty with Russia) only if the estate had belonged to the Russian Treasury. But the property had never ceased to form the property of the person from whom it had been taken by the Russian authorities.<sup>44</sup>

(11) In France, after the Restoration, confiscated property could be recovered if it had not been sold and had remained in the patrimony of the State. The French Act of 5 December 1814 laid down that the confiscated property of French *émigrés* who had left the country during the First Empire could not be considered the property of the Empire. The Empire had had only precarious possession of such property, according to the Act, which laid down that it must be returned. It followed that the Sardinian State, as successor to the French State under treaties which had retroceded Savoy to it, could not be considered to have possession of property of which the French State itself had only precarious possession.<sup>45</sup>

(12) Although the successor State cannot have possession of property that was held irregularly by the predecessor State, it may, of course, regain full ownership of the property in its capacity not as a successor State but as an "original State" if the property was formerly in its patrimony and was confiscated following total or partial annexation of its territory.

### 2. Extent of the rights of the successor State over the property transferred

(13) The successor State does not require more rights than the predecessor State itself had over the property

<sup>43</sup> Kulakowski and others v. Szumkowski (A. D. McNair and H. Lauterpacht, ed., *Annual Digest of Public International Law Cases, 1927-1928* (London, 1931), Case N. 375, p. 551).

<sup>44</sup> Digest by the Secretariat of the decision of the Supreme Court of Poland in *Uszycka v. Polish State Treasury* (1930) [*Yearbook of the International Law Commission, 1963*, vol. II, p. 134, document A/CN.4/157, para. 350]. Cf. also *Lempicki and Morawska v. Polish Treasury* "[...] there has come about such a change in public and private law as to cause the revival of the rights and titles of the rightful owners of confiscated property" (*ibid.*, para. 352).

<sup>45</sup> France, Cour de cassation, Chambre des requêtes, Judgment of 13 July 1897, *De Chambost v. Royer-Collard*, *Journal de droit international privé*, Paris, t. 27, 1900, p. 780, summary.

transferred. This is a statement of the obvious, since no one, including a predecessor State, can "give more than he has". It is no less obvious, however, that public property, once it has been transferred, falls not only within the patrimony but also within the juridical order of the successor State; in other words, the latter henceforth has full disposal of it and has the power—subject to the observations in paragraphs 16 and 17 below—to maintain or to modify either its legal status or what constitutes public property.

### 3. State property and property owned by public authorities

(14) While the State is the public authority *par excellence*, it is not the only one. Public authority also finds expression at the provincial, district and municipal levels and through secondary territorial authorities generally, as well as through "public corporations", to quote the term used by Mrs. Suzanne Bastid to describe a variety of establishments or enterprises operated in the general interest. Although, according to the definition given in article 5 below, public property means all the property belonging to the State, to territorial authorities or to public bodies, it is only the share of public property which belongs to the State that is subject to general and gratuitous transfer to the successor State. The ownership of other public property is not affected by the change of sovereignty and it remains within the patrimony of the territorial authorities or public corporations, even though it too is property owned by public authority. What is transferable, therefore, is State property *stricto sensu*, and not *all* public property including everything owned by public authority in whatever form it finds expression. Such State property may be separate from the rest and be clearly identifiable, or it may be intermingled with other property belonging to public authority or even to individuals.

(15) Accordingly, the Special Rapporteur might long ago have proposed a more precise title for his study, such as "succession of States to State property" instead of "succession of States to public property". However, such an approach does not take account of the fact that the *patrimonial transfer of State property* is accompanied by the *substitution of the juridical order* of the successor as concerns the governance of all public property. In other words, the cessionary State succeeds to the State patrimony of its predecessor but at the same time it extends its municipal juridical order to other public property which does not enter into its patrimony. This is what the Special Rapporteur has tried to express in the draft articles. But does not this extension of the juridical order of the successor encounter immediately perceptible limits, once it is stated that property is to be transferred as it exists and with its legal status?

#### C. Transferability of property as it exists and with its legal status

(16) It seems self-evident that State property should be transferred as it exists, and in particular with its legal status. Thus, any debts, mortgages, and so on, with which the property ceded may be encumbered are generally not

affected by the change of sovereignty. There would seem to be little point in discussing at length a practice followed by the Third Reich, which automatically cancelled mortgages on immovable property to which it succeeded. Not only does such a practice seem to be questionable, but the Third Reich should not even be considered a successor State as the result of its various forced annexations.

(17) There is, however, another problem which is more to the point. It is the question of the compatibility of the legal status and existing characteristics of the property transferred with the rules of municipal law of the successor State. It may be that the latter's legislation does not provide for some legal institution which was perhaps peculiar to the legislation of the predecessor State. In such a case, it would seem that one could hardly fail to allow for that situation, which imposes objective limits on the transmissibility of State property as it exists.

This problem was also considered from another, complementary angle when the Special Rapporteur attempted an approach to the definition and determination of public property in his former draft article 1, which has become article 5 of the present draft.

### Article 3. Date of transfer of property

Save where sovereignty, having been terminated irregularly, has been restored and is deemed to be retroactive to the date of its termination, or where the date of transfer is, by treaty or otherwise, made dependent upon the fulfilment of a suspensive condition or simply upon the lapse of a fixed period of time, the date of transfer of public property shall be the date on which the change of sovereignty occurs *de jure*, through the ratification of devolution agreements, or is effectively carried out in cases where (a) no agreement exists or (b) reference is made in an agreement to the said effective date.

#### COMMENTARY

(1) The date of transfer of property should normally be the same as the date of transfer of the territory itself. This means that the draft article submitted for the Commission's consideration goes beyond the strict confines of transmission of State property and concerns the broader problem of transfer of the territory itself. The draft is accordingly presented in provisional form, since it also pertains to the work of Sir Humphrey Waldock, Special Rapporteur for succession of States in respect of treaties.<sup>46</sup>

(2) Very often, however, the date of transfer of property is not the same as the date of transfer of the territory but later, in fact if not legally. Except where a portion of territory is absorbed or annexed—which immediately terminates the former sovereignty—the transfer of all the

property involved is carried out gradually as the details of the transfer are worked out in implementation agreements or the new sovereign effectively takes over, sector by sector, the public property which devolves to it.

(3) Moreover, the date of transfer of the territory is very often not the actual date laid down by agreement, but an earlier one. For instance, when a peace treaty is concluded, several dates are involved—the date of the armistice, truce or cease-fire, the date of signature of the peace treaty and the date of its ratification. The date of actual transfer of the property may in some cases be earlier than the date of the ratification which should give the operation full legal effect, and may be close to the time when possession is taken of the territories just after the armistice. Situations of this kind will not be dealt with here.

(4) The following will be discussed in turn below: (a) the problem of the date of transfer of the property in relation to the problem of determining what constitutes the property; (b) the fixing by treaty of the date of handing over the property; (c) the effectiveness of the transfer of the property, by treaty or otherwise; (d) cases of retroactive restoration of sovereignty; (e) the problem of transitional periods or "*périodes suspectes*".

#### A. Date of transfer and date of determination of what constitutes public property

(5) The case of the peace treaties that brought the First World War to an end is very well known and highly specific. First there was the date of ratification of these treaties, which delimited new political frontiers. Then there was the date by which the Reparation Commission set up under the treaties was to define the transferable public property and determine what it consisted of, thus clarifying the meaning and scope of the expression "all property, rights and interests" or "all goods and property" found in several articles of the peace treaties. In addition to determining what constituted the property, the Reparation Commission had also, of course, to assess it, and its value was to be deducted from the reparations which Germany was required to pay to the various Allied and Associated Powers. Although the Commission carried out the first task quite well on the whole, it never completed the second.<sup>47</sup>

(6) It was not, of course, only from the day on which the Commission was able to determine the public character of a given property that it was declared to be transferable

<sup>46</sup> Sir Humphrey referred to this problem, notably in his draft article 2, where, in the circumstances which he specifies, treaties are applicable "from the date of the succession" in a portion of territory passing from the sovereignty of one State to that of another (*Yearbook of the International Law Commission*, 1969, vol. II, p. 52, document A/CN.4/214 and Add.1 and 2).

<sup>47</sup> It will be remembered that, under the Treaty of Versailles, not only property belonging to public authorities (the State, provinces, municipalities, etc.) but also "*public utility undertakings*", in which the holdings of public authorities and those of private individuals were intermingled, were to be transferred by treaty. On the question of the determination of what constituted this property, see the proceedings of the Commission and the Case of German reparations: *Arbitral award concerning the interpretation of article 260 of the Treaty of Versailles* [arbitrator F. W. N. Beichmann], publication de la Commission des réparations, annex 2145a (Paris, 1924) and United Nations, *Reports of International Arbitral Awards*, vol. I, (United Nations publication, Sales No. 1948.V.2), pp. 429-528 (the second of the thirteen questions put to the arbitrator asked him to define the expression "*entreprise d'utilité publique*", or "public utility undertaking" (*ibid.*, pp. 453-468).



and was legally transferred to the cessionary State. In the case of the Treaty of Versailles, it was agreed, with irreproachable legal correctness, that the territories and public property were to be transferred as at the date of ratification of the Treaty, or, in other words, even before the Commission had determined precisely what constituted the property. The Commission, in drawing up the list—which it stated could not be exhaustive, but only declaratory—left the successor State free and entitled to consider itself possessed of the property designated by the Commission retroactively from the date of ratification of the Treaty. It was the change of sovereignty that led to the operation of determining what constituted the property, and not the latter that brought about *de jure* the transfer of the property.

(7) There is another aspect to the problem of determining what constitutes public property in relation to the date of transfer. It is the question both of rights arising in the future and of claims that are uncertain or not yet liquidated. This should not normally be a difficult problem. The successor State is the *de jure* holder of all the rights, existing or future, of the predecessor State. Therefore, even in the absence of a definite determination of what the property consists of, the cessionary State possesses the rights in it as from the date of transfer of the territory.

#### B. Fixing by treaty of the date of transfer of the property

##### 1. De jure transfer

(8) Where no time is expressly laid down in an agreement, the transfer is legally effected as soon as the agreement enters into force by virtue of the law of treaties, i.e., generally from the date on which the instrument is ratified.<sup>48</sup> The date on which the Treaty of Versailles (1919) entered into force was 10 January 1920. This gave rise to many problems, including at least two which were brought before the Permanent Court of International Justice. The cessionary States sometimes took as their point of reference the date of the armistice (11 November 1918), sometimes the date of signature of the Treaty (28 June 1919), and sometimes, more correctly, the date on which the Treaty entered into force after exchange of the instruments of ratification. An account will be given below of the way in which the Permanent Court decided that the cession and occupation of the German territories which passed to Poland had become effective only on 10 January 1920.<sup>49</sup> The peace treaties of 10 February 1947 were to come into force upon deposit of ratifications by the parties in accordance with the provisions of those treaties.<sup>50</sup>

<sup>48</sup> cf. the Vienna Convention on the Law of Treaties (*Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289), and in particular articles 14 and 24.

<sup>49</sup> Settlers of German Origin in Polish Upper Silesia, Advisory Opinion of 10 September 1923, *P.C.I.J.*, Series B, No. 6.

<sup>50</sup> Treaty with Italy: article 90; Treaty with Romania: article 40; Treaty with Finland: article 36; Treaty with Bulgaria: article 38; Treaty with Hungary: article 42.

##### 2. Transfer before ratification

(9) The Treaty of Versailles is decidedly an instrument containing a little of everything. Article 51 provided that

The territories which were ceded to Germany in accordance with the Preliminaries of Peace signed at Versailles on February 26 1871, and the Treaty of Frankfurt of May 10 1871, are restored to French sovereignty as from the date of the Armistice of November 11 1918.\*

Because the spirit and the letter of the text were so clear, the Permanent Court of International Justice was unable to extend the derogation concerning entry into force of the Treaty that was made in the case of France with regard to Alsace-Lorraine, which it had lost in 1871, to the case of Poland, which argued that it too was recovering under the same treaty, territories that had been lost at an earlier date.

(10) At this point mention may be made of a different but related problem, which has probably been glimpsed in connexion with draft article 2 commented on above. This is whether the successor State should simply receive the property as it exists on the date fixed by treaty (10 January 1920 in the case of Poland) or whether, although that is the effective date of transfer, it must be transferred as it existed (and with the composition and characteristics which it had) on 11 November 1918, the date of the armistice.

In other words, the problem is whether, once the principle that transfer is postponed until the date of ratification of the treaty is accepted, the successor State is nevertheless justified in assuming responsibility for the costs and claiming the profits relating to the property involved during the period, if not from armistice to ratification, at least from signature to ratification. The High Court of Poland and the Permanent Court of International Justice adopted different positions on this point. The latter took the date of ratification as its point of reference. The former held that the sale to a third party by the Prussian Treasury of property—namely, the German States' share in the capital of a private company—which should have reverted to Poland was invalid because the sale had taken place after 28 June 1919, the date of signature of the Treaty of Versailles, and because, the Polish Court ruled, *the property was to be transferred to Poland as it existed on 11 November 1918*, under the very terms of the Treaty and of the Armistice Convention.

(11) The foregoing should be read in conjunction with the commentaries on draft article 2 concerning the transfer of public property as it exists. The problems which arise in connexion with the date of recovery of debt-claims, especially taxes, as seen through the decisions of German, French and especially Czech courts will be discussed later.<sup>51</sup>

##### 3. Transfers after a fixed period of time or by instalments

(12) When they occurred in the past, cessions of territories and property against payment became effective only after ratification of the treaty of cession and payment of the price by the acquiring State. It may be said that the date was established by agreement and depended both on

<sup>51</sup> See below, commentary to article 9 (Public debt-claims).

the date of ratification of the agreement and on the fulfilment of a suspensive condition, namely, payment of the transfer price.<sup>52</sup> One example will suffice. Under article 5 of the treaty of 4 August 1916 ceding to the United States of America the Danish West Indies, (St. Thomas, St. John, St. Croix and the adjacent islands and rocks), the purchaser agreed "to pay within ninety days from the date of the exchange of the ratifications [...] the sum of twenty-five million dollars in gold coin of the United States".<sup>53</sup> The agreement was ratified on 17 January 1917, and on 31 March 1917 the islands in question were effectively placed under the *imperium* of the United States, the transfer price having been paid to Denmark on that date.

(13) It will be noted that the commentary on the draft article concerning archives and public libraries<sup>54</sup> also contain some examples of the fixing of a time-limit by treaty for the transfer of such documents to the successor State.

(14) In some cases, devolution agreements impose a time-table of payments upon the successor State, notably for the transfer of public funds or assets which would normally be made on the date of transfer of the territory; this occurred, for instance, in the cases of India and Pakistan and of Syria and Lebanon. The Dominion of India was to succeed to the assets of the Reserve Bank of India, estimated at £1,160 million, only on the following terms: £65 million went into a "free" account, available immediately, and all the rest—the greater part—was placed in a blocked account, to be utilized according to a time-table. Again, Syria and Lebanon, upon becoming independent, were not allowed to dispose freely of assets; most of them were blocked and *were to be released progressively up to 1958*, subject to certain monetary and financial conditions.

#### 4. Transfer of property dependent upon the fulfilment of a suspensive condition

(15) The transfer of the territory itself may be made dependent upon the fulfilment of a suspensive condition—for instance, consultation of the people, a referendum of the Guinean "no" or the Algerian "yes" type; and many plebiscites held after the First World War. Cession of the territory takes effect on the day of the popular consultation. The transfer of property must take place on that date unless—as is usually the case—there is an agreement laying down the arrangements for succession after referendum and fixing the date of the various transfers in some other manner (which brings us back to the cases considered previously).

<sup>52</sup> Civil jurists do not regard payment of the price as a suspensive condition, but as an intimate part of—a "consideration" under—a synallagmatic contract.

<sup>53</sup> English text in *Supplement to the American Journal of International Law* (New York, Oxford University Press, 1917), vol. 11, p. 57; French text in *Revue générale de droit international public*, Paris, t. XXIV, 1917, p. 456, foot-note.

<sup>54</sup> See *Yearbook of the International Law Commission*, 1970, vol. II, pp. 160-161, document A/CN.4/226, Part Two, commentary to article 7, para. 45, and foot-note 184. See also article 14 below (in an addendum to the present report, to be published later).

#### 5. Reference in a treaty to a date to be fixed subsequently by agreement

(16) Article 23, paragraph 3, of the Treaty of Peace with Italy of 10 February 1947 reads:

The final disposal of these possessions [i.e., Italy's territorial possessions in Africa] shall be determined jointly by the Governments of the Soviet Union, of the United Kingdom, of the United States of America and of France within one year from the coming into force of the present Treaty [...].<sup>55</sup>

#### C. Effectiveness of the transfer

(17) When no agreement exists regarding the transfer of public property, the successor State is deemed to be the holder of the rights and interests attaching to such property with effect from the date on which the successor State actually takes possession of the property. Yet there have been cases in the past where the actual taking of possession was deemed to be an essential additional condition, even in the case of devolution by agreement. Thus, in the case of the *Fama*, which was heard in 1804, the British Admiralty High Court ruled that the taking of possession of Louisiana by France was necessary in order to consummate the Ildefonso cession agreement of 1796, failing which the purchase of the territory could have no legal effect.<sup>56</sup> However, this additional condition, which was interposed here by false analogy with the case of territories without a ruler, could not for long be maintained, since there is *ex hypothesi* no cession agreement in the case of territories without a ruler. Thus, on 24 March 1922, the Swiss Federal Council, as arbitrator in the *Case of the Colombian-Venezuelan Boundaries*, ruled that the taking of possession was not essential.<sup>57</sup> Accordingly, the date of transfer of public property must be fixed to coincide with the date of ratification of the cession agreement.

#### D. Cases where sovereignty is restored retroactively

##### 1. Retroactive restoration of Ethiopian and Albanian sovereignty

(18) After the Treaty of Peace with Italy of 10 February 1947, Ethiopia recovered the independence it had lost in 1935. A dispute arose between France and Italy regarding liability for damages caused in Ethiopia during the war to nationals of the United Nations or their property. The Franco-Italian Conciliation Commission, which considered this case, held that it was incorrect to speak of the cession of the territory in 1947, since Ethiopian sovereignty was retroactive to 3 October 1935, the date on which Italian troops had entered Ethiopia.<sup>58</sup> The annexation of Ethiopia had been retroactively declared illegal in article 38 of the Treaty of Peace of 10 February 1947, as had the annexation of Albania in other provisions of the Treaty.

<sup>55</sup> United Nations, *Treaty Series*, vol. 49, p. 139.

<sup>56</sup> Ch. G. Fenwick, *Cases on International Law* (Chicago, Callaghan, 1935), pp. 494 *et seq.*

<sup>57</sup> United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No. 1948.V.2), p. 224.

<sup>58</sup> See foot-note 15 above.



The Franco-Italian Conciliation Commission referred to the

situation of Ethiopia and Albania, countries which had been completely occupied by Italy and whose sovereignty was restored retroactively [...]. It is probable that the choice was determined also by political motives, or in any event, by the susceptibility of Ethiopia, which did not wish to appear to be an annexing or cessionary State in respect of territory that it considered had never ceased to be its own, despite occupation and annexation which the Treaty declared retroactively to be illegal (article 38).<sup>60</sup>

(19) Such positions in treaties, expressing disapproval of an act of annexation once the conscience of the world has reawakened, are not completely isolated. On the subject of India, for instance, Judge Moreno Quintana (in the *Case concerning right of passage over Indian territory*) stated in his dissenting opinion that "India, as the territorial successor, was not acquiring the territory for the first time, but was recovering an independence lost long since".<sup>60</sup>

(20) Writers are beginning to concern themselves with these problems and, by extending their research and refining their analysis, are coming to perceive that there have been many cases for which no comprehensive and satisfactory explanation was found in traditional international law.<sup>61</sup> The case of Poland may again be cited as an example.

## 2. The return of Poland to original sovereignty

(21) Poland, which in the course of history was four times partitioned among its neighbours, took the view, once it had regained its independence, that it had no predecessor. It strongly rejected the merest hint of an idea of succession. Its entry into possession of its public and private rights and of its property was considered by the Polish courts to be not the result of devolution to a successor but the expression of restored sovereignty. It was by "an act of its sovereign power" that it "recovered" its property and its rights. There had been no "transfer" and accordingly there was no need to seek to establish the date of the transfer. The property was considered never to have ceased to be subject to the exercise of Polish sovereignty.<sup>62</sup>

(22) The Polish courts maintained those positions *urbi et orbi* with admirable perseverance and spirit, but in fact they gave rise to many practical problems which Poland was not always able to solve by maintaining irrevocably the choice which they implied. On occasions, it hedged its positions and, in proceedings before international judicial bodies, relied on cession treaties and transfer agreements. It is this that should be discussed next.

<sup>60</sup> United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 657. (Translation from French).

<sup>60</sup> *I.C.J. Reports 1960*, p. 95.

<sup>61</sup> Cf. the interesting expositions of Professor I. Brownlie (*op. cit.*, *loc. cit.*). See also the writings of Ch. Alexandrowicz on legal history, but in particular his article "New and original states: The issue of reversion to sovereignty" (*op. cit.*, *loc. cit.*). Cf. also S. C. Jain (*op. cit.*, *loc. cit.*), A. I. S. Baddour (*op. cit.*, *loc. cit.*), M. Bedjaoui (*op. cit.*, *loc. cit.*).

<sup>62</sup> See *Yearbook of the International Law Commission, 1970*, vol. II, p. 138, document A/CN.4/226, and especially p. 149, foot-note 99.

## E. "Decisive dates" and "périodes suspectes"

(23) A careful distinction must be made between two problems: the first relates to the date of effective taking of possession, or in other words, from Poland's standpoint, the date on which it recovered its lost property. This could coincide with any of the following four dates: The date of the armistice (11 November 1918), the date of signature of the Treaty of Versailles (28 June 1919), the date of ratification of the Treaty (10 January 1920), or the date on which Poland effectively regained possession of its property. For Poland, in the light of its municipal law, the date, whichever it might be, was of little importance because it took the view, in terms of its retroactively restored sovereignty, that the property in question had never ceased to be subject to the exercise of its sovereignty and that executive acts directed against it in the past were null and void, since they were instances of simple violence.

Logically, however—and here we come to the second problem—this should have led Poland to demand and to recover the property *with its original legal status and composition* and as it originally existed. That could not be done. In view of the practical impossibility, but at the cost of hedging its position, Poland therefore wanted the property to be "returned" to it at least as it was on the date of the armistice (11 November 1918) and not as it might have been composed on the date of entry into force of the peace treaty (10 January 1920). Poland wished to prevent the German States from taking advantage of the "période suspecte" between the armistice and the ratification of the Treaty of Versailles in order to carry out operations calculated to diminish the value and the extent of the property.

(24) The *Case of German settlers in Upper Silesia* came before the Permanent Court of International Justice. The information which the Polish Government submitted to the Council of the League of Nations and which was transmitted to the Court stated that the case involved a diminution of the immovable property of the State committed illegally by the German or Prussian Government through the sale of land and other State property situated in the territories that were ceded under the peace treaty.<sup>63</sup>

The fact was that thousands of contracts of sale or leases concluded between the settlers and the predecessor State after the armistice and before the transfer had diminished the value of the State property which was to be ceded to the Polish Government.

(25) The *Prokuratorja generalna*, which represented the Polish Treasury in the litigation, had submitted observations to the Court in which it argued that

... any alienation or encumbrance of the public or private domain effected after the date of 11 November 1918 must be considered by the Allies to be null and void, particularly if, as was precisely the case with alienations of land in the settled areas, such transactions had not been essential to the normal functioning of the administration but had had a different purpose [...].<sup>64</sup>

(26) The Court was of the opinion that

The position of the Polish Government is not justified. As the Prussian State retained and continued to exercise its administrative

<sup>63</sup> This is far removed from the theory of retroactive restoration of sovereignty; it is simply a question of *cession of territory by treaty*.

<sup>64</sup> *P.C.I.J.*, series C, No. 3, vol. III, p. 894.

and proprietary rights in the ceded territory until this territory passed to Poland under the Treaty of Peace, the only ground on which the position of Poland could be justified is, in the opinion of the Court, the contention that the granting of the *Rentengutsvertrag* was prohibited by the provision in the Spa Protocol, by which the German Government engaged, while the Armistice lasted, not to take any measure that could diminish the value of its domain, public or private, as a common pledge to the Allies for the recovery of reparations.<sup>65</sup>

(27) The same opposing positions were taken by Poland and by the Court in the *Chorzow factory case*.<sup>66</sup> The Court held that

Article 256 of the Treaty of Versailles [ . . . ] contains no prohibition of alienation and does not give the State to whom territory is ceded any right to consider as null and void alienations effected by the ceding State *before the transfer of sovereignty*.<sup>67</sup>

It added:

Nor would it be legitimate to construe the Treaty of Versailles in such a way as to incorporate therein certain clauses of the Armistice Convention and of the instruments following it, so as to carry back to November 11th, 1918, the decisive date as from which rights acquired by individuals, under contracts concluded by them with the Reich and German States, should be regarded as void or liable to annulment.<sup>68</sup>

#### **Article 4. Limitations by treaty on the transfer of public property**

Subject to the application of general international law and of the law of treaties for the purposes of the interpretation or even the invalidation of an agreement regulating a case of State succession, any limitation imposed by treaty on the principle, hereinafter enunciated, of the general and gratuitous transfer of public property shall be interpreted strictly.

NOTE. For the commentary to draft article 4, the Special Rapporteur would refer the Commission to the future addendum to the present report.

## **II. DEFINITION AND DETERMINATION OF PUBLIC PROPERTY**

### **Article 5.<sup>69</sup> Definition and determination of public property**

1. For the purposes of these articles, "public property" means all property, whether tangible or intangible, and rights and interests therein, belonging to the State, a territorial authority thereof or a public body.

2. Save in the event of serious conflict with the public policy of the successor State, the determination of what constitutes public property shall be made by reference to the municipal law which governed the territory affected by the change of sovereignty.

<sup>65</sup> *Ibid.*, Series B, No. 6, pp. 42-43.

<sup>66</sup> For the circumstances of the case and references, see *Yearbook of the International Law Commission, 1970*, vol. II, pp. 141-142, document A/CN.4/226, commentary to article 1, paras. 37-42.

<sup>67</sup> *P.C.I.J.*, Series A, No. 7, p. 29.

<sup>68</sup> *Ibid.*, p. 30.

<sup>69</sup> Formerly article 1.

### **Article 5 bis<sup>70</sup> (Variant to article 5)**

For the purposes of these articles, "public property" means all property, rights and interests which, on the date of the change of sovereignty and in accordance with the law of the predecessor State, were not under private ownership in the territory transferred by that State.

#### **COMMENTARY**

(1) The Special Rapporteur draws the Commission's attention to his third report<sup>71</sup> containing his commentaries on draft article 1, which becomes article 5 in the present numbering. He submits below some additional observations which are centred on the following five points: (a) the notion of "public property" and that of "transferable public property"; (b) the definition of territorial authorities and public bodies; (c) the determination of what constitutes public property; (d) the distinction between *rights* and *interests*; (e) the transferability of unliquidated rights.

A. *Is property transferred or placed under the jurisdiction of the new juridical order?*

(2) As indicated above,<sup>72</sup> not *all* public property is transferable. The proposed definition is solely intended as an attempt to indicate what constitutes public property. It is another matter to determine whether all public property covered by this definition is transferable. This is a problem which was already mentioned in the Special Rapporteur's first report.<sup>73</sup>

(3) Where State succession is concerned, only public property belonging to the State appears to be susceptible of transfer from the patrimony of the predecessor State to that of the successor State. Other public property constituting the patrimony of provinces, municipalities or public enterprises retains its juridical status, i.e. is not generally the object of a transfer to the successor State, but falls under the juridical system of that State. In other words, the juridical order of the successor State will henceforth also govern the public property of territorial authorities other than the State or its public bodies. Furthermore, not *all* the property of the State is automatically transferable. The question whether property in the "private domain" of the State is transferable on the same grounds as property in its "public domain" is still being debated by the learned authorities. The Special Rapporteur, for his part, has specified that the transfer will affect all property appertaining to sovereignty. This formulation goes beyond the problem of the distinction between the public and private domain of the State. But it remains to be established whether it does not also at the same time and in a certain sense go beyond the distinction between

<sup>70</sup> Formerly variant to article 1.

<sup>71</sup> *Yearbook of the International Law Commission, 1970*, vol. II, p. 131, document A/CN.4/226.

<sup>72</sup> See above, commentary to article 2, paras. 14-15.

<sup>73</sup> *Yearbook of the International Law Commission, 1968*, vol. II, p. 107, document A/CN.4/204, paras. 87-90.

State property in particular and public property in general. The property of a *public authority* may be that of the State, but it may also be that of a territorial authority other than the State. The Special Rapporteur is at present not entirely certain that some property appertaining to sovereignty does not also include property of public authorities other than the State.

(4) It should also be noted that some ambiguity is introduced into these matters by certain agreements and court decisions. For example, the Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947 regarded itself as bound by the very specific wording of paragraph 1 of annex XIV to the Treaty,<sup>74</sup> and recognized the devolution to the *successor State*, in full ownership, of State property and also of para-statal property, including municipal property.<sup>75</sup>

(5) One question not mentioned in the third report but touched upon in the second <sup>76</sup> is the nature of the property of *chartered companies*. Such companies were granted some of the powers of sovereignty in the colonies by the metropolitan State and by virtue of those powers administered property the nature of which is not easy to define. The British South Africa Company, created by a Charter granted by Queen Victoria on 29 October 1889, had the power, in what has now become Zambia and Rhodesia, to conclude treaties and promulgate laws. In that area the company was the public and administrative authority *par excellence*. Thus a *private* company disposed of *public property*, behaving as its owner and granting concessions to other companies from which it collected royalties in the same way as a State.

#### B. Definition of territorial authorities and public bodies

(6) The definition of the territorial authority (province, municipality, district, canton, etc.) is normally a matter of internal public law. As the authority is not a subject of international law, there is no definition of it that is proper to that law. International lawyers have, however, concerned themselves with the definition of an authority such as a municipality. In particular, they had occasion to do so when an attempt was made in article 56 of the Hague Convention of 18 October 1907, revising the Convention of 1899, to provide for a system of protection of public property, including that of municipalities, in time of war. They then turned their attention to both the notion of public property and the definition of a municipality.<sup>77</sup> Writers have, in fact, adopted a rather more detailed

approach to the definition of public property in the context of the law of war than in that of State succession.

(7) With regard to public bodies or, as they have been termed, corporations of public law, an approach and a definition will be attempted in the context of draft article 11.

#### C. Determination of public property

(8) The Special Rapporteur draws the Commission's attention to recent illuminating comments on this problem by Professor Daniel Bardonnnet,<sup>78</sup> and would refer in particular to a case arising out of the work of the Reparation Commission established by the peace treaties of 1919. The Reparation Commission decided that it did not have the power to interpret article 256 in relation either to Germany or to the cessionary Powers. Consequently, in the event of a dispute arising between Germany and a cessionary Power with respect to a given property, *the Commission was not required to intervene. The dispute could be settled by agreement between the countries concerned; but the cessionary Power could also, by virtue of its rights of sovereignty over the territory ceded, settle any question relating to the ownership of the said property by a decision of its competent authorities.*<sup>79</sup>

(9) The Reparation Commission does not always seem to have taken a consistent position. Thus, on occasions it (a) itself proceeded to the determination of the public nature of a given property before assessing its value; (b) contributed to the definition of public property given by an arbitration body;<sup>80</sup> (c) invited the countries concerned, as in the above-mentioned case, to arrive at an agreed determination of public property, and (d) recognized that the successor State has the power to take a sovereign decision on the question. This last position should be compared with the Special Rapporteur's comments in his third report on the subject of recourse to the law of the successor State for the purpose of determining what constitutes public property.<sup>81</sup>

(10) It should be noted that there was an internationalist approach to the determination of public property within the Reparation Commission itself. Thus a *Committee of Three Jurists* was established, appointed and instructed by the Commission,<sup>82</sup> acting under article 195 of the Treaty of Saint-Germain-en-Laye.<sup>83</sup> The Committee dealt with a

<sup>74</sup> D. Bardonnnet, *La succession d'Etats à Madagascar (succession aux droits conventionnels et aux droits patrimoniaux)* (Paris, Librairie générale de droit et de jurisprudence, 1970), Bibliothèque de droit international, t. LVII, pp. 153-206.

<sup>75</sup> *Résolutions de la Commission des réparations*, decision No. 708, record No. 106. Text reproduced in *Traité de Versailles: Clauses de réparations annotées au 31 mars 1925* (Paris, Imprimerie officielle, 1925), p. 156.

<sup>80</sup> cf. the arbitral award by Beichmann cited above (see footnote 47 above).

<sup>81</sup> See *Yearbook of the International Law Commission*, 1970, vol. II, pp. 137 et seq., document A/CN.4/226, Part Two, commentary to article 1, paras. 17-46.

<sup>82</sup> Decision No. 901 of the Reparation Commission. The Committee consisted of Mr. Hugh A. Bayne, Mr. J. Fischer-Williams, and Mr. Jacques Lyon.

<sup>83</sup> G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1923), 3rd series, t. XI, pp. 754-755. For English text, see F. L. Israeli, *Major Peace Treaties of Modern History, 1648-1967* (New York, Chelsea House Publishers in association with McGraw-Hill, 1967), p. 1620.

<sup>74</sup> United Nations, *Treaty Series*, vol. 49, p. 225.

<sup>75</sup> Franco-Italian Conciliation Commission, "Dispute concerning the apportionment of the property of local authorities whose territory was divided by the frontier established under article 2 of the Treaty of Peace: decisions Nos. 145 and 163, rendered on 20 January and 9 October 1953 respectively" (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), pp. 501-549). See *Yearbook of the International Law Commission*, 1970, vol. II, p. 151, document A/CN.4/226, Part Two, commentary to article 2, paras. 32-34.

<sup>76</sup> *Ibid.*, 1969, vol. II, p. 92, document A/CN.4/216/Rev.1, para. 114 and foot-note 97.

<sup>77</sup> See O. Debbasch (*op. cit.*), pp. 29-30, and foot-notes 34 and 35) citing a number of authors.

number of cases, including that known as the Triptych of St. Ildefonse (concerning a series of paintings by Rubens) and that of the Treasure of the Order of the Golden Fleece. Belgium had requested Austria to restore these items, claiming that they had been transferred to Vienna "a violation of the rights of the Catholic Low Countries to which Belgium has succeeded". The Belgian case rested on the fact that these works of art had previously been acquired for valuable consideration and that the purchase could therefore only have been on behalf of the State or of the "Belgian public domain". The Committee of Three Jurists rejected the Belgian claim, taking the view that neither the Rubens Triptych nor the Treasure of the Order of the Golden Fleece formed part of the public domain of the predecessor State, but "*an integral part of the private settled property of the Habsburg family*".\*<sup>84</sup>

(11) This is not the place to discuss the soundness of the opinion of the Committee of Three Jurists or the validity of the distinction between the public and private domain of the State. For the moment, the case is mentioned simply as an example of a procedure for the determination of public property. But in such cases neither the Reparation Commission nor the Committee of Three Jurists which it appointed were in a position to carry out their task without reference to the municipal law of the predecessor State. But recourse to this municipal law has limits that are examined at length in the third report.<sup>85</sup> The obscurities or even inconsistencies in the national legislation of the predecessor State, the reluctance of the cessionary State to inherit rules concerning State property previously established by a despotic ruler or potentate and, even more, the temptation that assails every conqueror to change the régime of public property in order to grant concessions to an immigrant population in a colony or to attain some other political aim, the existence of charges on public property regarded as too heavy by the successor State—all these are additional factors discouraging recourse to the legislation of the predecessor State for the purpose determining what constitutes public property.

In this connexion we refer again to the study by Bardonnnet, who writes as follows:

Judicial practice [in France], which is favourable to the development of private property, has sought to demonstrate that the theory of succession to the rights of local sovereigns was false. Not only did the illegitimate character of these rights rule out the possibility of their being claimed by a successor in good faith [...], but the conquering State was competent to change local customs and to substitute its own legislation, or at least to retain only such part of the traditional law as was compatible with its civilizing mission and with international law. The argument of under-development was,

surprisingly, invoked against the successor State itself as being too faithful a reflexion of the predecessor State.<sup>86</sup>

(12) These comments on the limits to the application of local law link up with the Special Rapporteur's observations above on draft article 1 (irregular acquisition of property or territory), and more particularly, on paragraph 2 of draft article 2 (property of which the preceding sovereign had only precarious or irregular possession). The transfer in principle of the patrimonial rights of the predecessor State to the successor State implies that the rights concerned are not contested. Property acquired improperly by the former does not pass to the latter. This also implies the converse, namely, that all improper appropriation by the successor State is null and void.<sup>87</sup>

#### D. Distinction between rights and interests

(13) The proposed definition of public property refers to *rights and interests*. Although the notion of rights—real, patrimonial, pecuniary—is well-known to the law, that of interests is more intangible. So far as the Special Rapporteur is aware, there is no definition of "interests" as precise as that which could be given of "rights", the former term probably having a political rather than a legal connotation. The *Dictionnaire de la terminologie du droit international* defines "interest" as a

term denoting that which materially or morally concerns a natural or juridical person, the material or moral advantage presented for such a person by an act or an abstention from an act, by the maintenance of or alteration in a situation.<sup>88</sup>

<sup>86</sup> D. Bardonnnet, *op. cit.*, pp. 151-152, and *passim*. In these various cases local legislation was set aside, not in order to ensure to the successor State a wider succession to public property, but to enable it to extend the domain of private property for the benefit of its own citizens. Bardonnnet cites (*ibid.*, pp. 151 and 152, foot-notes 53 and 54) the decision of the Court of Appeal of French West Africa of 10 March 1933 (*Etat français v. Jao Juventio d'Almeida, Recueil Daresté*, 1933, court decisions, pp. 87-88) according to which

"The French State [...] cannot claim the transfer to its patrimony of anything that is merely the product of violence, spoliation and abuse [on the part of a] barbaric and tyrannous chief of a native tribe [...] and the French State cannot claim these rights as the source of its own."

The same author refers to the

"famous words used by Napoleon III in a letter to Marshal Pélissier of 6 February 1863, when a similar problem had arisen in Algeria and the French State had abandoned its right of eminent domain over the *arch* lands (*senatus consultum* of 22 April 1863): "What then, would the State invoke the despotic rights of the Grand Turk?" (*ibid.*, p. 152, foot-note 54).

According to this same decision of the Court of Appeal of French West Africa of 10 March 1933 cited by Bardonnnet, the fallacy of the succession theory

"arises from the significance attached to the effects of conquest [...] [The latter] is not a normal means of transmitting rights, embodied in the laws of a civilized country, [...] the codes ignore this method of acquisition by force; [...] the effects of conquest are not governed by any rules; [...] they depend on the will of the conqueror as much as on the facts of the situation, and conquest either creates no rights or creates them all, as the case may be; [...] conquest does not have the consequence of authorizing the victorious State to perpetuate itself in the abuses of a conquered native chief [...]" (*ibid.*, p. 152, foot-note 55).

<sup>87</sup> cf. D. Bardonnnet, *op. cit.*, pp. 176 *et seq.*, and *passim.*, in particular on the *Résidence générale de Madagascar* Case.

<sup>88</sup> *Dictionnaire de la terminologie du droit international*, ed. Jules Basdevant (Paris, Sirey, 1960), p. 342.

<sup>84</sup> Reparation Commission, annex No. 1141, *Belgian claims to the Triptych of St. Ildefonse and the Treasure of the Order of the Golden Fleece: Report by the Committee of Three Jurists (Confidential)*, Paris 1921. Initially, the Reparation Commission itself was to have ruled on the disposal of these works of art; for that purpose it sought the opinion of the Committee provided for in article 195 of the Treaty of Saint-Germain-en-Laye, which required that body to examine the conditions under which the objects or manuscripts in possession of Austria had been carried off by the House of Habsburg and by the other Houses that had reigned in Italy.

<sup>85</sup> See foot-note 81 above.

The Special Rapporteur has nevertheless used this term, despite its imprecision, in the definition he has proposed for public property. His sole reason, which he recognizes as insufficient, is that the term is used in a very large number of diplomatic agreements and texts. To take only one example, the Treaty of Versailles of 28 June 1919 includes a separate section (section IV of part X) entitled "Property, rights and interests".<sup>89</sup>

### E. Unliquidated claims and rights

(14) A special aspect of the problem of determining what constitutes transferable public property is presented by the question of unliquidated claims and rights. Some of the theorists take the view that such claims can hardly be considered as "public property" capable of transfer to the successor State.<sup>90</sup> Their argument is that such claims are vested in the predecessor State, for whose benefit they were established, and that, in the absence of a continuing legal relationship between the author of the damage suffered and the predecessor State—a relationship that would not survive the change of sovereignty—the successor State cannot become the creditor.

There is admittedly no legal link between the predecessor State and its successor nor any direct link between the new sovereign and the third party responsible for the damage. But in this matter—which properly belongs to the sphere of international responsibility rather than to that of State succession—there is a substitution of relationships. The damage suffered, if real, is not indeterminate; it has left some trace, or at least, if it is considered fair that there should be compensation, it has affected the exercise of sovereignty in one way or another or resulted in a more or less serious disturbance of some juridical, economic or social order attached to the territory transferred. Furthermore, the recognition or non-recognition of a right, which has been legally established but not yet liquidated, should not depend on the moment or period at which it is claimed. If the claim had been settled before the change of sovereignty, its product, either in its original form or re-used, would have in some way enriched the territory. This problem is of some practical importance, since it also affects outstanding debt-claims, particularly in respect of taxes.

## III. GENERAL PRINCIPLE OF THE TRANSFER OF ALL PUBLIC PROPERTY

### Article 6.<sup>91</sup> *Property appertaining to sovereignty*

**1. Property appertaining to sovereignty over the territory shall devolve, automatically and without compensation, to the successor State.**

<sup>89</sup> G. F. de Martens, *Nouveau Recueil général de traités* (Leipzig, Weicher, 1923), 3rd series, t. XI, p. 323.

<sup>90</sup> Ch. Rousseau, "Les transformations territoriales des Etats et leurs conséquences juridiques", *Cours de droit international public* (Paris, Les cours de droit, 1964-1965), pp. 142-143.

<sup>91</sup> Formerly article 2.

**2. Property of the territory itself shall pass within the juridical order of the successor State.**

### COMMENTARY

(1) The Special Rapporteur's main observations are to be found in his commentaries on the draft article in his third report.<sup>92</sup> The general principle of the transferability of public property appertaining to sovereignty is recognized.<sup>93</sup> The reference here is to property allocated by the State to a public service or public utility, these two terms being interpreted in a broad sense. There are only a few brief comments to add.

(2) The problem of substance does not in fact seem to be that of transfer, which is held to be mandatory by the majority of writers and to be possible subject to certain conditions by a minority, but rather whether the transfer of all public property, including that in the private domain, should be without compensation or against payment. In other words, while the transfer without compensation of property appertaining to the public domain is not in dispute, some legal authorities maintain that public property constituting the private domain can be transferred only against payment.<sup>94</sup> It is probably because of this problem that writers still support the distinction between the public domain and the private domain, despite the fact that it is not common to all systems of municipal law and has partly disappeared from diplomatic practice and international jurisprudence.

(3) As indicated in the third report, contradictory solutions have been adopted at different times and in different places. Further examples can be given to illustrate this point. Although, as mentioned above, the Committee of Three Jurists saw fit to retain the distinction between the public domain and the private domain in the case of the Triptych of St. Ildephonse (a work by Rubens) and in that of the Treasure of the Order of the Golden Fleece,<sup>95</sup> the Permanent Court of International Justice found elsewhere<sup>96</sup> that the "alleged public or private character [of property] is of no account" and that "the distinction between public and private property [...] is neither recognized nor applied by the Treaty of Trianon". Thus, according to the Court, the settlement treaties relating to the Austro-Hungarian monarchy—the Treaty of Saint-Germain-en-Laye and the Treaty of Trianon—do not take the public or private character of property as the criterion for its transfer. Yet at virtually the same moment the Committee of Three Jurists rendered a contrary opinion,

<sup>92</sup> *Yearbook of the International Law Commission*, 1970, vol. II, pp. 143 *et seq.*, document A/CN.4/226, Part Two, commentary to article 2.

<sup>93</sup> See D. Bardonnet, *op. cit.*, pp. 567 *et seq.*, and copious footnotes.

<sup>94</sup> See the Special Rapporteur's first report (*Yearbook of the International Law Commission*, 1968, vol. II, pp. 106-107, document A/CN.4/204, paras. 79-86), the second report (*ibid.*, 1969, vol. II, p. 69, document A/CN.4/216/Rev.1), and the third report (*ibid.*, 1970, vol. II, pp. 149-150, document A/CN.4/226, Part Two, commentary to article 2, paras. 24-27).

<sup>95</sup> See above, commentary to article 5, para. 10.

<sup>96</sup> *P.C.I.J.*, Series A/B, No. 61, pp. 238 and 237.

at least so far as the Treaty of Saint-Germain is concerned. Such ambiguities and contradictions include the provisions of article 56, third paragraph, of the Treaty of Versailles, which destroys the distinction made, since it stipulates that "Crown property and the property of the former Emperor or other German sovereigns shall be assimilated to property of the public domain".<sup>97</sup>

(4) A more direct approach to the question of whether property should be transferred without compensation was taken by the Financial Committee set up under the Reparations Commission. After protracted and difficult discussions, it decided, by majority vote, in favour of the principle of transfer without compensation. The Supreme Council nevertheless decided otherwise, although it made an exception in two cases—Belgium and Alsace-Lorraine—which were deemed to be territories restored to their original sovereign.

The Special Rapporteur has sought to escape from this distinction between the public and the private domain, which has been a source of difficulty and confusion. He has accordingly proposed that the transfer of property appertaining to sovereignty without compensation should be deemed to be the rule. There may perhaps be other property which, though not appertaining to sovereignty, belongs to the public domain and as such should also normally be transferred without compensation. If that proves to be the case, the matter could be dealt with in the context of other draft articles.

#### IV. INTANGIBLE PROPERTY AND RIGHTS

##### INTRODUCTORY COMMENTARY

##### A. "Jus imperii" and "jus gestionis"

(1) Articles 7, 8, 9 and 10 to some extent represent the *lex specialis* as opposed to the *lex generalis* laid down in article 6.

(2) Bluntschli at one time proclaimed the rule that "*the property*" of States which have ceased to exist passes, actively or passively, to the successors of such States".<sup>98</sup> In another rule he dealt with the question of "public treasuries", which he apportioned among several successors in proportion to population because "it is necessary to go back to the fundamental element of the State, i.e. man, in order to find an equitable and reasonable solution".<sup>99</sup> The writer used the term "property" in the broad sense which was given to it at the time and which covered "private property belonging to the Treasury, for example, some industries, some land, and cash".<sup>100</sup>

(3) Today, the Treasury, public funds, the currency, State bank deposits, gold reserves of the institution of issue, public debt-claims, tax revenue, State resources,

etc., are for the most part property appertaining to sovereignty over the territory and its inhabitants, constituting financial means by which or in respect of which this sovereignty is expressed. The legal character of the right to coin money or the privilege of issue, the right to levy taxes, the power of the public authority to take coercive measures to recover debts to the Treasury, Customs duties or public debt-claims is such that it would be inconceivable for the predecessor State to retain these rights and powers.<sup>101</sup> This does not necessarily mean that all such patrimonial rights or property belong to what is known in some systems of law as the "public domain of the State", or that they alone belong to it. Such intangible rights as debt-claims or income from a commercial activity of the State may come under the "private domain" in countries where this concept exists or, to put it differently, under the *jus gestionis* as opposed to the *jus imperii*, which characterizes other State activities directly connected with the exercise of sovereignty.<sup>102</sup>

(4) Taking this as his starting point, Professor Guggenheim goes on to say, in particular, that

[ . . . ] State revenue [ . . . ] is considered in most countries to belong to the private domain and, as such, to be governed by the civil law. The disposal of State revenue is a matter for agreement between the ceding State and the cessionary State.<sup>103</sup>

In point of fact, State revenue is governed by public law to an increasing extent in most States. The existence of treaty provisions, which are, moreover, extremely rare (see article 256 of the Treaty of Versailles), is hardly sufficient to warrant the conclusion that an obligation exists to determine the disposal of State revenue by agreement. The purpose of this comment is mainly to emphasize, as will be done again later, that a customary rule regarding succession to revenue from taxation exists in the very frequent cases where the matter is not settled by agreement.

(5) According to Professor Guggenheim, an agreement would be particularly useful

where the predecessor State is not incorporated into the successor State and therefore continues to exist [ . . . ]. If the State is

<sup>101</sup> A letter, dated 5 September 1952, from Mr. D. L. Busk, British Ambassador at Addis Ababa to the Ethiopian Minister for Foreign Affairs, specified that

"the transfer of power in Eritrea to the Imperial Ethiopian Government and to the Eritrean Government shall take place on a 'going concern' basis, that is to say, the existing British Administration will collect all revenue and pay all expenses of administration (including third party claims [ . . . ]) up to 15th September 1952."

(Exchange of notes constituting an agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ethiopia regarding financial arrangements on the establishment of the Federation of Eritrea with Ethiopia. Addis Ababa, 5 and 6 September 1952, United Nations, *Treaty Series*, vol. 149, p. 58.

Although the term "going concern" may be reminiscent of business procedures, it is nonetheless expressive, indicating that the territory has to be transferred with all its financial machinery, as it previously existed (taxes, Customs, currency, Treasury etc.) and operating normally.

<sup>102</sup> See *inter alia* Professor Paul Guggenheim: *Traité de droit international public* (Geneva, Librairie de l'Université, 1953), t. I, p. 467 and 468, foot-note 2.

<sup>103</sup> *Ibid.*, pp. 468-469.

<sup>97</sup> D. Bardonnet, *op. cit.*, p. 142 and foot-notes. See also articles 120 and 257, third paragraph, of the Treaty of Versailles.

<sup>98</sup> J.-K. Bluntschli, *Le Droit international codifié*, 5th ed. rev. and enl., tr. from the German by M. C. Lardy (Paris, Alcan, 1895), p. 85 (rule 54).

<sup>99</sup> *Ibid.*, p. 87 (rule 58), commentary to rule 58.

<sup>100</sup> *Ibid.*, p. 85, commentary to rule 54.

dismembered, its revenue becomes part of the property to be covered by the settlement. At the time of apportionment, items are usually allocated to the State in which they are situated but are nevertheless charged against its share. Where a State ceases to exist and there is only one successor State, the latter acquires not only the State revenue in the territory of its predecessor but also its revenue in third countries.<sup>104</sup>

However, where a State has ceased to exist, there is generally no agreement on the devolution of revenue, and where there is more than one successor State, the agreement, if any, is concluded among these States.

The writer himself limits the scope of his rule by confining its application to taxes: "*Immovable* \* property nevertheless passes to the successor State [...] if the latter accepts the charges encumbering that property."<sup>105</sup>

(6) In the opinion of the Special Rapporteur, there is an *imperative obligation* to devolve all public property appertaining to sovereignty, more especially resources, debt-claims and public funds.<sup>106</sup>

### B. Patrimonial rights "defined by law"

(7) The question here is whether all intangible rights, both acquired or potential, pass to the successor State. A number of decisions by national courts, particularly by the Polish courts after the First World War, can be cited which interpret succession to public property and to all rights acquired or to be acquired in the broadest and fullest sense.<sup>107</sup>

(8) Succession to "rights" and particularly to "interests", a term which, as we have seen, is very vague, implies that it is open to the cessionary State to assert future claims and rights still to be acquired. There are even examples of provisions going beyond succession to rights still to be acquired or to interests. Article 19 of the Convention of 4 August 1916 between the United States and Denmark concerning the cession of territory in the West Indies calls for the cession to the United States of

"all territory, dominion and sovereignty, *possessed, asserted or claimed* \* by Denmark".<sup>108</sup>

Another example is article 1 of the Treaty of Paris (1861) whereby His Most Serene Highness the Prince of Monaco renounced

in perpetuity, on his own behalf and on behalf of his successors, in favour of His Majesty the Emperor of France, all direct or *indirect* \* rights over the communes of Menton and Roquebrune, irrespective of the *origin and nature* \* of his rights thereto.<sup>109</sup>

(9) Some decisions go so far as to recognize the right of the successor State to demand payments to be made to a third party. In 1866 the Prussian State had concluded an agreement with a city, subsequently ceded to Poland, under which the city was required to contribute towards the upkeep of a secondary school. The Supreme Court of Poland found that the successor State had acquired the rights which the Prussian State derived from the agreement of 1866 even if this were a right to demand payments to be made to a third party, the school having a separate legal personality.<sup>110</sup>

### Article 7. Currency and the privilege of issue

1. The privilege of issue shall belong to the new sovereign throughout the territory transferred.

2. Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds which are proper to the territory transferred shall pass to the successor State.

3. The apportionment of monetary reserves, in cases where there is more than one successor or in cases of dismemberment, shall be determined by treaty, regard being had in particular to the percentage of currency in circulation in that territory.

### COMMENTARY

#### A. Introduction

(1) The problem of currency in cases of the territorial transformation of States is bound up with great technical complexities with which, in the Special Rapporteur's opinion, the International Law Commission need not concern itself in any detail. Even when considered in complete isolation from its financial aspects and strictly within the context of State succession, this question gives rise to problems in so far as it *relates both to succession to public property and succession to public debts*. Instruments of payment generally consist of three kinds of monetary

<sup>104</sup> *Ibid.*, p. 469.

<sup>105</sup> *Ibid.*, p. 468, foot-note 2.

<sup>106</sup> D. Bardonnet (*op. cit.*, pp. 573-574) considers that there is "a presumption of succession to public property in general, whether part of the public or private domain, whether immovable or movable [...]. Exceptions to the principle of total transfer must be expressly provided for in the treaties and must be strictly interpreted."

In a work by one of the authors who has attempted to codify international law (J. Internoscia, *New code of international law*, 1st ed. (New York, The International Code Company, 1910), p. 54) we find a rule 310, reading as follows: "A State that inherits must assume the charge of [...] (3) the money and property of the fisc (*l'argent et les biens du fisc; il denaro e la proprietà del fisco*)", and a rule 313 which states: "The money, forests, lands and, in general, all movable and immovable property of the treasury of the extinct State becomes its property." (The reference here is to "loss of the whole territory.")

<sup>107</sup> Cf., for example, Supreme Court of Poland, *Polish State Treasury v. Skibniewska* (1928), in A. D. McNair and H. Lauterpacht, ed., *Annual Digest . . . 1927-1928* (London, 1931), Case No. 48, pp. 73-74, which interprets article 208 of the Treaty of Saint-Germain-en-Laye (providing for the transfer of all "property and possessions" to the successors of Austro-Hungary) as including all claims as well.

<sup>108</sup> English text in *Supplement to the American Journal of International Law* (New York, 1917), vol. 11, p. 55; French text in *Revue générale de droit international public* (Paris, 1917), t. XXIV, p. 454. With regard to property "claimed" by Denmark, the predecessor State, see above, commentary to article 2, paras. 9-12.

<sup>109</sup> G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1869), t. XVII, part II, p. 56.

<sup>110</sup> Supreme Court of Poland, *Case of the Polish State Treasury v. City of Gniezno* (1930), in H. Lauterpacht ed., *Annual Digest . . . 1929-1930* (London, 1935), Case No. 31, p. 54 (quoted in *Yearbook of the International Law Commission*, 1963, vol. II, p. 133, document A/CN.4/157, para. 336), and other similar cases.



tokens: first, the metal currency in the strict sense, made up of the small coinage in circulation; second, the bullion or gold reserves providing the backing; thirdly, the paper money or fiduciary currency, whose issue is generally entrusted to a State banking institution. The first two categories of monetary tokens pose the problem of a change of sovereignty in terms of succession to *public property*, while the third, on the contrary, poses the problem in terms of succession to *public debts*. Paper money, generally guaranteed by a gold backing, theroretically constitutes a debt owed by the institution of issue to the bearer of the fiduciary currency.

(2) The following are the conclusions reached by a writer who has made a special study of these questions.<sup>111</sup>

In the case of *partial succession*, and with respect to paper money, he considers that

the debt of the institution of issue represented by its notes is regarded as a direct debt of the State and is consequently *shared* between that State and the States that succeed to one or more parts of its territory, in accordance with the general principles of the apportionment of State debts. This, at least, is the principle recognized in the ordinary law, from which derogations may be made by special treaty provisions. The logical consequence of this first rule of ordinary law is that the *assets* \* of the institution of issue, including those earmarked for the backing of issues, must be equally apportioned between the States in the same proportion as the actual debt represented by the issues [...]. The apportionment should be in proportion to the quantity of notes held in the former State and each of its separate parts.<sup>112</sup>

In the case of *universal succession*, the author considers that

If the State is dismembered and extinguished, it would be necessary to proceed to the complete liquidation of operations of issue and the liquidation of the institution of issue itself. Each of the successor States would participate in this liquidation in proportion to the notes in circulation in its territory on the date of the dismemberment.<sup>113</sup>

(3) If the currency problem is divested of its difficulties,<sup>114</sup> it may be reduced to the consideration of three points: (a) the privilege of issue; (b) the monetary tokens "proper" to the territory transferred, and (c) cases of dismemberment or cases where there is more than one successor State.

#### B. The privilege of issue

(4) Paragraph 1 of the proposed article does not call for lengthy comment, since it is obvious that the privilege of issue, which is an attribute of public authority, can belong

<sup>111</sup> B. Nolde, "La monnaie en droit international public", *Recueil des cours de l'Académie de droit international de La Haye*, 1929-II (Paris, Hachette, 1930), t. 27, pp. 243-390 (especially chapter III, "La monnaie en cas de transformations territoriales des Etats et d'exercice temporaire de la souveraineté monétaire", pp. 285-313).

<sup>112</sup> *Ibid.*, p. 296.

<sup>113</sup> *Ibid.*, p. 305; see also p. 303.

<sup>114</sup> Apart from the substantial bibliography given by Nolde (*ibid.*, pp. 391-393), and some historical examples, see also the lecture given in 1923 by Mr. de Monès del Pujol, the receiver of the Austro-Hungarian Bank: "La solution d'un grand problème monétaire: La liquidation de la Banque d'émission de l'ancienne monarchie austro-hongroise", *Revue des sciences politiques* (Paris, April-June 1923) pp. 161-195.

only to the new sovereign in the territory transferred. As drafted, the paragraph does not mean that the privilege of issue is the subject of a succession or a transfer. The predecessor State loses its privilege of issue in the territory transferred and the successor State exercises its own privilege of issue, which it derives from its sovereignty. Just as the successor does not derive its sovereignty from the predecessor,<sup>115</sup> so also it does not receive from the predecessor an attribute of sovereignty like the privilege of issue. The paragraph simply states that the privilege of issue "shall belong" to the new sovereign throughout the territory affected by the change. It is not *inherited*. As in the case of any right, however, a distinction must be made between the *possession* and the *exercise* of this privilege. The fact that the successor State may by treaty allow others to exercise or continue to exercise this privilege is evidence that it is in full possession of the privilege, inasmuch as it has the power thus to dispose of it.

(5) Article 3 of the Convention between the United States of America and Denmark providing for the cession of West Indies reads as follows:<sup>116</sup>

It is especially agreed, however, that:

...

4. The United States will maintain...

(h) Concession of June 20th, 1904, for the establishment of a Danish West-Indian bank of issue. This bank has for a period of 30 years acquired the monopoly to issue bank-notes in the Danish West-India islands against the payment to the Danish Treasury of a tax amounting to ten per cent of its annual profits.

The United States was of course subrogated to Denmark, the ceding State, with regard to collection of the 10 per cent tax. However, practices of this kind, which were never very widespread, are dying out, and the successor State itself is exercising its power to coin money and issue notes.

(6) When the independence of the various Latin American colonies was proclaimed at the beginning of the nineteenth century, the Spanish currency was generally not withdrawn. The various republics confined themselves to substituting the seal, arms or inscriptions of the new State for the image and name of His Most Catholic Majesty on the coins in circulation,<sup>117</sup> or to giving some other name to the Spanish peso without changing its value or the structure of the currency.<sup>118</sup>

(7) The successor's sovereign exercise of the privilege of issue has sometimes been limited by treaty. When Genoa was ceded to the King of Sardinia in 1814, it was decided that "the gold and silver currency of the ancient State of Genoa, as they exist, will be accepted by the public treasury concurrently with the currency of Pied-

<sup>115</sup> See *Yearbook of the International Law Commission*, 1969, vol. II, p. 77, document A/CN.4/216/Rev.1, para. 29.

<sup>116</sup> For the reference, see foot-note 108 above.

<sup>117</sup> In Chile the new inscriptions on the Spanish peso in 1817 were: "Liberty, Union and Strength" and "Independent Chile"; in Argentina: "Union and Liberty" and "Provinces of Rio de la Plata". In Peru and Mexico the new emblem, arms or seal were stamped on the coins.

<sup>118</sup> "Boliviano", "bolivar", "sucre" were new names given to the Spanish peso in Bolivia, Venezuela and Ecuador.



mont".<sup>119</sup> Article 77 of the treaty of peace with Turkey, signed at Sèvres on 10 August 1920,<sup>120</sup> provided, in connexion with the cession of Smyrna to Greece, for the maintenance of the Turkish currency for five years. The treaty was, however, never brought into force.

(8) The Peace Treaties of Saint-Germain-en-Laye and Trianon with Austria and Hungary had to take account of the wish of the successor States to exercise their privilege of issue, and to cease accepting the Austro-Hungarian paper money that the Bank of the Austro-Hungarian Empire had continued to issue for a short period. This bank was liquidated, and for the most part the successor States overprinted the old paper money during an initial period as outward evidence of their power to issue currency.<sup>121</sup>

(9) In the proceedings of the Hague Round-Table Conference, there was one instance of a restriction on the exercise of the privilege of issue. The new Indonesian Republic was required, as long as it had liabilities towards the Netherlands, to consult the Netherlands before establishing a new institution of issue and a new currency. However, this restriction did not last for long.

(10) Ethiopia and Libya apparently did not succeed to the monetary reserves, judging by the more clearly established fact that they did not succeed to the obligations derived from the issue of Italian currency. However, both countries made use of their right of issue to carry out monetary reforms when they became independent. Yugoslavia exercised its privilege of issue in Zone B of the Territory of Trieste by introducing first, in November 1945, a special currency, the "Yugolira", and later the Yugoslav national currency, the dinar.

(11) In pursuance of the decisions taken at the Conference on Indochina held at Pau from 30 June to 27 November 1950, a bank for Indochina was to begin operations on 1 January 1952 with authority to issue piastre notes, which would be individualized for each of the three Associated States of Indochina but would circulate as legal tender throughout those States.

### C. Monetary tokens "proper" to the territory transferred

(12) Paragraph 2 of Article 7 covers at least two different possibilities. In the first instance, this paragraph may be regarded, like paragraph 1, as simply a descriptive provision having nothing, strictly speaking, to do with State succession. In cases of *decolonization*, for example, many territories had their own institution of issue and their own currency. The privilege of issue in the territory may have been exercised by a private bank, a governmental body of the metropolitan country or a public body

of the territory. Alternatively, so far as assets are concerned, the monetary tokens in circulation may have been a mixture of the issues of two or more institutions of the kinds mentioned above. The first acceptance of paragraph 2 of the article is simply that whatever portion of those monetary tokens was owned by the territory that is being transferred should normally revert to it, without there being any problem of State succession—or (if one is to speak of succession), should pass under the control of the successor State. However, this paragraph is also intended to cover another possibility, namely, all those cases where the monetary tokens are not the *actual property* of the territory but are *proper* to it. These are cases where the territory was given monetary *autonomy* through an allocation of public property, clearly individualized and separate, originating in the predecessor State. In such cases, the principle of the transfer of public property from the predecessor to the successor should apply.

(13) The Special Rapporteur does not know whether this general pattern has in fact been followed in all or in most cases. A few examples will show that it has been departed from in two opposite ways; sometimes a State irregularly annexes a territory and improperly seizes the monetary tokens, and at other times the successor State cannot recover the gold holdings, foreign exchange reserves, and so forth, or must provide various kinds of compensation in order to do so.

At the time of the *Anschluss* of Austria, Nazi Germany caused the National Bank of Austria to be absorbed entirely by the Reichsbank. It did likewise in the case of the invasion of the Sudetenland and the demise of Czechoslovakia.<sup>122</sup> It had originally been agreed between Prague and Berlin that the Bank of Czechoslovakia would hand over to Germany about one sixth of its bullion reserve—390 million crowns, or just over twelve tons of gold. However, the German invasion and the dismemberment of Czechoslovakia upset these original arrangements, although the German armies did not find in Prague all the gold coveted by Berlin.

Similarly, to go back in history—still in connexion with Germany—Bismarck caused the bullion reserve of the Bank of France at Strasbourg to be sequestered. This measure was reversed by the Frankfurt Additional Agreement of 11 December 1871, under which Germany, upon annexing Alsace-Lorraine, was to return the bullion that had been kept at Strasbourg by the Bank of France, whose head office is in Paris.<sup>123</sup>

Under the Treaty of Craiova (7 September 1940), Romania relinquished all public property, including the property of the institution of issue.

<sup>119</sup> Protocol of the Congress of Vienna, draft articles annexed to the protocol of the meeting 12 December 1814, in G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1887), t. II, p. 88.

<sup>120</sup> G. F. de Martens ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1924), 3rd series, t. XII, p. 681.

<sup>121</sup> For the details, somewhat complicated, of the measures taken in respect of currency, see the two long articles 189 of the Treaty of Trianon and 206 of the Treaty of Saint-Germain-en-Laye (*ibid.*, p. 491, and *ibid.*, 1923, 3rd series, t. XI, p. 764).

<sup>122</sup> Cf. R. Sédillot, "Les problèmes financiers du démembrement", *L'Europe nouvelle*, Paris, No. 1101 (18 March 1939), pp. 287-288.

<sup>123</sup> At a later date, article 53 of the Regulations annexed to the Convention of 18 October 1907 respecting the Laws and Customs of War on Land permitted (in cases of military occupation and not, of course, of State succession) the seizure of movable property which might be used for military operations and of funds and securities which were the property of the occupied State. (For the English and French texts of the Convention and the Regulations annexed thereto, see J. B. Scott, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915), pp. 125-126.)

Following Germany's seizure of monetary and exchange reserves during the Second World War, an attempt at reorganization was made after the end of the hostilities through the Paris Agreement of 14 January 1946,<sup>124</sup> relating to reparation from Germany, the establishment of an inter-allied reparation agency and the restitution of monetary gold.<sup>125</sup>

(14) Leaving the subject of forced transfers of territory or military occupation and reverting to the subject of State succession, attention may be drawn to certain cases of transfer, limited or against compensation, of the monetary tokens "proper" to the territory.

When Transjordan became Jordan, it succeeded to a share of the surplus of the Palestine Currency Board, estimated at £1 million, but had to pay an equivalent amount to the United Kingdom for other reasons.<sup>126</sup>

In the case of Algeria, money on deposit in accounts with the Algerian institution of issue (the Bank of Algeria) at the time of independence was not transferred to the new sovereign. With regard to the Bank's other patrimonial assets, it was agreed that Algeria would pay France 8,000 million old francs as compensation.<sup>127, 128</sup>

The currency of Czechoslovakia was created in 1919 simply by overprinting the Austrian notes in circulation in the territory of the new Republic and reducing their value by 50 per cent.

The French Government withdrew monetary tokens from the French establishments in India but agreed to pay compensation. Article XXIII of the Franco-Indian Agreement of 21 October 1954 states:<sup>129</sup>

The Government of France shall reimburse to the Government of India within a period of one year from the date of the *de facto* transfer the equivalent value at par in £ sterling or in Indian rupees

<sup>124</sup> For the English and French texts of the Agreement, see United States of America, Department of State, *Treaties and other International Acts Series*, No. 1655 (Washington, U.S. Government Printing Office, 1947).

<sup>125</sup> It will be recalled that this gave rise to a case before the International Court of Justice concerning the problem of monetary gold belonging to the National Bank of Albania, which was removed from Rome in 1943 (Case of the monetary gold removed from Rome in 1943 (Preliminary Question)) (Italy v. France, United Kingdom and United States of America: Judgement of 15 June 1954, *I.C.J. Reports 1954*, p. 19).

<sup>126</sup> See the Agreement of 1 May 1951 between the United Kingdom and Jordan for the settlement of financial matters outstanding as a result of the termination of the mandate for Palestine (United Nations, *Treaty Series*, vol. 117, p. 19).

<sup>127</sup> The two residences of the Governor and Deputy Governor of the Bank of Algeria were included in the transfer (agreements of 14-19 January 1963, signed in Paris). The Bank, which was formerly named "the Bank of Algeria and Tunisia", possessed the privilege of issue in Algeria and in Tunisia. It lost the privilege as concerns Tunisia when that country became independent in 1956.

<sup>128</sup> For the opposite view, see G. Fouilloux, "La succession des Etats de l'Afrique du Nord aux biens publics français", *Annuaire de l'Afrique du Nord*, 1966 (Paris, vol. V, 1967). The author, no doubt through lack of knowledge of the facts, lays great stress on "le caractère gratuit des transferts, importants en nombre et en valeur" (*ibid.*, p. 62).

<sup>129</sup> English text in India, *Foreign Policy of India: Texts of Documents 1947-64* (New Delhi, Lok Sabha (Secretariat), 1966), p. 212; French text in *Recueil des traités et accords de la France*, year 1962, p. 535, and also in *Journal officiel de l'Inde française* (Pondicherry, 22 October 1954), No. 105, p. 567.

of the currency withdrawn from circulation from the Establishments after the *de facto* transfer.

#### D. Cases of dismemberment or cases where there is more than one successor State

(15) A distinction should first, perhaps, be drawn between cases of dismemberment and cases where there is more than one successor State. The two are not necessarily identical. In cases of dismemberment, the predecessor State always ceases to exist and is partitioned between two or more successors. However, the fact that there is a take-over by the latter does not always indicate dismemberment; the predecessor State may continue to exist, surrendering only part of its territory to be divided between two or more States.

(16) By virtue of its own sovereignty, each successor State possesses its privilege of issue, of which it may dispose at its discretion; no special difficulty arises here. The question which concerns us is how the successors divide the gold holdings, foreign exchange reserves, money in circulation, and so forth. The disposal of this public property is generally governed by an apportionment agreement. It does not seem possible to enunciate a rule for apportionment that would take into account all the factors involved (the size of the territory's population, the comparative wealth of the territory, its past contribution to the formation of the central reserves, the percentage of paper money in circulation in the territory, etc.). It must be borne in mind that the transfer of this paper money to the new sovereign mainly represents *succession to a debt*, whereas the transfer of the bullion reserves represents a *succession to public property*. Thus the successor State usually tries to withdraw the old notes from circulation, both because they represent a debt and because this operation provides an opportunity to manifest its new sovereign power of issue.

(17) With the demise of the old Tsarist empire after the First World War, some of its territories passed to Estonia, Latvia, Lithuania and Poland.<sup>130</sup> Under the peace treaties concluded, the new Soviet régime became fully responsible for the debt represented by the paper money issued by the Russian State Bank in these four countries.<sup>131</sup> The provisions of some of these instruments indicated that Russia released the States concerned from the relevant portion of the debt, as if this was a derogation by treaty from a principle of automatic succession to that debt. Other provisions even gave the reason for such a derogation, namely, the destruction suffered by those countries during the war.<sup>132</sup> At the same time and in these same treaties part of the bullion reserves of the Russian State Bank was transferred to each of these States. The

<sup>130</sup> No reference is made here to the cases of Finland, which already enjoyed monetary autonomy under the former Russian régime, Bessarabia, which was incorporated by the great Powers into Romania, or Turkey.

<sup>131</sup> See the following treaties: with Estonia (2 February 1920), article 12; with Latvia (11 August 1920), article 16; with Lithuania (12 July 1920), article 12; and with Poland (18 March 1921), article 180 (League of Nations, *Treaty Series*, vol. XI, p. 51; vol. II, p. 212; vol. III, p. 122 and vol. VI, p. 123).

<sup>132</sup> Cf. B. Nolde, *op. cit.*, p. 295.

ground given in the case of Poland is of some interest: the 30 million gold roubles paid by Russia under this head corresponded to the "active participation" of the Polish territory in the economic life of the former Russian Empire.

(18) In the case of India, various agreements were concluded between the United Kingdom and its two former Dominions and also between the two Dominions. The first point to be noted is that India had an entirely separate monetary system before the colonial Power withdrew and the country was partitioned. The only problem which would arise in the normal course of events was the apportionment of reserves and currency between India and Pakistan. As soon after 30 September 1948 as practicable, the Reserve Bank of India was to transfer to Pakistan assets equal to the volume of money actually in circulation at that time in the latter State. Before that date, Indian rupee notes issued by the Reserve Bank of India would still be legal tender in Pakistan. The apportionment of the cash balances of the Reserve Bank of India, which amounted to about 400 crores of rupees, was determined by the agreements of December 1947 between India and Pakistan<sup>133</sup> and by the Pakistan (Monetary System and Reserve Bank) Order, 1947.<sup>134</sup> Pakistan received 75 crores of rupees and also obtained part of the Bank's sterling assets. The ratio of the note circulation in Pakistan and in India to the total volume of money in circulation had been taken into account for the purpose of this apportionment. Pakistan's actual share came to 17.5 per cent.

### *Article 8. Treasury and public funds*

**1. Public funds, liquid or invested, which are proper to the territory transferred shall pass to the successor State.**

**2. Upon closure of the public accounts relating to Treasury operations, the successor State shall receive the assets of the Treasury and shall assume responsibility for costs relating thereto and for budgetary and Treasury deficits. It shall also assume the liabilities on such terms and in accordance with such rules as apply to succession to the public debt.**

#### COMMENTARY

##### *A. Public funds*

(1) Public funds "proper" to the territory transferred include, first of all, the funds belonging to the territory as a separate administrative and financial authority. These funds never belonged to the predecessor State at any time when it was still exercising its jurisdiction over the territory; still less can they belong to it after it loses its sovereignty in the territory. Public funds "proper" to the territory transferred must also, however, be understood to mean cash, stocks and shares which, although they form

part of the over-all assets of the State, are situated in the territory or have a relationship to it by virtue of the State's sovereignty over or activity in that region. The principle of total transfer of all the assets of the predecessor State requires that these funds should pass to the successor State.

(2) Examples drawn from practice will show the differences in the situations which are covered as well as the extent to which the principle of transfer has been respected.

Public State funds may be liquid or invested; they include stocks and shares of all kinds. Thus, the acquisition of "all property and possessions" of the German States in the territories ceded to Poland included also, according to the Supreme Court of Poland, the transfer to the successor of a share in the capital of an association.<sup>135</sup>

After the Anschluss of 1938, all Austria's assets, of whatever kind, passed to the Third Reich. The Reich also acquired in Czechoslovakia, under the agreement of 4 October 1941, all the stocks, shares and other interests of the Czech State in enterprises whose business was situated outside Czechoslovakia, as its frontiers were in 1939, and "an equitable share" in the remaining enterprises within Czechoslovakia. Slovakia succeeded to Czechoslovakia's holdings under an agreement with the Third Reich dated 13 April 1940. All the funds of public establishments, "whether or not possessing juridical personality",<sup>136</sup> became Slovak, automatically and without payment, provided that they were situated in the territory of Slovakia. Hungary, under the agreement of 21 May 1940 with the Reich, succeeded *ipso jure* to the property of establishments "controlled" by Czechoslovakia in the territory taken over by Hungary.

As part of the "transfer without payment of the right of ownership over State property", the USSR received public funds situated in the Sub-Carpathian Ukraine, which, within the boundaries specified in the Treaty of Saint-Germain-en-Laye of 10 September 1919, was ceded by Czechoslovakia in accordance with the Treaty of 29 June 1945.

The Free Territory of Trieste succeeded to all Italy's movable assets, including public funds, under the 1947 Treaty of Peace.<sup>137</sup>

It appears, however, that the public funds of the British Mandatory Government in Palestine were withdrawn by the United Kingdom. Yet this example does not invalidate the general principle inasmuch as a Mandate, which was conceived as an international public service assumed by a State on behalf of the international community, in no way deprives the Mandatory Power of the authority to withdraw its own property when such property is clearly

<sup>133</sup> See *Keesing's Contemporary Archives, 1946-1948*, vol. VI, January 24-31, p. 9066.

<sup>134</sup> A. N. Aiyar, *Constitutional Laws of India and Pakistan* (Madras, Company Law Institute of India, 1947), p. 147.

<sup>135</sup> Digest by the Secretariat of the decision of the Supreme Court of Poland in *Polish State Treasury v. Deutsche Mittelstandskasse* (1929) (*Yearbook of the International Law Commission*, 1963, vol. II, p. 133, document A/CN.4/157, para. 337).

<sup>136</sup> "Betriebe, Anstalten und Fonds, mit oder ohne eigene Rechtspersönlichkeit", in the words of the agreement of 13 April 1940, quoted by I. Paenson; *Les conséquences financières de la succession des Etats (1932-1953)* (Paris, Domat-Montchrestien, 1954), p. 104.

<sup>137</sup> Treaty of Peace with Italy of 10 February 1947, annex X (United Nations, *Treaty Series*, vol. 49, p. 209).

separable and detachable from that of the mandated country.

(3) It will be observed that neither in the proposed draft article nor, thus far, in these commentaries has any distinction been made on the basis of whether one or more than one successor State is involved. Practice shows that where there is more than one the public funds are divided *equitably*, as indicated in connexion with the dismemberment of Czechoslovakia.<sup>138</sup> Similarly, in the fragmentation of the former Kingdom of the Serbs, Croats and Slovenes, the apportionment of funds and assets was effected *in accordance with the principles of equity*. The Special Rapporteur has accordingly not deemed it necessary to complicate the text of article 8 by recommending equitable apportionment where there is more than one successor State. While he believes that the principle of equity should and must be fully applied, he also believes that any apportionment, if it is to be equitable, must take into account a great many factual data which vary from country to country and situation to situation and which defy codification. In other words, equity means everything and means nothing, and it is as well to leave its exact content to be spelt out in individual agreements.

(4) India succeeded to the sterling assets of the Reserve Bank of India, estimated at £1,160 million.<sup>139</sup> However, these assets could not be utilized freely, but only progressively. A sum of £65 million was credited to a free account and the remainder—i.e., the greater part of the assets—was placed in a blocked account. Certain sums had to be transferred to the United Kingdom by India as working balances and were credited to an account opened by the Bank of England in the name of Pakistan. The conditions governing the operation of that account were specified in 1948 and 1949 in various agreements concluded by the United Kingdom with India and Pakistan.<sup>140</sup>

The Indo-Pakistan agreements of December 1947<sup>141</sup> confirmed the application of the principle of succession by each State to all the assets situated in its territory and equitable apportionment of the central assets.

On termination of the French Mandate, Syria and Lebanon succeeded jointly to the "common interests" assets, including "common interests" Treasury funds and the profits derived by the two States from various concessions. The two countries succeeded to the assets of the "Banque de Syrie et du Liban". However, most of these assets were blocked and were released only progressively over a period extending to 1958.<sup>142</sup>

<sup>138</sup> See para. 2 above.

<sup>139</sup> United Kingdom, *Financial Agreement between the Government of the United Kingdom and the Government of India*, Cmd. 7195 (London, H. M. Stationery Office, 14 August 1947).

<sup>140</sup> For details, see I. Paenson, *op. cit.*, *passim* and in particular pp. 65-66 and 80.

<sup>141</sup> See foot-note 133 above.

<sup>142</sup> For Syria, see the Convention on Winding-up Operations, the Convention on Settlement of Debt-claims and the Payments Agreement, all three dated 7 February 1949 (France, *Journal officiel de la République française, Lois et décrets*, Paris, 10 March 1950, 82nd year, No. 60, pp. 2697-2700); for Lebanon, see the Franco-Lebanese monetary and financial agreement of 24 January 1948 (*ibid.*, 14 and 15 March 1949, 81st year, No. 64, pp. 2651-2654; also in United Nations, *Treaty series*, vol. 173, p. 99).

As has been noted, Jordan received a share of the surplus of the Palestine Currency Board.<sup>143</sup> It also came into possession of a number of very small balances of various funds (the Benzine Fund, the Ottoman Agricultural Bank Fund and the Transjordan Frontier Force Fines Fund).<sup>144</sup>

The principle of geographical apportionment of movable assets was adopted by the new States of former French West Africa at the Paris Conference of 5 and 6 June 1959. The size of the budgets of the various States and the theoretical proportion of assets brought in by each of them were also taken into consideration. The application of the principle of geographical apportionment placed Senegal in a privileged position, and to compensate for this it waived its share in the assets of the Reserve Fund, which included cash, debt-claims, stocks and bonds, in favour of the other partners. The Federation of Mali was subsequently dissolved and the public funds were divided in the proportion of 38 per cent for Mali and 62 per cent for Senegal.<sup>145</sup>

## B. Treasury

(5) The public accounts are usually closed as at the date of transfer, and the transfer takes place *ipso facto*. Transfer of the Treasury is always difficult, however, because of the complexity of Treasury operations. The assets, composed of public funds, stocks and securities, budgetary revenues, miscellaneous Treasury income and the movable and immovable installations used by Treasury departments, should normally be transferred to the successor State. In return, the latter assumes the *liabilities*, comprising miscellaneous and administrative *costs* of the Treasury, the *public debt* proper and any *deficits*.

(6) In cases of total absorption, the Treasury is automatically merged into that of the new sovereign, which must decide the question of liabilities in accordance with the rules governing the public debt. In all other cases of succession the situation is the same except as regards amounts which may be due to the predecessor State if it has a definite debt-claim against, or has granted advances to, the local Treasury. However, these are matters to be dealt with in connexion with the public debt at a later stage, when the International Law Commission will be considering the modalities for extinguishing that debt. It will therefore suffice, at this point, to enunciate a general rule and to disregard differences according to the type of State succession, since the usefulness of such distinctions will become apparent only when the various aspects of the public debt are being studied. The costs which pass to the successor State consist, in particular, of the departmental expenses of the Treasury. Budgetary and Treasury deficits must be carefully distinguished from the liabilities represented by the public debt. The latter is represented by various debt-claims against the Treasury by individuals or bodies corporate. The budgetary or administrative deficit is not necessarily of the same nature or the same origin.

<sup>143</sup> See above, commentary to article 7, para. 14.

<sup>144</sup> See foot-note 126 above.

<sup>145</sup> See below, commentary to article 9, para. 24, sub-para. 4.

(7) India assumed the deficits of the various accounts in the care of the local administration of the former French Establishments in India.<sup>146</sup>

In the case of the advances which the United Kingdom had made in the past towards Burma's budgetary deficits, the United Kingdom waived repayment of £15 million and allowed Burma a period of twenty years to repay the remainder, free of interest, starting on 1 April 1952. The former colonial Power also waived repayment of the cost it had incurred for the civil administration of Burma after 1945 during the period of reconstruction.<sup>147</sup>

(8) The Special Rapporteur has suggested a draft article which would oblige the successor State to assume responsibility for costs incumbent on the Treasury which is being transferred by the predecessor State. It should be noted, however, that there have been cases where responsibility for such costs remained with the ceding State. For example, article XII of the Treaty of Peace concluded at Bucharest on 7 May 1918 between the Central Powers and Romania<sup>148</sup> stipulates that the State property (*Staatsvermögen*) of the ceded Romanian territories shall pass to the acquiring States *free and clear of any compensation or costs*. Many more examples of this kind could easily be found.

(9) There are some cases to the contrary, where the ceding State is not only released from all responsibility for costs (which, as has been noted repeatedly above, is then assumed by the successor), but is also tempted actually to transfer only a small part of the assets of the Treasury and of public funds. However, this is generally effected by means of more or less regular operations reducing the transferable assets before the date of actual change of sovereignty. Thus, it may justifiably be stated that the existence of such cases, many and varied as they may be, does not create any doubt as to the existence or the validity of the rule concerning transferability of public funds and assets of the Treasury, as formulated in the text suggested by the Special Rapporteur.<sup>149</sup>

<sup>146</sup> Article 20 of the Franco-Indian Agreement of 21 October 1954 (for the reference, see foot-note 129 above) continued, after the words "in respect of all credits" with the words "debts and deficits of the various accounts in the care of the local administration".

<sup>147</sup> The United Kingdom also reimbursed Burma for the cost of supplies to the British Army incurred by that territory during the 1942 campaign and for certain costs relating to demobilization.

<sup>148</sup> G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1921), 3rd series, t. X, p. 856.

<sup>149</sup> The Special Rapporteur has in mind, in particular, the case (but is it an isolated case?) of the transfer of the Algerian Treasury at the time when Algeria became independent. While the liquid assets of the Algerian Treasury amounted to some 150,000 million old francs in 1961 (i.e., one year before independence), a letter in March 1961 from the French authorities gave instructions, two months before the Evian negotiations for independence, to transfer as much as possible of those liquid assets to France. Entries in the books of the Algerian Treasury were erased or scratched out or written over, or no entries were made for some operations. Thus, by 16 April 1962 the liquid assets of the Treasury were reduced to 78,600 million and twelve days later (28 April) to 1,100 million. Some public transfers to France were recorded in the books of the Algerian Treasury as "unspecified operations". Transfers of funds were also effected by Algerian public agencies and establishments in contravention of the legislation in force, which was reaffirmed by a Franco-Algerian Protocol of August 1962. The fact that Algeria was made responsible for the payment of very heavy debts, and the use of the Treasury guarantee

## Article 9. Public debt-claims

1. Irrespective of the type of succession, public debt-claims which are proper to the territory affected by the change of sovereignty shall remain in the patrimony of that territory.

2. The successor State shall, when the territorial change is effected, become the beneficiary of the public debts of all kinds receivable by the predecessor State by virtue of its sovereignty or its activity in the territory transferred.

### COMMENTARY

#### A. Exposition of the problem: State debt-claims and territorial debt-claims

(1) It is difficult indeed to formulate a uniform general rule on the subject of public debt-claims which would apply to all types of succession—not that the principle of succession to the public debt-claims of a State is in doubt, but there are so many different types of succession that it may prove to be not at all easy to find a single formula covering them all. In addition to the quite clear case of *total absorption*, in which the predecessor State ceases to exist and its successor may properly take over all its debt-claims as well as all its rights, there is the whole range of cases of partial cession, secession, decolonization and dismemberment.

(2) In cases of *partial cession*, *secession* and *decolonization*, the difficulty arises from the fact that there are two distinct categories of public debt-claims. The first comprises claims properly belonging to the territory concerned; the debtor, the title or the pledge (if any) may be

that had been given during the war in respect of many activities, rendered the financial situation very precarious by the time the Treasury was transferred to Algeria on 31 December 1962. The liquid assets were not enough to meet even short-term commitments, quite apart from the pressure exerted on those assets by the funds on deposit in current and other accounts. It should be pointed out, however, that withdrawals of funds in 1961-1962, and even in 1963, by individuals who were leaving Algeria permanently were a strain not so much on the Treasury as on the banking system as a whole, which they dislocated. Transfers in 1962, especially by individuals, have been estimated at about 500,000 million old francs and the total outflow of capital from Algeria between 1961 and 1964 at approximately 1.1 million million. A very cautious study by Mr. Poul Høst-Madsen refers to the difficulty of making estimates of the flight of capital from developing countries (P. Høst-Madsen, "How much capital flight from developing countries?", *Finance and Development* (quarterly publication of IMF and IBRD), Washington, vol. II, No. 1, March 1965, pp. 28-37). However, the author mentions Algeria as the most typical instance of large-scale transfers. "One element in some of these calculations," he writes, "which may give them a degree of plausibility, is the large outflow of capital which in recent years has taken place from Algeria" (*ibid.*, p. 28); and again: "In recent years, the best known instance of a flow of capital from a developing country is the outflow that accompanied the large-scale emigration of Europeans from Algeria during the years before and after that country became independent. This movement of capital was for the most part directed toward France, and is reflected as a large credit entry for 'errors and omissions' in French statistics of economic transactions with the overseas franc area. This entry amounted to \$0.9 billion in 1960, \$1.6 billion in 1961, and more than \$2 billion in 1962 [...] it has been officially estimated that the movement of private capital from Algeria into France reached an equivalent of \$1 billion in 1962\*" (*ibid.*, pp. 28-29).

situated either within the territory or outside its geographical boundaries. The second category comprises claims which belong to the predecessor State and arise out of its activity or sovereignty in the territory concerned.

It is the second category that should mainly concern us here, since debt-claims proper to the territory itself remain in its patrimony and cannot be affected by the change which has taken place with regard to sovereignty. If there is any change in their status or in the beneficiary, it occurs not as a result of State succession but by the will of the new State, acting not as successor but as the new sovereign in the territory. Debt-claims proper to the transferred territory therefore remain in its patrimony, even if the ceding State is the debtor. For example, the United Kingdom, as noted above, reimbursed Burma, when it became independent, for the cost of supplies to the British Army during the 1942 campaign which had been borne by that territory and for certain costs relating to demobilization.<sup>150</sup>

(3) In cases of *dismemberment*, the same distinction must be made. The various territories which constituted the former State retain their own debt-claims, but those of the State, wherever they are situated and whatever they relate to, have to be allocated. In such cases, as will be seen below, the claims are apportioned equitably among the territories on the basis of various criteria.

(4) For all types of succession, therefore, the problem must be confined to "public debts [...] receivable by the predecessor State". However, there is another point which must be taken into consideration. Where it does not entirely cease to exist—for example, in cases of partial cession, secession or decolonization—the predecessor State possesses debt-claims of various kinds and various origins. Those which have strictly no relationship with the transferred territory should not normally be affected by the succession of States, even though it can be argued that the territory may in the past have contributed to the general assets of the State through its economic activity, through its proportion of tax revenue, or in any other indirect and hardly distinguishable manner.<sup>151</sup>

The Special Rapporteur did not, however, feel obliged or competent to deal with that aspect of the problem. While it is true that the only debt-claims covered by the draft article are those of the predecessor State, they concern debts arising from that State's activity in the territory concerned or originating in its exercise of sovereignty in that territory. This does not mean that such claims are necessarily *situated* in the region which is transferred. All that is indicated is that they are claims which arose on account of the predecessor State, in connexion with or in exercise of its sovereignty in the territory or within the

context of its activity there. The Special Rapporteur accordingly proposes referring to "public debts [...] receivable by the predecessor State", and specifying that the latter's claim existed "by virtue of its sovereignty or its activity in the territory transferred".

(5) Some judicial decisions, apparently setting certain limits to the problem, transfer to the successor State those claims "which were in a *definite relationship* \* to the acquired territory".<sup>152</sup> For example, in 1928 the Supreme Court of Poland held that the Polish Treasury was entitled to recover a debt owed to the Austrian Government by a farmer who had received a government loan to buy livestock and equipment to replace those destroyed by operations of war. The Polish State was also held to have acquired claims against farmers who had received agricultural machinery on credit from the Austrian Government during the war.<sup>153</sup> Yet it will be seen on closer examination that these are in fact claims which arose, during the war by virtue of the sovereignty or activity of the Austrian Government in the territory transferred.

(6) However, it was, "*by virtue of its sovereignty* \*" <sup>154</sup> that Poland became possessed of all the debt-claims, as the same court decided in other instances. In *Polish Treasury v. Heirs of Dietl*, the Supreme Court of Poland held that Poland had acquired claims arising out of a deed executed in 1889 by which defendants' decedent undertook to erect a school for the children of his factory workmen and certain others in territory recovered by Poland from Russia.<sup>155</sup> In this particular case, the successor State became the beneficiary of the debts in question because they arose by virtue not of the sovereignty or activity of the predecessor State (Russia in this instance) but of the sovereignty regained by Poland over the territory concerned.

In strict accordance with this line of thinking, it was in no way surprising that Poland should have objected to the *offsets* proposed by debtors against whom it was proceeding and who relied on their own debt-claims against the predecessor State. Poland declared that it was the beneficiary, by virtue of its own sovereignty, of debts originating in the regained territory. Debtors could not be allowed to exonerate themselves vis-à-vis Poland by pleading their own debt-claims against the predecessor State—in this instance, Austria. Logically, therefore, the fact that Poland had acquired the territory under an international treaty and against payment should have been regarded as a secondary argument. Yet this secondary argument was the only one that was given prominence by the Supreme Court of Poland.<sup>156</sup>

<sup>152</sup> Digest by the Secretariat of the decisions of the Supreme Court of Poland in *Polish State Treasury v. Skibniewska* (1928) and *Polish State Treasury v. Czosnowska* (1929) (*Yearbook of the International Law Commission*, 1963, vol. II, p. 133, document A/CN.4/157, para. 338).

<sup>153</sup> *Ibid.*, paras. 339 and 340.

<sup>154</sup> Digest by the Secretariat of the decision of the Supreme Court of Poland in *Polish Treasury v. Heirs of Dietl* (1928) (*ibid.*, p. 132, para. 333).

<sup>155</sup> *Ibid.* See also *Graffowa and Wolanowski v. Polish Ministry of Agriculture and State Lands* (1923) (*ibid.*, p. 132, paras. 331-332).

<sup>156</sup> *Polish State Treasury v. Paduchowa and others* (1927) (*ibid.*, p. 133, para. 341).

<sup>150</sup> See foot-note 147 above.

<sup>151</sup> This would seem to be the rationale of the criteria and methods that are adopted for the equitable apportionment of assets between two or more successors in cases of dismemberment. The "central" assets held by the Treasury or by the institution of issue in the capital city of the dismembered State are generally divided as though each territory had contributed to their formation. If this argument were applied to cases of partial cession, however, the ceding State itself would have to be regarded as a new successor State, which would be contrary to the principle of identity and continuity of the State.



(7) Some writers make the very justifiable distinction between rights in tangible property and incorporeal rights or debt-claims, but add that the latter are all direct attributes of State sovereignty.<sup>157</sup> In other words, debt-claims fall within the patrimony of the successor State because they are all debt-claims pertaining to sovereignty over the territory. The Special Rapporteur considers this approach of an earlier age to be very outmoded, too narrow and somewhat incorrect today. There are some debt-claims which arise not out of sovereignty, but simply out of the activity of the State.

### B. Public debts of all kinds

(8) It should first of all be indicated what is meant by "public" debt-claims. These are incorporeal patrimonial rights of all kinds. The fact that they are public means that they do not belong to individuals, but it does not mean that they are necessarily governed by public law. Public debts may, according to their nature, be governed by either public or private law. Debts governed by public law are those which the predecessor State has acquired, or to which it may lay claim, by virtue of its sovereign prerogatives. One example of this is the collection of taxes. The second category comprises debts of which the State may become the beneficiary as part of its "commercial" or private activity.

(9) The general terms in which article 9 is couched indicate that it is of little importance where the debts are situated. Irrespective of their geographical location, once they are receivable by the predecessor, they are *ipso facto* receivable by the successor, provided, of course, that they pertain to the exercise of sovereignty or of an activity by the predecessor State in the territory transferred. Moreover, a patrimonial right such as a debt-claim, which is *incorporeal*, can only be "situated" as a result of various legal artifices.

(10) The expression "debts [. . .] receivable by the predecessor State" was considered preferable in the context to "debts of which the predecessor State was the beneficiary" or "debts actually owed" to that State. The two latter formulations imply that the reference is to debts which are certain, legally determined and perhaps even in process of settlement. Bearing in mind *de facto* situations which had to be taken into account, it seemed to the Special Rapporteur more correct to use the word "receivable", which is more general and covers debts that might some day, for one reason or another, be owed to the State.

<sup>157</sup> One author, J. T. N. Dimitriu, wrote:

"Mr. Michoud distinguishes two different types of patrimonial or quasi-patrimonial public rights: the first consists in the right to have a public domain [. . .] and the second in the right to levy taxes. The first represents, for the State, a right in tangible property substantially similar to such a right under private law; the second represents a simple debt-claim. To these the author adds the right to establish monopolies, either for tax purposes or for reasons of public policy. *All these rights are direct attributes of the sovereignty* \* of the State, or, in short, of the community as a whole. They are not covered by the legal term 'property and possessions' in article 256 of the Treaty of Versailles, since all these rights of Powers are inherent in the State as a legal person" (*Le régime des biens d'Etat cédés en vertu des anciens et des nouveaux traités* (Paris, Presses modernes, 1927) [thesis], p. 86).

(11) Again, "debts of all kinds" means all debts, irrespective of their origin, irrespective of the debtor (natural or legal persons, national, territorial or foreign) and irrespective of their legal nature (secured or unsecured debts stocks, shares, government bonds, and not excluding taxes). It includes debt-claims which constitute the public resources of the State, such as (a) *State property rights*, comprising income from property belonging to the State (logging in national forests, hunting or fishing rights, etc.), income from the State's financial holdings in private enterprises, and income from industrial and commercial operations (tax monopolies, industrial public services); (b) *administrative fees* or remuneration for services rendered; and most of all, (c) *taxes*, which are the supreme expression of sovereignty in that they are levied by authority, on a permanent basis and without any quid pro quo.

(12) In cases of *total annexation*, all debt-claims, like all other public property, pass into the patrimony of the annexing State. But a *problem of recognition* often arises in such cases. The annexation of Ethiopia by Italy in 1936 comes to mind. Emperor Haile Selassie brought an action in the United Kingdom to recover from a cable and wireless company sums which it owed to him. The company pleaded in defence that the debt owed to the Emperor in his sovereign capacity had passed into the patrimony of the Italian State which had succeeded the sovereign, who had been divested of all public property. It was only because the United Kingdom subsequently decided to recognize the annexation that the argument of the defence was accepted.<sup>158</sup> The same problem of recognition arose when the Italian Government objected before the French courts to the sale by Emperor Haile Selassie of 8,000 shares in the Franco-Ethiopian Djibouti-Addis Ababa Railway Company, which he held in his sovereign capacity.<sup>159</sup>

The total annexation of Austria by the Third Reich resulted in the forced transfer of the debt-claims of the former to the latter. The legislation promulgated simultaneously by the two States on 13 March 1938 to effect the *Anschluss* permitted the absorption of all the property, assets and debt-claims of the Austrian Federal Republic by the Third Reich, which considered itself the universal successor.<sup>160</sup>

When Ethiopia regained its independence, it apparently incorporated the predecessor's debt-claims into its patrimony. Under article 34 of the Treaty of Peace with Italy, it succeeded to all the rights, interests and privileges of the Italian State in Ethiopia, which would normally include debt-claims. The same occurred in the case of Albania upon its liberation from the Italian Fascist régime.

(13) In the case of a *partial cession*, such as that of the French Establishments in India, one of the agreements that were concluded to provide for reciprocal compensation of various kinds stated that "on the date of the *de*

<sup>158</sup> See *Yearbook of the International Law Commission*, 1970, vol. II, p. 167, document A/CN.4/226, Part Two, commentary to article 8, paras. 30-31.

<sup>159</sup> *Ibid.*, para. 32.

<sup>160</sup> Germany, *Reichsgesetzblatt* (Berlin, 14 March 1938), year 1938, part I, No. 21, p. 237—cited by I. Paenson, *op. cit.*, p. 143.

*facto* transfer local public accounts shall be closed in the Establishments Treasurer and Paymaster's books" and that "the Government of India shall take the place of the French Government in respect of all credits \* [ . . . ]".<sup>161</sup> Similarly, in the case of the cession of southern Dobruja by Romania to Bulgaria under the Treaty of Craiova of 7 September 1940, Romania renounced all debt-claims of the State arising out of arrears of unpaid rentals and all debt-claims against the local authorities. It is true, however, that a quid pro quo of 1,000 million lei was granted to Romania.

(14) Debt-claims also include *all stocks and shares* owned by the State. As an example of the type of succession following decolonization, the Belgo-Congolese Convention of 6 February 1965, signed at Brussels by Paul-Henri Spaak and Moïse Tshombe,<sup>162</sup> might be cited. As can be seen, this instrument, which is entitled "Convention for the settlement of questions relating to the public debt and *portfolio of the Belgian Congo Colony* \*", linked<sup>163</sup> the effective transfer of the Congolese portfolio to the recognition of certain public debts by the independent Congo. The dispute related to some 60,000 million Belgian francs, and the stocks and shares which were to be transferred to the Congo were valued at 15,000 million Belgian francs. The Convention, as concluded, was essentially a political compromise which departed considerably from the principles of State succession in respect of public property. It made the Democratic Republic of the Congo the owner of the portfolio which had formerly belonged to the colony. In return for the effective transfer of the securities constituting the portfolio, the Congo undertook not to change the pre-existing obligations towards the companies and agencies in which it held shares.

### C. Tax debt-claims

(15) Irrespective of the type of succession, it would appear that, unless there is a special agreement covering the particular case, the cessionary State succeeds to all taxes and, more generally, to all debt-claims appertaining to the prerogatives of sovereignty. The change of sovereignty does not dispense anyone from the payment of taxes and duties provided for under the previous laws, so long as they have not been repealed or amended.

It was held that the fact that Savoy had been annexed to France did not release a petitioner from the registration taxes which he owed under Sardinian law.<sup>164</sup>

When Alsace-Lorraine was annexed by the German Empire in 1871, a distinction was made by treaty between

private debt-claims of the Treasury and debt-claims connected with taxes.<sup>165</sup> Protocol No. 1 of the Frankfurt Conferences, of 6 July 1871, states the following:

There are some debt-claims which, being essentially private and to some extent personal, are totally distinct from those which the change of sovereignty carries with it. This is so, for instance, in the case of funds advanced to French industrialists established in the ceded territories.<sup>166</sup>

It was accordingly laid down, in article VIII of the Final Protocol to the Additional Agreement of 11 December 1871, that

The German Empire shall allow the French Treasury every facility for the recovery of any debts, secured or unsecured, the repayment of which it may have occasion to claim against debtors domiciled in the ceded territories under instruments or titles prior to the Treaty of Peace and which are not connected with ordinary taxes or other levies.<sup>167</sup>

(16) Despagnet, in his *Cours*,<sup>168</sup> bases himself on a stipulation in strict treaty form when he argues that, as laid down in 1871, funds advanced by a ceding State did not create a public right and could therefore remain in the patrimony of the ceding State. But if one considers instead the situation after the First World War, it will be seen that the ceding States were not allowed to claim payment of certain debts, such as funds advanced by them to individuals or local bodies, in view especially of the fact that individuals and administrative authorities of the ceded States had large claims against the ceding States because of the compulsory war loans floated by the latter.<sup>169</sup>

(17) To revert to the aforementioned Additional Agreement of 11 December 1871, however, it will be noted that the Agreement indicates *a contrario*—and this is the matter of particular concern to us here—that *the power to tax, being essentially a prerogative of sovereignty, belongs to the successor State, and to it alone, throughout the territory which is transferred*.<sup>170</sup> There may be a time problem in this case. Between the time when the agreement is concluded and the time of the actual change of sovereignty, taxes may have been levied by the former Power which is ceding the territory. Disputes may then

<sup>165</sup> See Preliminaries to Peace of 26 February 1871 (M. de Clercq, *Recueil des traités de la France* (Paris, Durand, 1880), t. X, p. 430), Treaty of Peace of 10 May 1871 (*ibid.*, p. 472), Additional Agreement to the Treaty of Peace of 11 December 1871 (*ibid.*, p. 531), Protocol No. 1 of the Frankfurt Conferences, Conference of 6 July 1871 (*ibid.*, p. 503).

<sup>166</sup> *Ibid.*, p. 507.

<sup>167</sup> *Ibid.*, p. 541.

<sup>168</sup> F. Despagnet, *Cours de droit international public*, 4th ed. (Paris), para. 99.

<sup>169</sup> See article 205, fourth paragraph, of the Treaty of Saint-Germain-en-Laye (*British and Foreign State Papers*, vol. 112, p. 409) and article 188 of the Treaty of Trianon (*ibid.*, vol. 113, pp. 561-562).

<sup>170</sup> With regard to the power to tax in Alsace-Lorraine after those territories were returned to France in 1918, see Conseil d'Etat, Ziwi judgement, 4 November 1932, in *Recueil des arrêts du Conseil d'Etat* (collection Lebon) (Paris, Sirey, 2nd series, 1932), t. 102, p. 907, and in M. Dalloz, *Recueil périodique et critique de jurisprudence, de législation et de doctrine* (Paris, Jurisprudence générale Dalloz, 1933), 3rd part, p. 4; and Judgement of the Tribunal supérieur de Colmar of 13 March 1922 (Koch as executor of Jaunez v. Registry), cited—along with very voluminous precedents and practice—in A.-Ch. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, C.N.R.S., 1966), t. II, pp. 335-337.

<sup>161</sup> Articles XIX and XX of the Franco-Indian Agreement of 21 October 1954. See foot-notes 129 and 146 above.

<sup>162</sup> United Nations, *Treaty Series*, vol. 540, p. 227.

<sup>163</sup> After various complications, accounts of which were given in the second and third reports of the Special Rapporteur (see *Yearbook of the International Law Commission*, 1969, vol. II, pp. 96-97, document A/CN.4/216/Rev.1, paras. 131 and 138; and *ibid.*, 1970, vol. II, p. 165, document A/CN.4/226, Part Two, commentary to article 8, paras. 20-21).

<sup>164</sup> France, Cour de Cassation, Civil Chamber, Judgement of 30 August 1864, Barjaud v. Registry (M. Dalloz, *Jurisprudence générale: Recueil périodique et critique de jurisprudence, de législation et de doctrine*, part one (Paris, Bureau de jurisprudence générale, 1864), p. 351).



arise, and have in fact arisen, as a result of claims for refunds submitted by individuals against the former sovereignty, such claims being themselves the result of demands for payment made on the individuals in question by the new sovereign.

(18) The problem of the date of transfer is the subject of a separate article (article 3) with a commentary. However, unless there are special circumstances or the two States agree, as they do in some cases, to the reciprocal waiver of such claims, with or without lump-sum payments in compensation, it is generally felt that, once the treaty has been consummated by ratification—i.e., has entered into force and become applicable—the territory is deemed to have been ceded even if the cession does not become effective until later. This is by no means the end of the problem, however. In the first place, it may happen that the transfer of territory occurs without the conclusion of any agreement in good and due form. Furthermore, the principle of good faith in international relations must be able to apply fully during the period between the decision to effect the transfer and its actual implementation.<sup>171</sup>

(19) In the case under discussion, concerning Alsace-Lorraine in 1871, claims for refunds of taxes and other levies were addressed to the German Government, in order that the dispute might be settled between the States. However, this has not been the rule in all cases.

(a) *Cases of cession of part of the territory and of dismemberment*

(20) In a number of cases, although the tax debt-claim had by law arisen and accrued to the ceding State prior to the decision concerning the change of sovereignty, the successor State nevertheless demanded and obtained payment for its own account, thus forcing the debtor either to incur the hazards of legal action to secure a refund or to resign himself to making payment twice over.

In a series of decisions, the Supreme Administrative Court of Czechoslovakia found that it was as a consequence of its own territorial sovereignty that the Czechoslovak State had collected all rates and taxes payable on Czechoslovak territory but not yet paid on the day of the State's coming into existence, and that the Czechoslovak State was entitled not to recognize the payments which were made to foreign authorities after the decisive date. An appellant contended unsuccessfully that the Czechoslovak State was not entitled to collect a fee to which a claim of the former Austrian State had arisen before 28 October 1918 and which had been paid to the Austrian authorities in Vienna on 29 November 1918. The Court held that since 28 October 1918 the right to collect taxes in Czechoslovakia, including taxes due before that day, belonged only to the Czechoslovak State.<sup>172</sup>

<sup>171</sup> This is the period which the Special Rapporteur referred to in his first report as the "période suspecte" (see *Yearbook of the International Law Commission*, 1968, vol. II, p. 104, document A/CN.4/204, para. 69). See also *ibid.*, 1970, vol. II, pp. 141-143, document A/CN.4/226, Part Two, commentary to article 1, paras. 36-46.

<sup>172</sup> *Yearbook of the International Law Commission*, 1963, vol. II, pp. 134-135, document A/CN.4/157, para. 354. See also A. D. McNair and H. Lauterpacht, ed., *Annual Digest . . . , 1925-1926* (London, 1929), Case No. 48, p. 68.

Another case related to the territory of Hlučín (Hultschin), which was ceded by Germany to Czechoslovakia by virtue of the Treaty of Versailles and actually annexed in January 1920. Czechoslovakia had decided that the previous local law, in so far as it was consistent with the new sovereignty, would remain in force, and the Czechoslovak authorities had accordingly demanded from an owner of coal mines in the ceded territory the payment of coal duty due for a certain period prior to the incorporation. The Czechoslovak Supreme Court allowed the claim of the applicant authorities and held that payment to the German Treasury would be inconsistent with the new sovereignty, would not discharge the debt and must be made to the Czechoslovak Treasury.<sup>173</sup>

Poland was not considered to be the successor to the Prussian and German States. The Polish Supreme Court held that Poland had acquired *modo originario* the property and possessions of those two countries, and in particular the rights which the Prussian State derived from an agreement concluded in 1866 between the Prussian State and the City of Gniezno, even if that were a right to demand payments to be made to a third party.<sup>174</sup>

(b) *Cases of decolonization*

(21) It is, perhaps, understandable in a case of dismemberment or partial cession of territory that the taxes, duties and other levies payable in the territory should pass to the successor State only on the date of the change of sovereignty, since prior to that date they belonged to the central Government of the ceding State and the revenue from them might have been used both in the ceded territory and throughout the rest of the country. To refuse to allow the predecessor State to receive this revenue, when it comes from debts which were due at an earlier date or to which, in other words, its nationals generally—and not only the residents of the territory that is transferred—have a right, would be to place at a disadvantage those members of the population who have remained subject to the jurisdiction of the predecessor State.

(22) The situation is completely different in the case of decolonization. The various taxes and the like were levied on behalf of the dependent territory by a separate administration for the benefit of a separate Treasury. After independence, these charges are levied on behalf of the liberated State. Thus, in the case of decolonization, there is no change in the beneficiary of the debt; to be more precise, there is a change in the political capacity and

<sup>173</sup> See *Yearbook of the International Law Commission*, 1963, vol. II, p. 135, document A/CN.4/157, paras. 355-356. See also McNair and Lauterpacht, ed., *Annual Digest . . . , 1927-1928* (London, 1931), Case No. 53, p. 78.

<sup>174</sup> The City of Gniezno was to pay quarterly contributions towards a secondary school (*Polish State Treasury v. City of Gniezno* (1930) (*Yearbook of the International Law Commission*, 1963, vol. II, p. 133, document A/CN.4/157, para. 336, and H. Lauterpacht, ed., *Annual Digest . . . , 1929-1930* (London, 1935), Case No. 31, p. 54; *Zbiór Orzeczeń Sadu Najwyższego*, III (1930), No. 52). See also *Polish State Treasury v. District Community of Swiecie* (1929) (*Yearbook . . . , 1963*, vol. II, p. 132, document A/CN.4/157, paras. 334-335; H. Lauterpacht, ed., *Annual Digest . . . , 1929-1930* (London, 1935), Case No. 30, p. 52; *Zbiór Orzeczeń Sadu Najwyższego*, III (1929), No. 21).

status of the beneficiary, but so far as taxation is concerned it is still, as before, a separate territorial authority for tax purposes. Consequently, the question whether the former metropolitan country may levy taxes on its own behalf during the transitional period does not arise, since even in the colonial phase the tax revenue accrued to the territory. It would therefore seem logical to take the view that in the case of decolonization the "Czechoslovak solutions" described above<sup>175</sup> are the only correct ones.

(23) However, while the principle of "succession" to tax debt-claims is beyond question in cases of decolonization, the application of that principle in practice encounters many difficulties, especially if independence is accompanied by an exodus of colonials returning to the former metropolitan country. In every case which the Special Rapporteur has had access to and has studied, it is clear that many individuals and corporations left the territory without paying all or part of the taxes, duties and other levies which they owed to the local Treasury.

As to whether the State which has become independent may be able to collect these taxes in the territory of the former metropolitan country with the agreement of the *ceding State*, the possibilities are meagre.<sup>176</sup> Even after independence and over a period of years, it is not always possible for the newly independent State to collect the amount due in taxes from nationals of the former metropolitan State who for a time continued to live in the former colony.

#### D. Cases where there is more than one successor State

(24) The various problems which arise are usually resolved by means of special agreements. As a result of the

<sup>175</sup> See para. 20 above.

<sup>176</sup> In the case of Algeria, which is the least unfamiliar to the Special Rapporteur, the upheavals that occurred in the territory during the two years preceding independence prevented the full collection of taxes. The budget estimates for 1960, 1961 and 1962 amounted to 268,000, 304,000 and 321,000 million old francs respectively. The actual tax revenues for those years were 175,000, 167,000 and 103,000 million francs. Thus, the disturbances of all kinds were such that between 1960 and 1962 Algeria's budget deficit amounted to 448,000 million francs. In particular, for 1962, during which the transfer of sovereignty occurred, less than one third of the estimated amount was realized (103,000 million out of 321,000 million). The Algerian Government sought the help of the French Government in collecting the tax debts, but the latter Government indicated that enforced recovery in France of taxes payable to Algeria by repatriates was out of the question. More generally, with respect to debt-claims of all kinds and not only those connected with taxes, Algeria unsuccessfully sought, especially during the financial negotiations of 14-19 January 1963, financial action by France with a view to the establishment of a "Fund for the Settlement of Unpaid Debts". The Algerian authorities subsequently required French nationals, on final departure from Algeria, to produce at the frontier post a "tax clearance certificate" issued by the Algerian taxation services. This document was replaced a little later by a simple unsworn declaration countersigned by the French Embassy at Algiers, which to some extent constituted a subrogation or guarantee by the French Government. In practice, however, it was physically impossible for the Embassy to play its full part as a guarantor. When the French Minister for Foreign Affairs, Mr. Maurice Schumann, visited Algiers in October 1969, a tax agreement was signed under which the Algerian and French Treasuries undertook to recover on each other's behalf any tax which might be owed by an individual who was in their respective territories. So far as the past was concerned, however, there could be no hope of recovery.

agreements (in so far as they can be considered valid!) of 13 April 1940, 21 May 1940 and 4 October 1941 concluded by the Third Reich with Slovakia, Hungary and the Protectorate of Bohemia-Moravia respectively, the public debt-claims of the dismembered State, Czechoslovakia, were to be apportioned among the four successors according to the manner in which they pertained to the territory of each successor. Similarly, when Czechoslovakia was reconstituted in 1945, it succeeded in the same way and no less fully to all the debt-claims of, for instance, the Hungarian State with respect to the portion of territory which was recovered.

In the case of the dismemberment of Yugoslavia, arrears of taxes and Customs duties unpaid as at 15 April 1941 were to be paid to the State in whose territory the competent tax collection office was situated.

The succession of India and Pakistan to the United Kingdom occurred in violent circumstances. However, under the agreements between India and Pakistan of December 1947, each of the two successor States<sup>177</sup> retained the revenue from taxes collected after 14 August 1947.<sup>178</sup> It was unsuccessfully proposed by Pakistan that the revenue from all taxes collected up to 31 March 1948 should be pooled, with a view to apportioning it later. Taxes continued to be collected in accordance with the previous legislation by each of the two States on their respective territorial bases. The place where the taxation authority is situated determined the competent tax jurisdiction in case of dispute.

In the case of Senegal, a threefold succession was necessary: to France, to former French West Africa and to the Federation of Mali. With regard to the second of these, an inter-State conference met in Paris and decided unanimously, on 5 and 6 June 1959, to adopt the principle of geographical apportionment of movable (and immovable) assets, subject to compensatory payments to equalize the portions.<sup>179</sup> An agreement of 22 March 1960, adopted at the Conference of Presidents and Prime Ministers of the Republics of former French West Africa, confirmed the principle of devolution of assets according to the criterion of geographical apportionment. Senegal, which as a result of this was in a privileged position, waived its share in the assets of the Reserve Fund, which included debt-claims, stocks and bonds as well as cash, in consideration whereof the creditor States cancelled the balances standing to the debit of Senegal. Where its portion of assets was concerned, Senegal was subrogated to former French West Africa with respect to shares, funds advanced and guaranteed debts situated in its territory. In exchange, it assumed the financial liabilities of former French West Africa with respect to common harbour and railway services.

<sup>177</sup> The term is perhaps incorrect, since it will be recalled that India was considered to be an original State for the purposes of State succession in an international organization. See United Nations, *Repertory of Practice of United Nations Organs*, vol. I (United Nations publication, Sales No. 1955.V.2 (vol. I)), Article 4, paras. 32-37.

<sup>178</sup> See foot-note 133 above.

<sup>179</sup> See J.-Cl. Gautron, "Sur quelques aspects de la succession d'Etats au Sénégal", *Annuaire français de droit international*, 1962, Paris, vol. VIII, p. 840.

The dissolution of the short-lived Federation of Mali was regulated, so far as debt-claims are concerned, by a Senegalese-Malian Resolution No. 11, which allowed each State to take over assets according to their geographical location. The proportions in which movable assets were divided between the two States was set (as in the case

of immovable assets) at 62 per cent for Senegal and 38 per cent for Mali. The State which received a larger portion of assets than was due to it was subject to an equalization payment, charged against its share in the Reserve Fund.<sup>180</sup>

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<sup>180</sup> *Ibid.*, p. 861.



# STATE RESPONSIBILITY

(Agenda item 3)

## DOCUMENT A/CN.4/217/ADD.2

First report on State responsibility, by Mr. Roberto Ago, Special Rapporteur

*Review of previous work on the codification of the topic of the international responsibility of States*

### ADDENDUM \*

[5 April 1971]

#### ANNEX XXIV

Restatement of the law, by the American Law Institute \*

*Original text : English*

#### PART IV

#### Responsibility of States for injuries to aliens

#### CHAPTER 1

#### GENERAL PRINCIPLES OF RESPONSIBILITY

#### TOPIC 1. CONDITIONS OF RESPONSIBILITY

#### 164. General rule of state responsibility

(1) A state is responsible under international law for injury to an alien caused by conduct subject to its jurisdiction, that is attributable to the state and wrongful under international law.

(2) As used in this Part (sections 164-214), "injury" means any kind of loss, detriment, or other damage for which a legal remedy is afforded under the principles of justice generally recognized by states that have reasonably developed legal systems.

(3) As used in this Part, "conduct" includes both action and failure to act.

\* The present document completes the Special Rapporteur's first report on State responsibility (A/CN.4/217 and Add.1), published in *Yearbook of the International Law Commission*, 1969, vol. II, p. 125.

\* American Law Institute, *Restatement of the Law, Second, Foreign Relations Law of the United States* (St. Paul, Minn., American Law Institute Publishers, 1965), pp. 497 *et seq.* The *Restatement* is divided into sections with accompanying comments, illustrations, etc. This annex reproduces only the text of the sections (164-214) of part IV of the *Restatement*.

#### 165. When conduct causing injury to alien is wrongful under international law

(1) Conduct attributable to a state and causing injury to an alien is wrongful under international law if it

- (a) Departs from the international standard of justice, or
- (b) Constitutes a violation of an international agreement.

(2) The international standard of justice specified in subsection (1) is the standard required for the treatment of aliens by

(a) The applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles,

(b) Analogous principles of justice generally recognized by states that have reasonably developed legal systems.

(3) The rules that follow as to specific types of conduct, attributable to a state and causing injury to an alien, that are wrongful under international law because they depart from the international standard, are illustrative, not exclusive. Conduct, attributable to a state and causing injury to an alien, that is not covered by any such rules may be, but is not necessarily, wrongful under international law as a departure from the international standard.

#### 166. Discrimination against alien

(1) Conduct, attributable to a state and causing injury to an alien, that discriminates against aliens generally, against aliens of his nationality, or against him because he is an alien, departs from the international standard of justice specified in section 165.

(2) Conduct discriminates against an alien within the meaning of subsection (1) if it involves treating the alien differently from nationals or from aliens of a different nationality without a reasonable basis for the difference.

#### 167. Effect of violation of domestic law

Conduct, attributable to a state and causing injury to an alien, that violates the law of the state does not depart from

the international standard of justice specified in section 165 merely by reason of such violation. Such conduct departs from the international standard only if it would depart therefrom in the absence of the state law.

168. *Responsibility for injury and for failure to make reparation distinguished*

When conduct attributable to a state and causing injury to an alien is wrongful international law, the state is responsible for the injury under the rule stated in section 164 and has a duty to make reparation for it. When conduct attributable to a state and causing injury to an alien is not wrongful under international law, the state is not responsible for this injury under the rule stated in section 164, but, in the case of certain economic injuries, it nevertheless has a duty to make reparation, and is responsible, under the rules stated in sections 186, 195, and 196, for failure to do so.

TOPIC 2. ATTRIBUTION OF CONDUCT TO STATE

169. *General rule as to attribution*

Conduct of any organ or other agency of a state, or of any official employee, or other individual agent of the state or of such agency, that causes injury to an alien, is attributable to the state within the meaning of section 164 (1) if it is within the actual or apparent authority, or within the scope of the functions, of such agency or individual agent.

170. *Conduct of local authorities*

If conduct of an agency or agent of a political unit that is included in a state causes injury to an alien, such conduct is attributable to the state to the same extent as conduct of an agency or agent of the state, subject to the special rule stated in section 193 (3) as to a contract of a political subdivision of a state.

TOPIC 3. WHO IS AN ALIEN FOR PURPOSES OF STATE RESPONSIBILITY

171. *Alien defined*

A person is an alien for purposes of the responsibility of a state for injury to an alien, if

- (a) He is not a national of the respondent state,
- (b) He is a national of the respondent state and of another state, and the respondent state, for purposes of the conduct causing the injury, treats him as a national of the other state, or
- (c) He is a national of the respondent state and of another state, provided (i) his dominant nationality, by reason of residence or other association subject to his control (or the control of a member of his family whose nationality determines his nationality) is that of the other state and (ii) he (or such member of his family) has manifested an intention to be a national of the other state and has taken all reasonably practicable steps to avoid or terminate his status as a national of the respondent state.

172. *Alien shareholder of domestic corporation*

When a domestic corporation, in which an alien is directly or indirectly a shareholder, is injured by action attributable to a state that would be wrongful under international law if the corporation were an alien corporation, the state is not responsible under international law for the injury to the corporation. The state is however, responsible for the consequent injury to the alien to the extent of his interest in the corporation, if

- (a) A significant portion of the stock of the corporation is owned by the alien or other aliens of whatever nationality,
- (b) The state knows or has reason to know of such ownership at the time of the conduct causing the injury to the corporation,
- (c) The corporation fails to obtain reparation for the injury,
- (d) Such failure is due to causes over which the alien or other alien shareholders cannot exercise control, and
- (e) A claim for the injury to the corporation has not been voluntarily waived or settled by the corporation

173. *Alien shareholder of corporation having nationality of third state*

When an alien corporation, in which an alien of a different nationality is directly or indirectly a shareholder, is injured by conduct attributable to a state that is wrongful under international law the state is responsible for the consequent injury to the alien to the extent of his interest in the corporation, if

- (a) A significant portion of the stock of the corporation is owned by the alien or by other aliens who are not nationals of the state to which the conduct is attributable or of the state of which the corporation is a national,
- (b) The corporation fails to obtain reparation for the injury,
- (c) Such failure is due to causes over which the alien or such other alien shareholders cannot exercise control, and
- (d) A claim for the injury to the corporation has not been waived or settled by the corporation or by the state of which it is a national.

TOPIC 4. TO WHOM STATE IS RESPONSIBLE

174. *Responsibility to state of nationality*

The responsibility of a state for injury to an alien may be invoked by a state of which the alien is a national. It cannot be invoked by any other state.

175. *Responsibility to alien*

The responsibility of a state under international law for an injury to an alien cannot be invoked directly by the alien against the state except as provided by

- (a) The law of the state,
- (b) International agreement, or
- (c) Agreement between the state and the alien.

176. *Responsibility to international organization*

(1) If an individual is injured in connection with the performance of his functions as an agent of the United Nations by conduct attributable to a state, the state is responsible to the United Nations to the same extent that it would be responsible to another state if the individual were an alien with reference to the first state and a national of the other state. Such responsibility arises even if the agent of the United Nations is a national of the respondent state.

(2) In the case of any other international organization having a constitution that provides for an independent staff, the same responsibility arises if the respondent state is a member of the organization or has consented to the performance of the functions in question.

177. *Responsibility to state of which alien is official or member of national services*

An official of a state, or a member of its national services, who is not a national of the state and is injured in the performance of his functions as such official or member by conduct attributable to another state, of which he is not a national, is treated as if he were a national of the first state for purposes of determining state responsibility for the injury.

## CHAPTER 2

## INADEQUATE ADMINISTRATION OF LAW

## TOPIC 1. DENIAL OF PROCEDURAL JUSTICE

178. *Denial of procedural justice defined*

As used in the Restatement of this subject, "denial of procedural justice" means conduct, attributable to a state and causing injury to an alien, that departs from the international standard of justice specified in section 165 with respect to the procedure followed in enforcement of the state's law as it affects the alien in criminal, civil, or administrative proceedings, including the determination of his rights against, or obligations to, other persons.

179. *Arrest and detention*

- (1) The arrest of an alien is a denial of procedural justice if
  - (a) He is not informed of the cause of the arrest, or
  - (b) The arrest is for a cause not recognized as justifying liabilities is a denial of procedural justice.
- (2) The detention of an alien constitutes a denial of procedural justice if he is not, without unreasonable delay,
  - (a) Informed of the charges against him,
  - (b) Afforded access to a tribunal or other authority having jurisdiction to determine the lawfulness of his detention and to order his release if such detention is unlawful,
  - (c) Permitted during detention to communicate with a representative of his government,
  - (d) Afforded access to counsel, or
  - (e) Granted a trial.
- (3) Mistreatment of an alien in the course of arrest or during detention is a denial of procedural justice.

180. *Denial of trial or other proceeding*

- (1) Failure to afford to an alien an appropriate trial or other legal proceeding for the determination of his rights or liabilities is a denial of procedural justice.
- (2) Application of the principle of sovereign immunity to dismiss an action by an alien against a state is not a denial of procedural justice if the principle is applied in a manner consistent with the law of states that have reasonably developed legal systems. If the action is based on an injury that is wrongful under international law, the state remains responsible for the injury.

181. *Fairness of trial or other proceeding*

In order to conform to the requirements of sections 179(2)(e) and 180, a trial or other proceeding to determine the rights or liabilities of an alien must be fair. In determining whether the proceeding is fair, it is relevant to consider, among other factors whether the alien has had the benefit of

- (a) An impartial tribunal or administrative authority,
- (b) Adequate information with respect to the nature of the proceedings so as to permit the alien to present his claim or defense,
- (c) Adequate interpretation and translation into his own language at all stages of the proceeding,
- (d) Reasonable opportunity to contest evidence against him,
- (e) Reasonable opportunity to obtain and present witnesses and evidence in his own behalf,
- (f) Reasonable opportunity to communicate with a representative of his government with respect to the proceedings,

(g) Reasonable opportunity to consult counsel and time to prepare for the proceeding, and

(h) Reasonable dispatch by the tribunal or administrative authority in reaching a determination.

182. *Unjust determination*

An adverse determination that is manifestly unjust in a proceeding determining criminal charges against an alien, or determining his rights and liabilities of a civil nature, is a denial of procedural justice.

## TOPIC 2. FAILURE TO PROTECT FROM PRIVATE INJURY

183. *Responsibility for failure to protect*

A state is responsible under international law for injury to the person or property of an alien caused by conduct that is not itself attributable to the state, if

- (a) The conduct is either (i) criminal under the law of the state, (ii) generally recognized as criminal under the laws of states that have reasonably developed legal systems, or (iii) an offense against public order, and
- (b) Either (i) the injury results from the failure of the state to take reasonable measures to prevent the conduct causing the injury, or (ii) the state fails to take reasonable steps to detect, prosecute, and impose an appropriate penalty on the person or persons responsible for the conduct if it falls within clause (a) (i).

## CHAPTER 3

## INJURIES TO ECONOMIC INTERESTS OF ALIENS

## TOPIC 1. GENERAL PRINCIPLES

184. *Relationship to international standard of justice*

Conduct attributable to a state and causing injury to the economic interests of an alien is wrongful under international law if it departs from the international standard of justice specified in section 165. Sections 185-196 describe particular types of such conduct that *per se* depart from the international standard. Other types of conduct causing injury to the economic interests of an alien may or may not depart from the international standard, depending on the circumstances.

## TOPIC 2. TAKING OF PROPERTY

185. *When taking is wrongful under international law*

The taking by a state of property of an alien is wrongful under international law if either

- (a) It is not for a public purpose,
- (b) There is not reasonable provision for the determination and payment of just compensation, as defined in section 187, under the law and practice of the state in effect at the time of taking, or
- (c) The property is merely in transit through the territory of the state, or has otherwise been temporarily subjected to its jurisdiction and is not required by the state because of serious emergency.

186. *Failure to pay just compensation for taking*

Failure of a state to pay just compensation for taking the property of an alien is wrongful under international law, regardless of whether the taking itself was wrongful under international law.

### 187. *Just compensation defined*

Just compensation as required by section 186 must be

- (a) Adequate in amount, as indicated in section 188,
- (b) Paid with reasonable promptness, as indicated in section 189, and
- (c) Paid in a form that is effectively realizable by the alien, to the fullest extent that the circumstances permit, as indicated in section 190.

### 188. *Adequacy of compensation*

(1) Compensation, to be adequate in amount within the meaning of section 187, must be in an amount that is reasonable under the circumstances, as measured by the international standard of justice indicated in section 165. Under ordinary conditions, including the following, the amount must be equivalent to the full value of the property taken, together with interest to the date of payment

(a) If the property was acquired or brought into the jurisdiction of the state by the alien for use in a business enterprise that the alien was specifically authorized to establish or acquire by a concession, contract, license, or other authorization of the state, or that the alien established or acquired in reasonable reliance on conduct of the state designed to encourage investment by aliens in the economy of the state,

(b) If the property is an operating enterprise that is taken for operation by the state as a going concern,

(c) If the taking is pursuant to a program under which property held under similar circumstances by nationals of the state is not taken, or

(d) If the taking is wrongful under international law as stated in section 185.

(2) In the absence of the conditions specified in subsection (1), compensation must nevertheless be equivalent to full value unless special circumstances make such requirement unreasonable.

### 189. *Promptness of compensation*

Payment with reasonable promptness, within the meaning of section 187, means payment as soon as is reasonable under the circumstances in the light of the international standard of justice specified in section 165.

### 190. *Effectiveness of compensation*

(1) Compensation, to be in effectively realizable form, within the meaning of section 187, must be in the form of cash or property readily convertible into cash. If not in the currency of the state of which the alien was a national at the time of the taking, the cash paid must be convertible into such currency and withdrawable, either before or after conversion, to the territory of the state of the alien's nationality, except as indicated in subsection (2).

(2) Such conversion and withdrawal may be delayed to the minimum extent necessary to assure the availability of foreign exchange for goods and services essential to the health and welfare of the people of the taking state.

### 191. *Meaning of property*

As used in this chapter (sections 184-196), "property" includes tangible property, whether real or personal, movable or immovable, and intangible property. It also includes any interest in property if such interest has a reasonably ascertainable value.

### 192. *Meaning of taking*

Conduct attributable to a state that is intended to, and does, effectively deprive an alien of substantially all the benefit of his interest in property, constitutes a taking of the property,

within the meaning of section 185, even though the state does not deprive him of his entire legal interest in the property.

## TOPIC 3. BREACH OF CONTRACT

### 193. *When breach of contract is wrongful under international law*

(1) The breach by a state of a contract with an alien, except as indicated in subsections (2) and (3), is wrongful under international law if either

(a) The breach is effected in an arbitrary manner without bona fide claim of excuse,

(b) The law and practice of the state in effect at the time of the breach do not make reasonable provision for reparation for the breach,

(c) The state entered into the contract with the alien (or an alien assignor of the contract) in his capacity as an alien, or

(d) The circumstances indicate that, when the alien became a party to the contract, the parties contemplated that performance of the contract would involve to a substantial degree foreign commerce, use of foreign resources, or activity outside the territory of the state.

(2) Subsections (1)(a) and (1)(b) are not applicable to a contract for the repayment of money borrowed on the domestic market of the state.

(3) Breach by a political subdivision of a state, whether or not it is a federal state, of a contract to which the central government or an agency of that government is not a party, does not, as such, give rise to responsibility on the part of the state under international law.

(4) A breach of a contract within the meaning of this section is any conduct attributable to the state that is contrary to its obligations under the contract. Such obligations are determined by the governing law as specified in section 194 and are subject to termination with just compensation as stated in section 195.

### 194. *Law determining breach of contract*

The law governing a contract between a state and an alien, for purposes of determining whether conduct constitutes a breach of the contract as defined in section 193(4), is the law indicated by the applicable law of conflict of laws, except that if the governing law departs from the international standard of justice specified in section 165(1), it governs only as modified to comply with that standard.

### 195. *Termination of contract obligations by state*

(1) If a state takes such action as is effective, under governing law as indicated in section 194 and subsection (3) of this section, to terminate an obligation of the state under a contract with an alien, subsequent failure of the state to comply with the terms of the contract to the extent so terminated does not constitute a breach of the contract within the meaning of section 193(4).

(2) Failure of a state to pay just compensation for terminating a contract with an alien is wrongful under international law, regardless of whether the termination itself was wrongful.

(3) To the extent that the law of a state permits it to terminate a contractual obligation to an alien without reasonable provision for the determination and payment of just compensation, such law departs from the international standard of justice and therefore governs only as modified in accordance with the rule stated in section 194 in determining whether the state's failure to perform the obligation constitutes a breach of the contract within the meaning of section 193(4).



## TOPIC 4. PROHIBITION OF GAINFUL ACTIVITY

196. *General rule*

(1) Conduct attributable to a state that forbids an alien to engage in previously lawful gainful activity is wrongful under international law unless either

(a) The alien receives reasonable notice and opportunity to engage in other gainful activities or to depart from the territory of the state,

(b) The prohibition is promulgated for bona fide reasons of public policy of the state and is equally applicable to nationals and to aliens similarly situated, or

(c) Under the law and practice of the state in effect when the prohibition becomes effective there is reasonable provision for the determination and payment of just compensation.

(2) Failure of a state to pay just compensation under the circumstances indicated in subsection (1)(c) is wrongful under international law.

## CHAPTER 4

## JUSTIFICATION

197. *Police power and law enforcement*

(1) Conduct attributable to a state and causing damage to an alien does not depart from the international standard of justice indicated in section 165 if it is reasonably necessary for

(a) The maintenance of public order, safety, or health, or

(b) The enforcement of any law of the state (including any revenue law) that does not itself depart from the international standard.

(2) The rule in subsection (1) does not justify failure to comply with the requirements of procedural justice stated in sections 179-182 except as stated in section 199 with respect to emergencies.

198. *Currency control*

Conduct attributable to a state and causing damage to an alien does not depart from the international standard of justice indicated in section 165 if it is reasonably necessary in order to control the value of the currency or to protect the foreign exchange resources of the state.

199. *Emergencies*

Conduct attributable to a state and causing damage to an alien does not depart from the international standard of justice indicated in section 165 if it is reasonably necessary to conserve life or property in the case of disaster or other serious emergency.

200. *Retaliation*

When an alien is injured by conduct attributable to a state for which the state would otherwise be responsible under international law, the state is not excused from responsibility merely because its conduct is in retaliation for conduct of the state of the alien's nationality, even if the conduct of the state of his nationality is wrongful under international law. However, in determining whether conduct that affects an alien otherwise than similarly situated nationals, or aliens of other nationalities, discriminates against him in violation of the rule stated in section 166, it is relevant to consider the relationship between such conduct and conduct of the state of nationality.

201. *Relationship to international agreement or discrimination*

The rules stated in sections 197-200 do not relieve a state of responsibility under the rule stated in section 165 for conduct that is contrary to an international agreement or of responsibility under the rule stated in section 166 for conduct that discriminates against an alien.

## CHAPTER 5

## WAIVER AND SETTLEMENT

202. *Waiver by prior agreement: the "Calvo Clause"*

(1) If an alien, as a condition of engaging in economic activity in the territory of a state, agrees with the state that he is to be treated as if he were a national in respect to such activity, and that his only remedy for injury in this respect is that available under the law of the state, such agreement, commonly called a "Calvo Clause", relieves the state of responsibility for injury to the economic interests of the alien in respect to such activity, if

(a) The alien is in fact treated as favourably as if he were a national,

(b) The conduct of the state causing injury to the alien does not constitute violation of an international agreement under the rule stated in section 165 (1)(b), and

(c) The law of the state affords the alien a bona fide remedy for such injury that satisfies the requirements of procedural justice stated in sections 180-182.

(2) A Calvo Clause does not relieve a state of responsibility for injury to an alien except as stated in subsection (1).

203. *Waiver or settlement by alien after injury but before espousal*

A waiver or settlement by an alien of a claim against a state, made after an injury attributable to that state but before espousal of the claim by a state of which the alien is a national, is effective as a defense on behalf of the respondent state, provided the waiver or settlement is not made under duress.

204. *Waiver or settlement by alien after espousal*

A waiver or settlement by an alien of a claim against a state, made after espousal of the claim by a state of which the alien is a national, is not effective as a defense on behalf of the respondent state, but may be taken into account in determining the amount of reparation payable for the injury.

205. *Waiver or settlement by state of nationality*

A waiver or settlement made by a state of which an injured alien is a national, whether made before or after espousal of the claim by that state, is effective as a defense to an international claim asserted by that state against the state responsible for the injury.

## CHAPTER 6

## EXHAUSTION OF REMEDIES

206. *General rule*

(1) A state is not required to make reparation on a claim presented on behalf of an alien injured by conduct wrongful

under international law and attributable to the state, if the alien has not exhausted the remedies made available by the state, unless such exhaustion is excused under the rule stated in section 208.

(2) Such remedies include not only proceedings available under the law and practice of the state for the redress of injuries, but also any remedies that are available by agreement between the state and the alien, or by international agreement.

#### 207. *Meaning of exhaustion*

An injured alien has exhausted the remedies made available by a state, within the meaning of the rule stated in section 206, when he has taken all steps that could reasonably be expected of him to

(a) Present his claim to the appropriate court or other tribunal or agency,

(b) Support his claim with all appropriate evidence and points of law, and

(c) Avail himself of all appropriate procedures, including appeals.

#### 208. *Exhaustion excused*

An alien is excused from exhausting an available remedy if either

(a) It is apparent that the remedy would not satisfy the requirements of procedural justice stated in sections 180-182,

(b) Exhaustion would be clearly ineffective in view of one or more prior determinations made, on substantially identical claims, by the highest agency of the state that has authority to grant relief, or

(c) The state of the alien's nationality, which has espoused his claim, is asserting on its own behalf a separate and preponderant claim for direct injury to it arising out of the same wrongful conduct.

#### 209. *Waiver of exhaustion*

A state may, by appropriate manifestation of intention, waive the exhaustion of available remedies.

#### 210. *Determination as to exhaustion*

To the extent that a determination as to whether domestic remedies have been exhausted depends on the law of the

respondent state, an international tribunal will refrain from making that determination if procedures are available for determination by an authoritative tribunal of the respondent state. If they are not available, the tribunal will make its own determination.

### CHAPTER 7

## UNITED STATES LAW AS TO INJURIES BY FOREIGN STATES TO UNITED STATES NATIONALS

#### 211. *National's rights before espousal by government*

When a foreign state is responsible for an injury to a national of the United States, the resultant claim for reparation, until and unless espoused by the United States, and except as otherwise provided by law, is subject to the control of the national who has suffered the injury, and he is entitled to any reparation paid to him by the foreign state.

#### 212. *Discretion as to espousal of claim*

The Government of the United States has discretion as to whether to espouse the claim of a United States national for injury caused by conduct attributable to a foreign state that is wrongful under international law. This discretion is vested in the President and exercised on his behalf by the Secretary of State.

#### 213. *Power to waive or settlement claims*

The President may waive or settle a claim against a foreign state based on the responsibility of the foreign state for an injury to a United States national, without the consent of such national.

#### 214. *Distribution of reparation received by United States Government*

When the United States Government receives reparation from a foreign state in the form of a lump sum in settlement of claims arising from injuries to numerous nationals of the United States, and distributes such sum in compliance with reasonable procedures prescribed by a statute that provides that such distribution shall not be subject to judicial review, the distribution is conclusive as to the United States nationals affected.

## DOCUMENT A/CN.4/246 AND ADD.1-3

Third report on State responsibility, by Mr. Roberto Ago, Special Rapporteur

*The internationally wrongful act of the State, source of international responsibility*

[Original text: French]  
[5 March, 7 April, 28 April and 18 May 1971]

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## Introduction

1. When presenting to the International Law Commission, at its twenty-first session,<sup>1</sup> his first report on the international responsibility of States, containing a review of previous work on the codification of this topic,<sup>2</sup> the Special Rapporteur stated that his intention was to provide the Commission with a general conspectus of that work so that it could study the past and derive from it some useful guidance for its future work. The main aim was to avoid, in the future, committing the errors which in the past had prevented the codification of this branch of international law.

2. In this context the Special Rapporteur was concerned to illustrate some of the most serious difficulties encountered when dealing with the topic of international responsibility and to bring out the reasons for those difficulties as they emerge from an examination of the various attempts at codification made hitherto under the auspices of official bodies, in particular the League of Nations and the United Nations itself. On concluding this review the Special Rapporteur drew attention to the ideas which had guided the International Law Commission since the time when, having had to recognize that its previous efforts had reached a deadlock, it had decided to resume the study of the topic of responsibility from a new viewpoint. In particular, he summarized the methodological conclusions reached by the Sub-Committee on State Responsibility created in 1962, and later by the Commission itself at its fifteenth (1963) and nineteenth (1967) sessions, on the basis of which the Commission decided to take up the work of codification again and try to achieve some positive results in conformity with the recommendations formulated by the General Assembly in its resolutions 1765 (XVII), 1902 (XVIII), 2045 (XX), 2167 (XXI), 2272 (XXII) and 2400 (XXIII).

3. After this introduction, the International Law Commission discussed the Special Rapporteur's first report in detail at its 1011th, 1012th, 1013th and 1036th meetings. All the members of the Commission present at the twenty-first session participated in the discussion. Replying to comments and summing up the debate, the Special Rapporteur gave an account of the views of members and in doing so was able to note that there was a great identity of ideas in the Commission as to the most appropriate way of continuing the work on

State responsibility and as to the criteria that should govern the preparation of the different parts of the draft articles which the Commission proposed to draw up. The Commission's conclusions were subsequently set out in chapter IV of its report on the work of its twenty-first session, which was devoted to State responsibility.<sup>3</sup> The criteria laid down by the Commission may be summarized as follows.

4. Adhering to the system consistently adopted for all the topics it has undertaken to codify, the Commission intended to confine its study of international responsibility for the time being to the responsibility of States. Nevertheless, it did not underrate the importance of studying questions relating to the responsibility of subjects of international law other than States; but the overriding need to ensure clarity in the examination of the topic, and the organic nature of the draft, were obvious reasons for deferring consideration of these other questions.

5. While recognizing the importance, alongside that of responsibility for internationally wrongful acts, of questions relating to responsibility arising out of the performance of certain lawful activities—such as space and nuclear activities—the Commission believed that questions in this latter category should not be dealt with simultaneously with those in the former category. The majority of the members of the Commission observed that owing to the entirely different basis of the so-called responsibility for risk, the different nature of the rules governing it, its content and the forms it may assume, a simultaneous examination of the two subjects could only make both of them more difficult to grasp. The Commission therefore decided to proceed first to consider the topic of the responsibility of States for internationally wrongful acts; it intends to consider separately the topic of responsibility arising from lawful activities as soon as progress with its programme of work permits.

6. The Commission agreed on the need to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may be a source of responsibility. A consideration of the various kinds of obligation placed on States in international law, and in particular a grading of such obligations according to their importance to the international community, should probably be regarded as a necessary element for assessing the gravity of an internationally wrongful act and as a criterion for determining the consequences it should have. But this must not obscure the essential fact that it is one thing to define a rule and the content of the obligation it imposes and another to determine whether that obligation has been violated and what should be the consequences of the violation. Only the second aspect comes within the sphere of responsibility proper; to encourage any confusion on

<sup>1</sup> See *Yearbook of the International Law Commission*, 1969, vol. I, pp. 104 *et seq.*, 1011th meeting, paras. 2 *et seq.*

<sup>2</sup> *Ibid.*, vol. II, p. 125, document A/CN.4/217 and Add.1. The Special Rapporteur also submitted, as annexes to that report, the main texts drafted during the previous work on codification. A further annex was issued as document A/CN.4/217/Add.2 and has been reproduced in the present volume, p. 193.

The Commission also had before it two documents published by the Secretariat in 1964 and supplemented by documents issued in 1969: (a) Summary of the discussions in the various United Nations organs and the resulting decisions (*ibid.*, 1964, vol. II, p. 125, document A/CN.4/165), and supplement (*ibid.*, 1969, vol. II, p. 114, document A/CN.4/209); (b) Digest of the decisions of international tribunals relating to State responsibility (*ibid.*, 1964, vol. II, p. 132, document A/CN.4/169), and supplement (*ibid.*, 1969, vol. II, p. 101, document A/CN.4/208).

<sup>3</sup> *Ibid.*, p. 233, document A/7610/Rev.1, paras. 80-84.

this point would be to raise an obstacle which might once again frustrate the hope of successful codification.

7. The study of the international responsibility of States to which the Commission was to devote itself comprised two broad, separate phases, the first covering the origin of international responsibility and the second the content of that responsibility. The first task was to determine what facts and what circumstances must be established in order to attribute to a State the existence of an internationally wrongful act which, as such, is a source of international responsibility. The second task was to determine the consequences attached by international law to an internationally wrongful act in different cases, in order to arrive, on this basis, at a definition of the content, forms and degrees of responsibility. Once these two essential tasks had been accomplished, the Commission would be able to decide whether a third should be added in the same context, namely, the consideration of certain problems concerning what has been termed the "implementation" of the international responsibility of States, and of questions concerning the settlement of disputes arising out of the application of rules relating to responsibility.

8. The conclusions thus reached by the Commission at its 1969 session were favourably received at the twenty-fourth session of the General Assembly.<sup>4</sup> The over-all plan for the study of the topic, the successive stages in the execution of that plan and the criteria to be applied to the different parts of the draft to be prepared, as established by the Commission, met with the general approval of the members of the Sixth Committee. On the basis of the latter's report, the General Assembly, in its resolution 2501 (XXIV) of 12 November 1969, which also recalled its resolution 2400 (XXIII) on the same subject, recommended that the Commission should "continue its work on State responsibility".

9. On the basis of the directives laid down by the International Law Commission and the recommendations of the General Assembly, the Special Rapporteur began to consider, in succession, the many and diverse questions raised by the topic as a whole. He submitted to the Commission at its twenty-second session a second report on State responsibility, entitled "The origin of international responsibility".<sup>5</sup> The Commission considered that report at its 1074th and 1075th meetings.<sup>6</sup> At the same time, the Special Rapporteur submitted a questionnaire listing a number of points on which he particularly wished to know the views of members of the Commission, with a view to the continuation of his work. In view of the short space of time available to it, the Commission had only a general discussion on the report by way of a first broad review, postponing a more detailed discussion of specific points until its twenty-

third session. The discussion took place at the 1075th, 1076th, 1079th and 1080th meetings. At the 1081st meeting, the Special Rapporteur dealt with a number of points on which questions had been raised during the discussion and summarized the main conclusions to be drawn from the Commission's broad review. The Commission's conclusions are set forth in chapter IV of its report on the work of its twenty-second session.<sup>7</sup> Those conclusions were, on the whole, considered acceptable in the debate in the Sixth Committee at the twenty-fifth session of the General Assembly. The debate is summarized in the report of the Sixth Committee.<sup>8</sup>

10. The introduction to the Special Rapporteur's second report on State responsibility contained a detailed plan of work for the first phase of the study of the topic: the phase which is to focus on the subjective and objective conditions for the existence of an internationally wrongful act. The first task, which may seem limited in scope but is particularly delicate because of its many possible implications, consists in formulating the basic general principles. Once these principles have been established, the next step will be to deal with all the questions relating to attribution to the State, as a subject of international law, of the conduct (action or omission) in particular circumstances, of certain persons, certain groups or certain entities—questions which are often designated by the global term of "imputability". It will also be necessary to determine in what conditions the action or omission thus attributed to the State could be regarded as constituting a violation of an international legal obligation and thus having the constituent elements of an internationally wrongful act which, as such, generates State responsibility at the inter-State level. All this would be followed by an examination of the questions arising in connexion with the various circumstances which might possibly result in the conduct attributed to the State not being wrongful: *force majeure* or act of God, the consent of the injured State, legitimate application of a sanction, self-defence, state of necessity and so on. After that, it would be possible to go on to the second phase of the work, that covering the content, forms and degrees of international responsibility.

11. The plan of work recalled above was approved as a whole by the Commission, which also expressed its agreement in principle that the more general questions should be treated first and that there should be a gradual transition from the general to the particular. That obviously did not preclude the possibility of including rules of a very general character in the body of the draft, as had been the case in other drafts adopted by the Commission. The views of the Commission on that subject were welcomed by certain members of the Sixth Committee who took part in the debate on State responsibility. The Special Rapporteur is therefore encouraged to follow closely the plan of work recalled above in

<sup>4</sup> See *Official Records of the General Assembly, Twenty-fourth Session, Sixth Committee*, 1103rd-1111th meetings and 1119th meeting and *ibid.*, Annexes, agenda items 86 and 94 b, document A/7746, paras. 86-89.

<sup>5</sup> See *Yearbook of the International Law Commission, 1970*, vol. II, p. 177, document A/CN.4/233.

<sup>6</sup> *Ibid.*, vol. I, pp. 175 *et seq.*

<sup>7</sup> *Ibid.*, vol. II, pp. 305 *et seq.*, document A/8010/Rev.1, paras. 64-83.

<sup>8</sup> See *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 98-107.

preparing the successive reports which he intends to submit on this topic.

12. The introduction to the second report then went on to mention certain questions of methodology on which the Special Rapporteur was particularly anxious to secure the Commission's agreement, with a view to the continuation of his work. The Special Rapporteur recalled that, in accordance with the decisions taken at the twenty-first session, his reports on the topic would be so conceived as to provide the Commission with a basis for the preparation of draft articles, with a view to the eventual conclusion of an international codification convention. That being so, he proposed to adopt, at least in the first stage of the work on responsibility, certain criteria which would apply, on an experimental basis, to the first subjects to be dealt with. Generally speaking, each draft article would be preceded by a full explanation of the reasons which had led him to propose a particular wording, as well as of the practical and theoretical data on which his arguments were based. More specifically, he would indicate the questions arising in connexion with each of the points successively considered and state the differences of opinion which had appeared regarding them and the ways in which they had in fact been settled in international life. Reference would therefore be made to the most important cases which had arisen in diplomatic practice and international jurisprudence.

13. As mentioned in his statements to the Commission, the Special Rapporteur was thus indicating his preference for an essentially inductive method, rather than for the deduction of theoretical premises, whenever consideration of State practice and judicial decisions made it possible to follow such a method. He recalled, however, that the precedents offered by State practice and judicial decisions were not equally numerous on the different subjects, being abundant on some and relatively scarce on others. The Special Rapporteur also pointed out that despite the extra work it involved it was necessary to take due account of a very large number of opinions of writers. The topic of State responsibility, particularly in some of its aspects, is one of those on which a great many views have been expressed by writers<sup>9</sup> and it is sometimes essential to clear away in advance certain disputes—as well as certain complications which have artificially taken root in theoretical discussions—in order to be able to define the problems to be solved in clear and simple terms. At the same time, the method of taking full account of the various trends, and particularly the most modern ones, would meet the double requirement of ascertaining and harmonizing the approaches adopted in the different legal systems and also of establishing which of those trends were supported by the majority of writers and which were merely the expression of an individual point of view.

<sup>9</sup> The Special Rapporteur pointed out that in order to avoid overburdening the reports, he would confine himself as far as possible to references to the views of the very numerous writers who had dealt specifically with the points in question. He intends to supply the Commission with a separate document containing as complete and up-to-date a bibliography as possible on international responsibility.

14. During the consideration of the second report the members of the International Law Commission expressed their agreement with the methodological criteria thus proposed. The report of the Sixth Committee shows that in that body some representatives expressly stated that they favoured the essentially inductive method preferred by the Special Rapporteur and said they were glad that he had been encouraged to continue the consistent application of the system whereby any proposal for a particular form of wording was preceded by a full explanation of the arguments in its favour and a broad indication of the precedents offered by State practice and judicial decision as well as the various views expressed by writers. The Special Rapporteur therefore intends to continue applying the criteria which were previously employed on an experimental basis.

15. The introduction to the second report also contained other comments of a general nature. It was observed that State responsibility differs widely, in its aspects, from the other topics which the Commission has previously set out to codify. In its previous drafts, the Commission has generally concentrated on defining the rules of international law which, in one sector of inter-State relations or another, impose particular obligations on States, and which may, in a certain sense, be termed "primary", as opposed to the other rules—precisely those covering the field of responsibility—which may be termed "secondary", inasmuch as they are concerned with determining the consequences of failure to fulfil obligations established by the primary rules. Now the statement of primary rules often calls for the drafting of a great many articles, not all of which necessarily require a very extensive commentary. Responsibility, on the other hand, comprises relatively few principles, which often need to be formulated very concisely. But the possible brevity of the formulation is by no means indicative of simplicity in the subject-matter. On the contrary, on every point there may be a whole host of complex questions, which must all be examined, since they affect the formulation to be adopted. It should come as no surprise, therefore, that the present report contains very long passages dealing with a whole series of problems, followed by a few short articles. Those remarks, too, met with full understanding on the part of the members of the Commission.

16. To complete the series of methodological questions considered by the International Law Commission, it should be mentioned that latter agreed that the topic of international responsibility was one of those where the progressive development of law could be particularly important, especially—as the Special Rapporteur had said—with regard to the determination of the content and the degrees of responsibility. Some members of the Sixth Committee also expressed their agreement on that point. It should be noted, however, that the International Law Commission indicated expressly that in its view the relative importance of progressive development and codification of accepted principles could not be fixed in accordance with a pre-established plan; it would have to emerge in concrete terms from the pragmatic solutions adopted for the various points.

17. With regard to the substantive questions dealt with in the second report relating to the definition of basic general rules on State responsibility, the discussion in the Commission centred on the consideration of the substantive questions posed by the Special Rapporteur in his questionnaire. The discussion brought out the views and concerns of the members of the Commission and revealed a broad agreement in principle with some of the solutions suggested by the Special Rapporteur. It should be remembered, of course, that the discussion was general and brief and that some members stressed that they were expressing purely provisional views on certain points.

18. At the suggestion of some of its members, the Commission briefly discussed, in that context, the desirability of prefacing the draft by a definitions article or by an article indicating what matters were excluded from its scope. The Commission acknowledged, however, that it would be better to postpone any decision on that point until later. When solutions to the different problems have reached a more advanced stage, it will be easier to see whether or not such preliminary clauses were needed in the general economy of the draft. The Special Rapporteur will therefore refrain from submitting any draft clauses of that kind in this report.

19. The International Law Commission appreciated the fact that the Special Rapporteur had seized the opportunity offered by the particularly difficult search for a definition of the general rule which constituted the starting-point and basis of the whole draft to make a number of suggestions regarding possible solutions to certain problems concerning the content of international responsibility. Those suggestions will therefore be maintained in the present report, in which the whole subject will be re-examined. However, the members of the Commission also agreed with the Special Rapporteur that in defining the initial rules it was necessary to avoid formulae which might prejudice solutions to be adopted later, when the Commission would be dealing with the determination of the content and degrees of responsibility. Consequently, in the first part of the over-all plan for the study of the topic, the work will continue to be based on a general notion of responsibility, meaning thereby the set of new legal relationships to which an internationally wrongful act by a State may give rise in the various possible cases. Later, it will be for the Commission to say whether such relationships may arise between that State and the injured State or between the injured State and other subjects of international law, or possibly even with the international community as a whole.<sup>10</sup>

20. The International Law Commission also agreed that in defining the general principle attaching responsibility to any internationally wrongful act, it was necessary to adopt a formula which did not prejudice the

existence of responsibility for lawful acts. In that connexion, some members of the Commission reverted to the idea that this second topic should also be studied, and it was suggested that an initial article might perhaps be included in the present draft to indicate the two possible sources of international responsibility. Those ideas were taken up by some members of the Sixth Committee, who gave further examples of cases in which, in their view, responsibility was attached to lawful acts or to activities which fell half way between lawful and wrongful acts. However, the Special Rapporteur, like several members of the International Law Commission and the Sixth Committee, still feels that it is preferable to adhere to the already acceptable criterion and not to cover in one and the same draft two matters which, though possessing certain common aspects and characteristics, are quite distinct. Being obliged to assume the possible risks arising from the exercise of a lawful activity and being obliged to face the consequences—which are not necessarily limited to compensation—of the breach of a legal obligation are not comparable situations. It is only because of the relative poverty of legal language that the same term is habitually used to designate both. These remarks do not, of course, prevent the Commission from also undertaking, if it sees fit, a study of this other form of responsibility, which is a safeguard against the risks of certain lawful activities. It could do so after the study on responsibility for wrongful acts has been completed, or it could even do so simultaneously but separately. Consequently, the Special Rapporteur feels he should not depart from the criteria originally approved by the Commission in that connexion. Wishing to avoid any misunderstanding, he feels it would be desirable to follow the suggestion made by some members of the Commission and change the title (“The origin of international responsibility”) which he gave, in his second report, to the first part of the draft on State responsibility. The present report is therefore entitled: “The internationally wrongful act of the State, source of international responsibility”. If, in order to be even clearer, the Commission should wish to make the title of the general topic more specific, the Special Rapporteur would suggest that the latter should be entitled: “State responsibility for internationally wrongful acts”.

21. During the discussion of the various points listed in the questionnaire submitted by the Special Rapporteur at the twenty-second session,<sup>11</sup> the International Law Commission considered a series of questions which must be taken into account in defining the basic general rules on State responsibility. In that connexion it discussed the possible responsibility of a State for a wrongful act by another State, the importance to be accorded in the draft on responsibility for internationally wrongful acts to the notion of abuse of right, the advisability of taking into account in the definition to be formulated the distinction between action and omission and the distinction between an internationally wrongful act consisting only of a wrongful conduct and an internationally

<sup>10</sup> Views along those lines were expressed by several members of the International Law Commission. In the Sixth Committee, on the other hand, some members said they favoured a traditional concept and expressed concern regarding the tendency to allow States which were not directly injured by a wrongful act to invoke the international responsibility of the State which was the author of that act.

<sup>11</sup> See *Yearbook of the International Law Commission, 1970*, vol. I, p. 175, 1074th meeting, para. 1.

wrongful act consisting also of a wrongful event, and the possibility of taking into consideration the economic element of damage in determining the conditions for the existence of an internationally wrongful act. The Commission also examined certain terminological problems arising from the need to express in the various languages the concept for which the Special Rapporteur proposes to use, in French, the expressions "*fait illicite international*" or "*fait internationalement illicite*". In particular, it tried to find a term capable of expressing in the most appropriate and unambiguous way the idea of attaching to the State some particular conduct, which represents the subjective element of the internationally wrongful act. In revising the material which was the subject of sections I and II of chapter I of his second report, the Special Rapporteur based his work in respect of all those matters on the views which prevailed in the Commission. The various questions and the views on them expressed by the Commission will be discussed in due course later in this report.

22. In his second report, the Special Rapporteur dealt lastly with what several writers term the "capacity" of States to commit internationally wrongful acts and the possible limits of such "capacity" in certain circumstances. On that point, the Commission agreed with the Special Rapporteur that this notion has nothing to do with capacity to conclude treaties, or more generally, to act internationally. Some members of the Commission even had doubts about the use of the term "capacity" itself, since it might lead to misunderstanding, and the Special Rapporteur therefore agreed to consider the possibility of using a different term; consequently a new term is proposed in the present report.

23. At the end of its consideration of the second report, the Commission invited the Special Rapporteur to continue his study of the topic and the preparation of the draft articles. It was agreed that he would include in his third report all of the part which had been examined provisionally at the twenty-second session, revised in the light of the discussion and the summary conclusions which it had produced. The new report would also include a detailed analysis of the various conditions which must be met if an internationally wrongful act is to be attributed to a State as an act giving rise to international responsibility.

24. The first chapter of this report therefore reproduces the material included in chapter I of the second report, revised as indicated. Section 1 deals with the definition of the principle attaching responsibility to any internationally wrongful act of the State; section 2 is devoted to the determination of the conditions for the existence of a wrongful act under international law, while in section 3 an effort is made to define the principle that each State may, at the international level, be considered the author of a wrongful act which is a source of responsibility. The Special Rapporteur has now added to these three sections a fourth section dealing with the principle according to which the provisions of a State's municipal law cannot be invoked to prevent an act by that State from being characterized as wrongful in international law.

25. The basic general principles having thus been defined, chapter II is devoted to a detailed examination of the conditions in which the actual conduct of a specific individual or group of individuals should be considered as an "act of the State" from the point of view of international law. Section 1 contains preliminary considerations designed to clear away certain difficulties caused basically by incorrect premises and to assert the autonomy of international law in this matter. The following sections are devoted to establishing the individuals or groups of individuals whose conduct may be considered to constitute conduct attributable to the State at the international level. In the remaining sections of chapter II, which will be included in a further report, it will be determined which of the various types of conduct engaged in by those individuals or groups should be specifically attributed to the State. The analysis will then be concluded from a negative viewpoint, indicating the categories of individuals or groups whose conduct cannot be considered conduct of the State and determining the international situation of the State in relation to such conduct.

26. In the context of the first group of questions, chapter II, section 2, defines the rule which represents the starting-point in this field, namely, that an action or omission may be taken into consideration for the purpose of attributing it to the State as an internationally wrongful act if it was committed by an individual or group of individuals who constituted an organ of the State according to the legal order of the State concerned and acted in that capacity in the case in question. Section 3 poses the question whether, in the light of the rule thus defined, a distinction should be drawn according to whether the organ in question belongs to one or other of the main branches of the State machinery or according to whether its functions relate to international relations or are concerned solely with domestic matters, or again according to whether those functions are of a superior or subordinate nature. Section 4 is devoted to an examination of the question whether one should take into account, for the purpose of attribution to the State as a subject of international law, an action or omission by individuals or groups who, in the internal legal order, are not, properly speaking, organs of the State but organs of separate public institutions: autonomous national public institutions or territorial public entities (States members of a federal State, cantons, regions, *départements*, municipalities, autonomous administrations of certain territories or dependent territories, and so on). Section 5 deals with the possibility of considering as attributable to the State—again with a view to assigning international responsibility to the latter—the conduct of individuals or groups which although formally not organs have in fact acted in that capacity (*de facto* organs, State auxiliaries, private persons who occasionally perform public functions, and so on). Lastly, section 6 discusses the specific question of the possibility of attributing to a State an action or omission by an organ placed at its disposal by another State or an international organization.

27. The second group of questions will be considered in a seventh section of chapter II, which will be devoted



essentially to an examination of the controversial question of attributing to the State the conduct of an organ which has exceeded its competence or ignored its instructions, and the possible limitations of such attribution.

28. The third group of questions will be dealt with in an eighth section of chapter II, in which the possibility of attributing to the State, at the international level, the actions of individuals who have acted as such will be ruled out in principle and the circumstances in which the existence of an internationally wrongful act of the State can be envisaged in connexion with certain types of conduct by individuals will then be examined. In the same context we shall deal, in a separate section, with the exclusion, in principle, of the possibility of attributing to a State actions or omissions by individuals acting as organs of insurrectional movements directed against that State and the limitation of that exclusion. We shall also examine the possibility of attaching the conduct of such individuals to the insurrectional movement itself as a separate subject of international law.

29. At this stage, the examination of the conditions permitting specific conduct to be considered as an "act of the State" may be considered completed. We shall then proceed, in another chapter (devoted to "the violation" according to international law), to an examination of the various aspects of what has been called the objective element of the internationally wrongful act: the failure to fulfil an international obligation. First of all, we shall show that the source of the international legal obligation which has been violated (customary, treaty or other) has no implications when it comes to determining whether the violation is an internationally wrongful act. We shall then seek to define the features of the violation of an obligation concerning conduct and the distinction to be drawn in that connexion between the cases in which the specific aim of the obligation in question is to ensure some particular conduct as such, and the cases in which the obligation consists only in ensuring that a given event shall not occur. We shall deal next with the characteristics of the violation when the obligation violated is one of those which require, in a general way, that a certain result should be ensured, without specifying the means by which the result is to be obtained. In this connexion we shall also examine the value of the requirement that local remedies must have been exhausted in order for an international obligation relating to the treatment of individuals to be violated. Lastly, we shall examine the problem of determining the *tempus commissi delicti* in the cases where the failure to fulfil an international obligation creates a permanent situation or is the result of distinct and successive types of conduct. Once all these points have been settled, there will still be some special problems to consider: the possibility of attributing an internationally wrongful act simultaneously to more than one State in connexion with a single specific situation; and the possibility of making a State responsible, in certain circumstances, for an act committed by another State. After that, the detailed consideration of the various circumstances precluding wrongfulness

will complete the first part of the study of State responsibility for internationally wrongful acts.

## CHAPTER I

### General principles

#### 1. PRINCIPLE ATTACHING RESPONSIBILITY TO EVERY INTERNATIONALLY WRONGFUL ACT OF THE STATE

30. One of the principles most deeply rooted in the doctrine of international law and most strongly upheld by State practice and judicial decisions is the principle that any conduct of a State which international law classifies as a wrongful act entails the responsibility of that State in international law. In other words, whenever a State is guilty of an internationally wrongful act against another State, international responsibility is established "immediately as between the two States", as was held by the Permanent Court of International Justice in the *Phosphates in Morocco* case.<sup>12</sup> Moreover, as stated by the Italian-United States Conciliation Commission set up under article 83 of the Treaty of Peace of 10 February 1947,<sup>13</sup> no State may "escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law".<sup>14</sup>

31. Theoreticians have sometimes sought a justification for the existence of this fundamental principle, and they have usually considered that they have found it in the actual existence of an international legal order and in the *legal* nature of the obligations it imposes on its subjects.<sup>15</sup> For it is obvious that if one attempts, as certain advocates of State absolutism have done in the past, to deny the idea of State responsibility because it allegedly conflicts with the idea of sovereignty, one is forced to deny the existence of an international legal order.

<sup>12</sup> *Phosphates in Morocco* case (Preliminary Objections), 14 June 1938, *P.C.I.J.*, series A/B, No. 74, p. 28.

<sup>13</sup> United Nations, *Treaty Series*, vol. 49, p. 167.

<sup>14</sup> *Armstrong Cork Company Case*, 22 October 1953 (United Nations, *Reports of International Arbitral Awards*, vol. XIV (United Nations publication, Sales No.: 65.V.4), p. 163).

<sup>15</sup> Among the authors of classic works on the subject, see D. Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale* (Florence, Lumachi, 1902), reprinted in *Scritti di diritto internazionale pubblico* (Padua, CEDAM, 1956), vol. II, t. 1, pp. 25 and 62, and *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955), vol. I, p. 384; P. Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", *Zeitschrift für Völkerrecht* (Breslau, J.U. Kern's Verlag [Max Müller], 1917), Supplement 2 to vol. X, p. 16; K. Strupp, "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts* (Stuttgart, K. Kohlhammer, 1920), vol. III, part one, pp. 4 *et seq.*

Among recent affirmations of the principle, mention should be made of the very cogent statement by A. Verdross in *Völkerrecht*, 5th ed. (Vienna, Springer, 1964), p. 373: "Eine Leugnung dieses Grundsatzes würde das VR zerstören, da mit der Verneinung der Verantwortlichkeit für begangenes Unrecht auch die Pflicht der Staaten, sich völkerrechtsgemäss zu verhalten, aufgehoben würde". [A denial of this principle would destroy international law, since the negation of responsibility for a wrongful act would also do away with the duty of States to behave in accordance with international law.] (Translation by the United Nations Secretariat.)

The Swiss Government pointed this out in its reply to point II of the request for information addressed to Governments by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930):

... the actual basis of the reciprocal responsibility of States lies in the actual existence of an international juridical order and in the need which States experience to observe certain rules of conduct *inter se*.<sup>16</sup>

Others prefer to think that, in the international order, State responsibility derives from the fact that States mutually recognize each other as sovereign. The rule establishing responsibility would then be the necessary corollary to the principle of the equality of States.<sup>17</sup> However, these differences of opinion are of little importance; there is no need to justify or establish this fundamental principle by deducing it from other principles. Despite certain variations in its formulation, it is expressly recognized, or at least clearly assumed by doctrine and practice unanimously.<sup>18</sup>

32. As regards the meaning and scope of the correlation thus established between a wrongful act and responsibility, Grotius had already observed that in the law of nations, too, *maleficium* was an independent source of legal obligations.<sup>19</sup> Translated into terms of modern legal technique, this amounts to saying that internationally wrongful acts by States create new international legal relations characterized by subjective legal situations

<sup>16</sup> League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (C.75.M.69.1929.V), p. 24. The Swiss Government's reply was based on a quotation from Anzilotti.

<sup>17</sup> Cf. Ch. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (Leyden, Brill, 1924), t. II, p. 90. See also C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 5-6.

The idea that the legal basis of international responsibility is to be found in the "recognition of a political unit as a member of the community governed by international law" was expressed in point II of the request for information addressed to Governments by the Preparatory Committee for the 1930 Conference. However, some Governments criticized the idea (League of Nations, *Bases of Discussion*... [op. cit.], pp. 20-24).

<sup>18</sup> Belief in the existence of the general rule whereby responsibility attaches to any internationally wrongful act by a State was clearly expressed in point II of the above mentioned request for information drawn up by the Preparatory Committee for the 1930 Conference. The same conviction also emerges from all the replies from Governments. Moreover, the Third Committee of the Conference, unanimously approved article 1, which laid down that:

"International responsibility is incurred by a State if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State." (See *Yearbook of the International Law Commission*, 1956, vol. II, p. 225, document A/CN.4/96, annex 3.)

Among codification drafts emanating from private institutions, the draft convention prepared by the Harvard Law School in 1961 states as a "basic principle" of State responsibility the rule that "A State is internationally responsible for an act or omission which, under international law, is wrongful..." (Italics supplied by the Special Rapporteur). (*Yearbook of the International Law Commission*, 1969, vol. II, p. 142, document A/CN.4/217 and Add. 1, annex VII).

<sup>19</sup> H. Grotius, *De Jure Belli ac Pacis Libri Tres* (Amsterdam, MDCCXX), lib. II, cap. XVII, pp. 462 et seq.

distinct from those which existed before the acts took place. The fact that the legal relations between States established as a result of an internationally wrongful act are new relations has been pointed out both by jurists whose writings are now legal classics<sup>20</sup> and by authors of recent works.<sup>21</sup>

33. Notwithstanding this unanimous recognition of the principle, there are serious differences of opinion on the definition of the legal relationships created by an internationally wrongful act and the legal situations which occur in these relationships. One conception, which may be considered classical in international law doctrine and which proceeds from certain theoretical premises—though it has some solid support in judicial decisions and State practice—describes the legal relations deriving from an internationally wrongful act in one single form: that of an obligatory bilateral relationship established between the State which committed the act and the injured State, in which the obligation of the former State to make reparation—in the wide sense of the term, of course—is set against the subjective right of the latter State to require such reparation.<sup>22</sup> In a community like

<sup>20</sup> D. Anzilotti, *Corso di diritto internazionale* (op. cit.), p. 383: "Al fatto illecito, cioè, in generale parlando, alla violazione di un dovere internazionale, si collega così il sorgere di un nuovo rapporto giuridico, tra lo Stato al quale è imputabile il fatto di cui si tratta [...] e lo Stato verso cui sussisteva il dovere inadempito." [The wrongful act, that is to say, generally speaking, the violation of an international obligation, is thus accompanied by the appearance of a new legal relationship between the State to which the act is imputable [...] and the State with respect to which the unfulfilled obligation existed] (Translation by the United Nations Secretariat).

<sup>21</sup> W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), t. 1, p. 499: "Völkerrechtliche Unrechtsfolgen in Gestalt der Entstehung neuer konkreter Rechtspflichten, die durchweg den Völkerrechtverletzer direkt oder indirekt schlechter stellen sollen, als dies vorher der Fall war, liegen durchweg vor (...)" [Unquestionably the consequences of an internationally wrongful act which take the form of the creation of new and concrete legal obligations always aim, directly or indirectly, to place the author of the violation of international law in a more unfavourable situation than the one existing previously (...)]. G. I. Tunkin, *Droit international public - Problèmes théoriques* (Paris, Pédone, 1965), p. 220: "La violation par l'Etat du droit international engendre certains rapports juridiques", [The violation by the State of international law gives rise to certain legal relations] and *Teoria mezhdunarodnogo prava* (Moscow, 1970), p. 470: "Naruszenie gosudartvom mezhdunarodnogo prava porozhdaet opredelennye pravovye otnosheniya" [The violation by the State of international law gives rise to the definition of legal relations]. E. Jiménez de Aréchaga, *International Responsibility - Manual of Public International Law* (London, published by Sorensen, 1968), No. 9, p. 533: "Whenever a duty established by any rule of international law has been breached by act or omission, a new legal relationship automatically comes into existence."

The "legal relationships" which are formed when international responsibility exists are also mentioned in: Institute of the State and of Law of the Academy of Sciences of the Soviet Union, *Kurs mezhdunarodnogo prava* [Course in international law], edited by F. I. Kozhevnikov et al., (Moscow, Nauka, 1969), vol. V: *Osnovnye instituty y otrasli sovremennogo mezhdunarodnogo prava* [Principal institutions and branches of international law], p. 426.

<sup>22</sup> Article 36 of the Statute of the International Court of Justice, which, on this point, reproduces unchanged the corresponding provisions of the Statute of the Permanent Court of International Justice, provides that the Court may have jurisdiction with respect to an internationally wrongful act only in order to establish the existence of such an act and to determine the nature and extent of the reparation to be made. On this basis, conduct that is wrongful under international law has been judged by the Permanent Court of International Justice to give rise to a duty of the State concerned

the international community, in which the relations between States and the community as such are not legally organized, the creation of an obligatory relationship of this nature would appear to be the only effect that can be attached to the wrongful act.<sup>23</sup>

to make reparation for the injury caused; this was held as early as Judgement No. 1 of 17 August 1923 in the S.S. "Wimbledon" case (*P.C.I.J.*, series A. No. 1, pp. 30 and 33). The same Court later defined its basic attitude in the matter in its Judgements No. 8 of 26 July 1927 (Jurisdiction) and No. 13 of 13 September 1928 (Merits) in the Case concerning the factory at Chorzów (*P.C.I.J.*, Series A. No. 9, p. 21 and No. 17, p. 29). In the second of these judgements, the Court observed that:

"... it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation..."

The principle stated by the Permanent Court was expressly reaffirmed by the International Court of Justice in its Advisory Opinion of 11 April 1949 concerning Reparation for injuries suffered in the service of the United Nations (*I.C.J. Reports* 1949, p. 184). The Court also applied this principle in its Judgement of 9 April 1949 in the Corfu Channel case (*ibid.*, p. 23).

In arbitration cases, the idea that all internationally wrongful conduct uniformly gives rise to a legal relationship between the offending State and the injured State, characterized by the right of the latter State to demand adequate reparation, has been stated many times. In this connexion, it is sufficient to refer to Mr. Huber's report of 1 May 1925, as arbitrator in the case concerning British claims in the Spanish zone of Morocco (United Nations, *Reports of International Arbitral Awards*, vol. II [United Nations publication, Sales No.: 1949.V.1], p. 641 and the decision of 22 October 1953, cited above, of the Italian-United States Conciliation Commission in the Armstrong Cork Company case (*ibid.*, vol. XIV [Sales No.: 65.V.4], p. 163) in which, quoting the opinion of Strupp, the Commission described wrongful actions as "producing the responsibility of those performing such actions and allowing the State which has suffered or whose subjects have suffered damage to demand reparation".

As to the practice of States, reference should be made first of all to the fact that article 3 of the IVth Hague Convention of 1907 respecting the Laws and Customs of War on Land provided that a belligerent which violated the provisions of the Regulations "shall, if the case demands, be liable to pay compensation". Article 12 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War (United Nations, *Treaty Series*, vol. 75, p. 146) established the responsibility of the State, but does not indicate what form that responsibility takes. With regard to the special sector of international responsibility for injuries to aliens, attention may be drawn once again to the general agreement on point II of the request for information addressed to States by the Preparatory Committee for the 1930 Conference for the Codification of International Law, according to which "a State which fails to comply with this obligation [...] incurs responsibility and must make reparation in such form as may be appropriate." (League of Nations, *Bases of Discussion...* [*op. cit.*], pp. 20 *et seq.*, and *Supplement to vol. III* [C.75 (a).M.69 (a).1929.V], pp. 2 and 6). According to article III, adopted on first reading by the Third Committee of the Conference, "The international responsibility of a State imports the duty to make reparation for the damage sustained [...]" (See *Yearbook of the International Law Commission*, 1956, vol. II, p. 225, document A/CN.4/96, annex 3).

It should, however, be noted that although international jurisprudence and State practice undoubtedly justify the conclusion that in general international law an internationally wrongful act imposes on the offending State an obligation to make reparation, it would be reading too much into this jurisprudence and State practice to try to draw the further conclusion that the creation of such an obligation is necessarily the only consequence which general international law attaches to an internationally wrongful act. In reality, this idea has its origin in a particular conception of the legal order in general and of the international legal order in particular.

<sup>23</sup> This is the well-known theory of Anzilotti (*Teoria generale...* [*op. cit.*], pp. 62 *et seq.*, and 81-82; *La responsabilità internazionale*

34. This view does not admit of the possibility of a real sanction which the injured State itself, or possibly a third party, would have the faculty to impose upon the offending State. Although it recognizes that a coercive act may become applicable following a wrongful act, it regards the former only as a means of enforcement intended to ensure, by coercion, that the recalcitrant State fulfils its obligations, and not as a "sanction" in the proper sense of the term, i.e. having a punitive purpose.<sup>24</sup> In conclusion, international responsibility is said to be characterized by the unity of the legal relationship created by the wrongful act: <sup>25</sup> an obligatory relationship in which the restoration or compensation aspects may be accompanied by punitive aspects, without the distinction being easy to make or having more than a theoretical interest.<sup>26</sup>

*des Etats a raison des dommages soufferts par des étrangers* (Paris, Pédone, 1906), reprinted in *Scritti...* [*op. cit.*], p. 161; *Corso...* [*op. cit.*], pp. 385-386). A similar view is maintained in works dealing specifically with the subject although some of them are already rather old (P. Schoen, *op. cit.*, pp. 22 and 122-123; K. Strupp, "Das völkerrechtliche Delikt", *Handbuch...* [*op. cit.*], p. 217; Ch. de Visscher, *op. cit.*, pp. 115-116; C. Eagleton, *op. cit.*, p. 182; R. Laß, "Die Rechtsfolgen völkerrechtliche Delikte", Institut für internationales Recht an der Universität Kiel, *Erste Reihe Vorträge und Einzelschriften* (Berlin, Stilke, 1932), Heft 18, pp. 19-20; etc.); but the same view is also to be found, with the normal variations from one writer to another, in recent treatises and monographs: for example, G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. 1, pp. 568 *et seq.*; A. Schüle, "Völkerrechtliches Delikt", *Wörterbuch des Völkerrechts* 2nd ed. (Berlin, de Gruyter, 1960), Bd. I, pp. 337 *et seq.*; D. P. O'Connell, *International Law* (London, Stevens, 1965), vol. II, pp. 1019 *et seq.*; and E. Jiménez de Aréchaga, *International Responsibility...* [*op. cit.*], pp. 533, 564 *et seq.*

<sup>24</sup> It follows that when the advocates of this theory deal, for example, in general international law, with an institution such as reprisals—whether peaceful or armed—they tend not to regard them as a form of sanction which may, as such, have its own punitive and repressive purpose, as is so well indicated by the term "retaliation" in English, but only as a means of coercion used to secure performance, or restoration of the impaired right, or reparation for the damage sustained. See, for example, K. Strupp, "Das völkerrechtliche Delikt", *Handbuch...* (*op. cit.*), pp. 195 *et seq.*, and *Eléments du droit international public: universel, européen et américain* (Paris, Editions internationales, 1930), vol. I, p. 345; Ch. de Visscher, *op. cit.*, p. 117; and G. Balladore Pallieri, "Gli effetti dell'atto illecito internazionale", *Rivista di Diritto Pubblico—La Giustizia Amministrativa*, Rome, January 1931—IX, fasc. 1, pp. 64 *et seq.*

<sup>25</sup> P. Reuter ("Principes de droit international public", *Recueil des cours de l'Académie de droit international de La Haye*, 1961-II [Leyden, Sijthoff, 1962], t. 103, pp. 584 *et seq.*) states clearly this aspect of the theory, which he calls "l'unité de la théorie de la responsabilité". In his view, "l'absence d'une distinction entre la responsabilité pénale et la responsabilité civile n'est en droit international que la conséquence de l'absence d'autorité ayant pour fonction propre de défendre les intérêts communs". [The absence of any distinction between criminal responsibility and civil responsibility in international law is essentially the result of the absence of an authority responsible for protecting the common interests.] (Translation by the United Nations Secretariat.)

<sup>26</sup> The unity of the theory which regards the creation of an obligatory relationship as the sole consequence of an internationally wrongful act is not affected by the fact that some writers refer to a penal aspect of responsibility in connexion with the particular characteristics which the content of the offending State's obligation may sometimes have and which are designated by the term "satisfaction" (see for example G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), pp. 357-358; Ch. de Visscher, *Théories et réalités en droit international public* (Paris, Pédone, 1953), pp. 344 *et seq.*; P. Reuter, *La responsabilité internationale* (Paris, 1956-1957), pp. 191-192). In reality, a separate

(Continued on next page.)

35. Another view, put forward by certain writers on essentially theoretical grounds, leads to a position almost diametrically opposed to that just described, despite the fact that it, too, upholds, though in an entirely different way, the idea of a single legal relationship arising from the wrongful act and thus falling within the concept of responsibility. Starting from the idea that the legal order is a coercive order, this view sees in an act of coercion not only the sole possible form of sanction, but also the sole legal consequence following directly from the wrongful act. The obligation to make reparation is—and this, according to this view, is true in any system of law—no more than a subsidiary duty placed between the wrongful act and the application of measures of coercion, by the law in municipal law, and in international law by a possible agreement between the offending State and the injured State. Accordingly, general international law would not regard the wrongful act as creating any obligatory relationship between the offending State and the injured State, but would authorize the latter to react to the wrongful act of the former by applying to it a sanction in the proper sense of the term.<sup>27</sup>

(Foot-note 26 continued)

term is used here to distinguish a form of moral reparation from a reparation which is essentially economic in character. On this point, see P.-A. Bissonnette, *La satisfaction comme mode de réparation en droit international* (thesis, Geneva University), 1952.

Similarly, the unity of the theory in question is not affected by the assertion made by certain writers—not without encountering strong opposition—that the obligation placed on a State committing a wrongful act may also include what are called “penal damages”. This term is used to denote the character of a real pecuniary penalty which seems to be possessed by certain indemnities demanded and sometimes granted. Among the writers who share this view, see J. H. Ralston, *The Law and Procedure of International Tribunals* (Stanford [Calif.], Stanford University Press, 1926), pp. 267 *et seq.*; E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (New York, the Banks Law Publishing Co., 1928), p. 419; C. Eagleton, “Measure of Damages in International Law”, *Yale Law Journal* New Haven [Conn.], vol. XXXIX, November 1929, No. 1, pp. 61 *et seq.*, and “International Organization and the Law of Responsibility”, *Recueil des cours de l'Académie de droit international de La Haye, 1950-I* (Paris, Sirey, 1951), pp. 379-380; Briggs, “The Punitive Nature of Damages in International Law and State Responsibility...”, *Essays in Political Science in Honour of W. W. Willoughby* (Oxford, 1937), pp. 339 *et seq.*; L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht] (London, Longmans, Green and Co., 1955), vol. I, pp. 354-355; P. Guggenheim, *Traité de droit international public* (Geneva, Librairie de l'Université, Georg et Cie, 1954), t. II, p. 81; D. P. O'Connell, *op. cit.*, pp. 1205 *et seq.* The idea of attributing to these forms of “damages” a “distinctively punitive purpose” and the character of a penalty was adopted F.V. by García Amador in his first report on State responsibility to the International Law Commission (*Yearbook of the International Law Commission, 1956*, vol. II, pp. 182 *et seq.*, document A/CN.4/96, paras. 49 *et seq.*), in his course of lectures “State Responsibility: Some New Problems” (*Recueil des cours... 1958-II* [Leyden, Sijthoff, 1959], t. 94, pp. 396-397), and in his sixth report to the Commission (*Yearbook of the International Law Commission, 1961*, vol. II, p. 35, document A/CN.4/134 and Add.1, paras. 140 *et seq.*). The approach of C. Th. Eustathiades (“Les sujets du droit international et la responsabilité internationale — Nouvelles tendances”, *Recueil des cours... 1953-III* Leyden, Sijthoff, 1955], t. 84, pp. 434-435) is critical as regards the so-called “punitive damages”, although rather cautious. For the view that international law does not recognize “penal damages”, see B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (London, Stevens, 1953), pp. 234-235.

<sup>27</sup> This view has been progressively developed by H. Kelsen, “Unrecht und Unrechtsfolge im Völkerrecht”, *Zeitschrift für*

36. Lastly there is a third view which, while not taking either of the other two extreme positions, recognizes what is sound in each of them, while stressing that they provide only a partial and incomplete description of the consequences of a wrongful act as manifested in real international life. This view, therefore, diverges from the other two in bringing out that in any system of law a wrongful act may give rise, not to a single type of legal relationship, but to a dual form of relationship, each form being characterized by the different legal situations of the subjects involved. So far as the international legal order in particular is concerned, in principle it attaches to an internationally wrongful act the same sort of consequences as an internal legal order generally attaches to an act of the same kind. These are consequences of different kinds which amount, according to the case, either to giving the subject of international law whose rights have been infringed by the wrongful act the subjective right to claim reparation—again in the broad sense of the term—from the author of the act or to giving that subject, or possibly a third subject, the faculty to impose a sanction on the subject which has engaged in wrongful conduct. In the first case, it is the subject which has engaged in wrongful conduct which *must* act to eliminate the consequences of the act; in the second case, it is the subject injured by the wrongful act which *may* act to punish its author, since by “sanction” here is meant the application of a measure which, although not necessarily an act of coercion and not necessarily involving the use of force, is nevertheless characterized by the fact that its purpose is, in part at least, to impose a penalty. Such a purpose is not the same as an attempt to secure by coercion the fulfilment of the obligation or restoration of the right infringed or compensation for the injury.<sup>28</sup>

*öffentliches Recht* (Vienna, Springer, 1932), Bd. XII, Heft 1, pp. 545-546, and 568-569; *Principles of International Law* 2nd ed. (New York, Holt, Rinehart and Winston, 1966), pp. 18-19; and “Théorie du droit international public”, *Recueil des cours... 1953-III* (Leyden, Sijthoff, 1955), t. 84, pp. 19 *et seq.*, and 29 *et seq.* The sanctions provided for by classical general international law are, according to Kelsen, reprisals and war; in applying them, the injured State acts as an organ of a decentralized international community. The United Nations Charter, on the other hand, gives—in Kelsen's opinion—a monopoly of force to the Organization. Kelsen's ideas were taken up by A. Carlebach. (*Le problème de la faute et sa place dans la norme du droit international* [Paris, Librairie générale de droit et de jurisprudence, 1962], pp. 2 *et seq.*). P. Guggenheim (*op. cit.*, p. 63) takes the same view in principle, but adopts a much more realistic approach. This writer, too, considers that the obligation to make reparation is not the “sanction” for the offence and that neither is it the consequence of a wrongful act under general international law. He regards reparation as an obligation to be agreed upon by special treaty. However, differing from Kelsen's opinion on this point, Guggenheim considers that the State has an obligation to submit its claim before resorting to measures of coercion such as war or reprisals. It should also be noted that according to this writer acts of coercion carried out under international law cannot be regarded as “penalties” in the penal law sense, because they lack the “retributive and preventive” character of a penalty and do not differ from enforcement measures (*ibid.*, p. 83). See also A. V. Freeman, *The International Responsibility of States for Denial of Justice* (London, Longmans, Green, 1938), pp. 17 *et seq.*, 571 *et seq.*

<sup>28</sup> On the existence, in international law, of sanctions proper (meaning repressive acts which in this sense have an undeniably penal character), see in particular R. Ago, “Le délit international”, *Recueil des cours... 1939-II* (Paris, Sirey, 1947), t. 68, pp. 527

37. For those who hold this view it is therefore obviously correct to describe as a "subjective right" the particular legal situation of the injured subject whereby it can legitimately require reparation: this legal situation is the logical concomitant of the obligation placed on the author of the wrongful act. This is not true, however, of the other legal situation which consists in the possibility of legitimately applying a sanction and which should rather be described as a "legal faculty". In the first case, a new obligatory legal relationship is established as a result of the wrongful act; in the second case there is also a new relationship, but it is clearly of a different kind. Consequently, in so far as an internationally wrong-

*et seq.*; L. Oppenheim, *op. cit.*, pp. 356 *et seq.*; C. Th. Eustathiades, "Les sujets...", *Recueil des cours...* (*op. cit.*), pp. 442 *et seq.*, and 448-449; G. Morelli, *op. cit.*, p. 363; W. Wengler, *op. cit.*, pp. 551-552.

Modern Soviet writers on international law (see A. N. Traĭnin, *Zashchita mira i borba s prestupleniami protiv chelovechestva* [The preservation of peace and the repression of criminal acts against humanity], (Moscow, Vychinsky Institute of Law of the Academy of Sciences of the Soviet Union, 1956), pp. 41 *et seq.*; G. I. Tunkin, *Droit international...* [*op. cit.*], pp. 202 *et seq.*, "Alcuni nuovi problemi della responsabilità dello Stato nel diritto internazionale", Istituto di Diritto Internazionale e Straniero della Università di Milano, *Comunicazioni e Studi* (Milan, Giuffrè, 1963), t. XI [1960-1962], pp. 16 *et seq.*, and *Teoria...* [*op. cit.*], pp. 447 *et seq.*; and Institute of the State and of Law of the Academy of Sciences of the Soviet Union, *op. cit.*, pp. 424 *et seq.*) sharply criticize the concept of a penal responsibility of States as developed by certain writers (Pella, Donnedieu de Vabres, etc.). This criticism is, however, directed primarily against the facile transplantation to international law of notions and institutions characteristic of municipal law and, more specifically, against certain trends towards the creation of supranational organs of "international penal justice". On the other hand, the aforementioned Soviet writers in no way deny the existence in international law of sanctions that are repressive and, hence, punitive in nature. Soviet writers (see G. I. Tunkin, *Droit international...* [*op. cit.*], pp. 224 *et seq.*, "Alcuni nuovi problemi..." [*op. cit.*], pp. 45 *et seq.*, and *Teoria...* [*op. cit.*], pp. 476 *et seq.*; and Institute of the State and Law of the Academy of Sciences of the Soviet Union, *op. cit.*, pp. 412 *et seq.*, and particularly pp. 433 *et seq.*) draw a clear distinction, in respect of the legal relationships which result from an internationally wrongful act, between the relationships which involve the application of sanctions and those which imply the simple obligation to make reparation for damage. They even criticize severely the older theory which disregarded "sanctions". Some of these writers (see M. Rapoport, "K voprosu ob otvetstvennosti za prestupleniya protiv chelovechestva" [The question of responsibility in respect of crimes against humanity], *Vestnik Leningradskogo Universiteta* [University of Leningrad Review], No. 5, 1965, p. 81) regard sanctions as real "penalties", and when responsibility involves their application, as in the case of aggression, it becomes a "penal" responsibility. The other writers already cited prefer to use the terms "political" and "material" responsibility to designate the two possible kinds of consequence of a wrongful act. (Tunkin, however, has certain reservations about the use of these terms.) On this specific point it may therefore be said that, terminological questions apart, the views of the Soviet writers are analogous to those of the writers mentioned at the beginning of this note.

In connexion with the aforementioned terminological aspect of the question, it may be remembered that the Government of Czechoslovakia, in the nineteenth principle of the declaration contained in the draft resolution it submitted at the seventeenth session of the United Nations General Assembly, during the discussion on principles of international law concerning friendly relations and co-operation among States (*Official Records of the General Assembly, Seventeenth Session, Annexes, Agenda item 75, document A/C.6/L. 505*) used the term "political responsibility" to characterize the responsibility of the State in relation to the "penal responsibility" of the "physical persons who committed acts qualified by international law as crimes against humanity".

ful act is described as an act giving rise in law to international responsibility, the general term responsibility (still according to this view) should be understood to mean the situation of a subject of international law confronted either with the right of another subject to claim reparation from it, or with the faculty of another subject to impose a sanction on it—in the sense given to these terms above.<sup>29</sup>

38. The above-mentioned position of principle amounts in the last analysis to drawing a parallel between the reaction of the international legal order to a wrongful act and the reaction of other legal orders. It is nevertheless recognized that in international law, unlike municipal law, no clear distinction has been established between acts of coercion according to whether their purpose is to impose a sanction in the true sense of the term or to compel the author of the wrongful act to fulfil his obligations. These two aspects, though in theory distinct and clearly identifiable in certain specific cases, are often combined and blended in a single action. Similarly, the holders of this view themselves observe that international law—because of the nature of the international community and its members rather than because of any alleged but non-existent primitive character of international law—has not worked out a distinction between civil and penal offences comparable to that established in municipal law.<sup>30</sup>

39. It is not easy, therefore, to distinguish clearly defined classes of wrongful acts, some of which only give the injured State the "right" to claim reparation from the guilty State, while others also give it the "legal faculty" to impose a sanction upon that State. What can be said is that modern international law has tended progressively to deny the faculty of resorting to measures of coercion as a reaction against less serious wrongful acts, in particular those of a purely economic nature; more generally speaking, it must be recognized that there is also a clear tendency to restrict the injured State's faculty of resorting to sanctions unilaterally.<sup>31</sup>

<sup>29</sup> This view was formulated by the author of the present report in his early writings on international responsibility. See R. Ago, "Le délit international", *Recueil des cours...* (*op. cit.*), pp. 426-427 and 524 *et seq.* The same idea is put forward by G. Sperduti ("Introduzione allo studio delle funzioni della necessità nel diritto internazionale", *Revista di diritto internazionale*, Padua, series IV, vol. XXII, fasc. I-II, 1943, pp. 22 *et seq.*), by C. Th. Eustathiades, ("Les sujets...", *Recueil des cours...* [*op. cit.*], pp. 429 *et seq.*), by A. P. Sereni (*Diritto internazionale* [Milan, Giuffrè, 1962], t. III, pp. 1541-1542), and by G. Morelli (*op. cit.*, pp. 356 *et seq.* and 361 *et seq.*). Substantially analogous opinions are to be found in L. Oppenheim (*op. cit.*, pp. 356 *et seq.*), A. Verdross (*op. cit.*, pp. 398 *et seq.*, 424 *et seq.*, and 647 *et seq.*), G. Dahm (*Völkerrecht* [Stuttgart, W. Kohlhammer, 1961], Bd. III, pp. 265 *et seq.*), W. Wengler (*op. cit.*, pp. 499-503), and D. B. Levin (*Otvetstvennost gosudarstv v sovremennom mezhdunarodnom prave* [Moscow, Izdatelstvo Mezhdunarodnye otnosheniya, 1966], pp. 9-10), and the authors of volume V of *Kurs mezhdunarodnogo prava* (Institute of the State and Law of the Academy of Sciences of the Soviet Union, *op. cit.*) who contrast (pp. 426 *et seq.*) the "subjects of the international offence" with the "subjects of the legal claims" which are created in the case of international responsibility.

<sup>30</sup> R. Ago, "Le délit international", *Recueil des cours...* (*op. cit.*), pp. 530-531.

<sup>31</sup> On this point see G. Dahm, *op. cit.*, p. 266; W. Wengler, *op. cit.*, pp. 504 *et seq.*

What seems also to emerge clearly from State practice is the existence of an order of priority between the two possible consequences of an internationally wrongful act, in the sense that the claim for reparation must as a rule precede the application of the sanction, even where recourse to a sanction would be permissible in principle.<sup>32</sup> By offering adequate reparation—that is to say, by eliminating the consequences of its wrongful conduct as far as possible—the guilty State should normally be able to avoid the sanction. Of course, this principle does not preclude recognition of the fact that there may be exceptional cases in which the faculty of reacting against an internationally wrongful act by applying a sanction must necessarily be immediately exercisable and cannot be made conditional on a prior attempt to obtain reparation, especially if this attempt has, *a priori*, no real prospect of success.<sup>33</sup> According to some writers, moreover, there are cases in which a State held to be guilty of very serious wrongful acts may have to face both sanctions and an obligation to make reparation.<sup>34</sup>

40. In spite of the divergence of the views described above, the different conceptions of responsibility nevertheless coincide in agreeing that every internationally wrongful act creates new legal relations between the State committing the act and the injured State. As has already been pointed out, this in no way precludes the establishment of other relations between the former State and other subjects of international law. What must be ruled out, it appears, at least at the present stage in international relations, is the idea that as a result of an inter-

nationally wrongful act general international law can create a legal relationship between the guilty State and the international community as such, just as municipal law creates a relationship between the person committing an offence and the State itself. International law can have no such effect, so long as it does not recognize a personification of the international community as such. But this situation has certainly not prevented international law from providing that in certain cases a particular internationally wrongful act may be the source of new legal relationships, not only between the guilty State and the injured State, but also between the former State and other States or, especially, between the former State and organizations of States.<sup>35</sup> The development of the international organization—as early as the League of Nations but more particularly with the United Nations—has led to consideration of the possibility that a State committing an internationally wrongful act of a certain kind and of a certain importance might be placed in a new legal relationship not only with the injured State, but also with the Organization. It might thus be subject to the faculty or even the duty of the Organization and its members to react against the internationally wrongful conduct by applying sanctions collectively decided upon.

41. In connexion with this last point, attention must also be drawn to the growing tendency of a group of writers to single out, within the general category of internationally wrongful acts, certain kinds of acts which are so grave and so injurious, not only to one State but to all States, that a State committing them ought to be automatically held responsible to all States. It is tempting to relate this view<sup>36</sup> to the recent affirmation of the International Court of Justice, in its Judgment of 5 Feb-

<sup>32</sup> This principle has been given clear expression in international practice and judicial decisions, especially in the arbitral award of 31 July 1928 in the case concerning the responsibility of Germany for damage caused in the Portuguese colonies in South Africa (Naulilaa incident) (United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No.: 1949.V.1), pp. 1027-1028). For an account of the practice, see L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Sirey, 1938), pp. 36 *et seq.*

<sup>33</sup> For examples of cases in which this situation may arise, especially where a state of war exists, see R. Ago, "Le délit international", *Recueil des cours*... (op. cit.), pp. 526 *et seq.*; P. Guggenheim, op. cit., pp. 65-66.

<sup>34</sup> This view seems to be the basis of the nineteenth principle of the declaration contained in the draft resolution submitted by the Government of Czechoslovakia at the seventeenth session of the United Nations General Assembly (for the reference, see footnote 28 above). This principle reads:

"The principle of State responsibility

"The State shall be held responsible for a violation of rules of international law, particularly for acts endangering peace and security and friendly relations among nations, as well as for acts violating legitimate rights of other States or their nationals.

"The State which has violated international law shall be liable to remedy in an adequate form the detriment thus caused, and shall bear also the corresponding political responsibility. Irrespective of the responsibility of the State, the physical persons who committed acts qualified by international law as crimes against humanity shall be subject to penal responsibility."

This formulation is supported by the authors of volume V of *Kurs mezhdunarodnogo prava* (Institute of the State and Law of the Academy of Sciences of the Soviet Union, op. cit.), pp. 411-412. The theory of a double consequence for particularly serious violations is defended by the same authors on pp. 429 *et seq.* See also G. I. Tunkin ("Alcuni nuovi problemi...", *Comunicazioni e Studi* [op. cit.], p. 38, and D. B. Levin (*Otvetstvennost gosudarstv...* [op. cit.], p. 115).

<sup>35</sup> On this question see the comments of Guggenheim (op. cit., pp. 99 *et seq.*), Eustathiades ("Les sujets...", *Recueil des cours*... (op. cit.), p. 433), Sereni (op. cit., pp. 1514-1542), Wengler (op. cit., pp. 500, 506 *et seq.*, and 580 *et seq.*), Tunkin (*Droit international*... (op. cit.), pp. 191 and 220 *et seq.*, "Alcuni nuovi problemi...", *Comunicazioni e Studi* (op. cit.), pp. 39 *et seq.*, and *Teoria*... (op. cit.), pp. 430 and 470 *et seq.*) [these comments were taken up and developed by Mr. Ushakov during the discussion on the first report at the twenty-first session of the International Law Commission (*Yearbook of the International Law Commission*, 1969, vol. I, p. 112, 1012th meeting, paras. 37-39)], and the comments of the authors of volume V of *Kurs*... (Institute of the State and Law of the Academy of Sciences of the Soviet Union, op. cit., pp. 432 *et seq.*).

<sup>36</sup> It has been particularly developed in Soviet doctrine. D. B. Levein ("Problema otvetstvennosti v nauke mezhdunarodnogo prava" *Izvestia Akademii Nauk SSSR*, No. 2, 1946, p. 105, and "Ob otvetstvennosti gosudarstv v soimennoe mezhhdunarodnoe pravo", *Sovetskoe gosudarstvo i pravo*, Moscow, No. 5, May 1966, pp. 75 and 76a) distinguishes between "simple violations of international law and international crimes which undermine its very foundations and most important principles". He identifies as such "genocide, aggression and colonial oppression". G. I. Tunkin (*Droit international*... (op. cit.), pp. 220 *et seq.*, "Alcuni nuovi problemi...", *Comunicazioni e Studi* (op. cit.), pp. 39 *et seq.*, and *Teoria*... (op. cit.), pp. 472 *et seq.*), who refers in this connexion to the opinions of certain older writers such as Heffter and Bluntschli, especially stresses threats to peace, breaches of the peace and acts of aggression. The authors of volume V of the *Kurs*... mention in the same context violations of the freedom of peoples, such as colonial oppression, the suppression by force of national

<sup>a</sup> For a summary in French, see *L'URSS et les pays de l'Est* (Paris, Editions du C.N.R.S. 1967), vol. VIII N° 2, pp. 340 *et seq.*



ruary 1970 in the case concerning the *Barcelona Traction, Light and Power Company, Limited*, that there are certain international obligations of States which are obligations *erga omnes*, that is to say, obligations to the whole international community. In the terms used by the Court :

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.<sup>37</sup>

Ideas of this kind may perhaps be worth studying in detail, for the writers concerned do not always seem to be quite clear whether, in such cases, the relationship established with States in general would originate in a rule of general and customary international law or in a rule of treaty law. Furthermore, it is not very clear whether it would be a relationship with States *ut singuli* or with States as members of an international organization which would alone be competent to decide on the action to be taken. In any event, these views are of particular interest, inasmuch as they reveal a trend towards incipient personification of the international community and are a factor which will make it possible gradually to outline a concept of "crime" in international law, within the general context of the internationally wrongful act. This idea appears, moreover, to be confirmed by the second paragraph of the first principle in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 in its resolution 2625 (XXV). This paragraph reads : "A war of aggression constitutes a *crime* against the peace, for which there is responsibility under international law". (Special Rapporteur's underlining).

42. If the various questions that arise concerning the legal relations which result from an internationally wrongful act and thus enter into the concept of international responsibility, and the existing differences of opinion about them, have been discussed in the preceding paragraphs—which follow closely the exposition given in the second report<sup>38</sup>—it is not because of any conviction that the Commission will have to take position on these questions from the beginning of its work, when formulating the basic general rule on State responsibility. The Special Rapporteur has always believed that this rule should be stated as concisely as possible and that belief was confirmed by the position on that subject

taken by the Commission in the discussion at the twenty-second session. The principle to be established from the outset is the unitary principle of responsibility, which it should be possible to invoke in every case. In establishing that principle there is no question of embarking upon the task of defining the various categories of wrongful acts and the consequences of those acts. The reason for going into the above-mentioned details once again is that it is thought necessary for the Commission to bear in mind, throughout its work on this topic, the extremely complex nature of the notion of responsibility for an internationally wrongful act—with respect to which, incidentally (as was recognized by both the International Law Commission and the Sixth Committee of the General Assembly), the claims of progressive development of international law may assert themselves, alongside those of codification pure and simple, more forcefully than they do with respect to other notions.

43. The Commission will, of course, have to take a position on all these questions, as it decided after discussing the first report at its twenty-first session;<sup>39</sup> the time to do so will be in the second phase of its study of the topic, when it will have to define the content, forms and degrees of State responsibility for an internationally wrongful act. However, as the Special Rapporteur pointed out in his second report, it is by no means impossible that the implications of these questions may already become apparent, to some extent, in the first phase, devoted to determining the notion of the internationally wrongful act as an act generating the international responsibility of a State. During the consideration of the second report the Commission unanimously recognized that for the purpose of formulating the basic principle on responsibility for an internationally wrongful act it is essential to take this fact into account and adopt a text which is simple enough to avoid prejudging, one way or another, the questions the Commission will have to settle later.<sup>40</sup> In its commentary to the principle in question, the Commission will therefore point out that it is using the term "*international responsibility*" to mean, globally and without taking a position, *all the forms of new legal relationship which may be established in international law by a State's wrongful act*—irrespective of whether they are limited to a relationship between the State which commits the wrongful act and the State directly injured, or extend to other subjects of international law as well, and irrespective of whether they are centred on the guilty State's obligation to restore the rights of the injured State and to repair the damage caused, or whether they also involve the faculty of the injured State itself, or of other subjects, of imposing on the guilty State a sanction permitted by international law.

44. With regard to the other expression the Commission will have to use in stating the basic principle on international responsibility, i.e. that denoting the type of act generating responsibility with which we are concerned, a question of terminology may arise, as the

liberation movements, *apartheid* and racial discrimination, genocide and being the first to use weapons of mass destruction (Institute of the State and Law of the Academy of Sciences of the Soviet Union, *op. cit.*, pp. 421-422).

It should be noted that in British doctrine a writer such as Lauterpacht (see L. Oppenheim, *op. cit.*, pp. 355-356) opts for a distinction which recalls that made by the Soviet and Czechoslovak writers and gives as an example of international "crimes" the massacre of aliens resident in the territory of a State and the preparation and launching of an aggressive war.

<sup>37</sup> *I.C.J. Reports* 1970, p. 32.

<sup>38</sup> *Yearbook of the International Law Commission*, 1970, vol. II, p. 177, document A/CN.4/233.

<sup>39</sup> *Ibid.*, 1969, vol. II, p. 233, document A/7610/Rev.1, para. 81.

<sup>40</sup> *Ibid.*, 1970, vol. II, p. 307, document A/8010/Rev.1, para. 73.

Special Rapporteur pointed out in the second report. In that report, he noted that the terms used in the practice and the literature of different countries were not the same and that different words were sometimes used in the same language, though all of them were qualified by the adjective "international".<sup>41</sup> Thus, writers in French sometimes speak of a "délit" and sometimes of an "acte illicite" or "fait illicite".<sup>42</sup> Similarly, Italian writers sometimes use the term "delitto", but more often "atto illecito" or "fatto illecito".<sup>43</sup> The literature in Spanish uses the terms "delito", "acto ilícito" and "hecho ilícito".<sup>44</sup> In English writers we find the terms "tort", "delict", "delinquency", "illegal conduct", "illegitimate", "illegal", "unlawful" or "wrongful" "act" and "act or omission".<sup>45</sup> German writers speak of "Unrecht", "De-

likt" and "unerlaubte Handlung".<sup>46</sup> In the works of Russian writers we find expressions such as "mezhdunarodnii delikt", "nepravomernoe deistvie" or "bezhddeistvie", "nepravomernoe povedenie".<sup>47</sup> And this list could be extended further.

45. The Commission devoted particular attention to the question of terminology at its twenty-second session. In view of the multiplicity of terms, the Commission considered it desirable to adhere in principle to the terminology employed hitherto in the report prepared by the Special Rapporteur. The French-speaking members agreed that the expression "fait illicite international" (or its equivalent "fait internationalement illicite") were usually preferable to "délit" or other similar terms, which may sometimes take on a special shade of meaning in certain systems of municipal law. They also agreed with the Special Rapporteur that the expression "fait illicite" seemed more accurate than "acte illicite", mainly for the practical reason that illicit conduct often takes the form of an omission, and this is not properly conveyed by the word "acte", the etymology of which suggests the idea of action. Furthermore, and especially from the point of view of legal theory, this preference seems even more justified, since the French term "acte" is ordinarily used in law to denote a manifestation of will intended to produce the legal consequences determined by this will, which certainly does not apply to illicit conduct.<sup>48</sup> For the same reasons the majority of the Spanish-speaking members favoured the terms "hecho ilícito internacional" and "hecho internacionalmente ilícito". Others, however, expressed a preference

<sup>41</sup> On these questions of terminology see, in particular, I. von Münch, *Das Völkerrechtliche Delikt in der Modernen Entwicklung der Völkerrechtsgemeinschaft* (Frankfurt-am-Main, Kepler, 1963), pp. 11 et seq.

<sup>42</sup> The expression "délit international" is used by G. Scelle (*Précis de droit des gens — Principes et systématique* (Paris, Sirey, 1934), part II, p. 61). It is to be found in the replies of some Governments (Switzerland, Netherlands) to the various points of the request for information sent to Governments by the Preparatory Committee for the 1930 Conference (League of Nations, *Bases of Discussion...* (op. cit.), pp. 13 and 65), and also in the French texts of foreign writers such as: K. Strupp, *Éléments...* (op. cit.), pp. 325 et seq.; R. Ago, "Le délit international", *Recueil des cours...* (op. cit.), pp. 415 et seq.; Th. C. Eustathiades, "Les sujets...", *Recueil des cours...* (op. cit.), pp. 419 et seq. The term "acto illicite" is used by H. Kelsen ("Théorie...", *Recueil des cours...* [op. cit.], pp. 16 et seq.) as the French equivalent of the German "Unrecht" and the English "delict". The term "acte illicite" is preferred by P. Guggenheim (op. cit., pp. 1 et seq.) and by P. Reuter ("Principes...", *Recueil des cours...* [op. cit.], pp. 585 and 590). The term "fait illicite" is used by J. Basdevant ("Règles générales du droit de la paix", *Recueil des cours...* 1936-IV (Paris, Sirey, 1937), t. 58, pp. 665 et seq.), by J. L'Huilier (*Éléments de droit international public* [Paris, Rousseau, 1950], pp. 354 et seq.) and by Ch. Rousseau (*Droit international public* [Paris, Sirey, 1953], p. 361).

<sup>43</sup> D. Anzilotti (*Corso...* (op. cit.), pp. 384 et seq.) speaks of "fatti illeciti internazionali". So do R. Ago ("Illecito commissivo e illecito omissivo nel diritto internazionale", *Diritto internazionale* (Milan, Istituto per gli Studi di Politica Internazionale, 1938), pp. 9 et seq.) and G. Morelli (op. cit., pp. 340 et seq.). G. Balladore Pallieri (op. cit., loc. cit.), A. P. Sereni (op. cit., pp. 1503 et seq.) and R. Quadri (*Diritto internazionale pubblico*, 5th ed. [Naples, 1968], pp. 584 et seq.) speak of "atti illeciti".

<sup>44</sup> S. Planas Suárez (*Tratado de Derecho Internacional Público* [Madrid, Hijos de Reus, 1916], t. 1, p. 167) and A. Ulloa (*Derecho internacional público*, 4th ed. [Madrid, Ediciones Iberoamericanas, 1957], t. II, p. 258) prefer "hechos ilícitos"; J. Garde Castillo ("El acto ilícito internacional", *Revista española de derecho internacional* (Madrid, Consejo Superior de Investigaciones Científicas, 1950), vol. III, No. 1, pp. 121 et seq.) uses "acto ilícito"; Podesta Costa (*Manual de derecho internacional público* (Buenos Aires, 1947), pp. 200 et seq.) uses "hechos lesivos"; L. M. Moreno Quintana and C. M. Bollini Shaw (*Derecho internacional público-Sistema nacional del derecho y política internacional* (Buenos Aires, Librería del Colegio, 1950), p. 166) use "delito internacional". In the Portuguese literature, H. Accioly (*Tratado de direito internacional público*, 2nd ed. (Rio de Janeiro, 1956), t. I, p. 275) uses the term "acto ilícito".

<sup>45</sup> For the term "tort", see G. Schwarzenberger (op. cit., pp. 562 et seq.); for "delict", see H. Kelsen (*Principles...* (op. cit.), p. 7 et seq.) and A. D. McNair (*International Law Opinions* (Cambridge, University Press, 1956), vol. II, p. 207); for "delinquency", see L. Oppenheim (op. cit., pp. 338 et seq.); for "illegal conduct", see C. Eagleton (*The Responsibility of States...* [op. cit.], p. 6); for "illegitimate act", see A. Ross, (*A Textbook of International Law* (London, Longmans, Green, 1947), p. 242); for "illegal act",

see C. C. Hyde (*International Law chiefly as Interpreted and Applied by the United States*, 2nd ed. [Boston, Little, Brown, 1947], vol. 2, p. 884) and I. Brownlie (*Principles of Public International Law* (Oxford, Clarendon Press, 1966), p. 354); for "unlawful act", see B. Cheng (op. cit., pp. 170 et seq.); for "unlawful act or omission", see E. Jiménez de Aréchaga (op. cit., p. 534); and for "wrongful act or omission", see F. V. García Amador ("State Responsibility...", *Recueil des cours...* [op. cit.], p. 377) and C. F. Amerasinghe (*State Responsibility for Injuries to Aliens* (Oxford, Clarendon Press, 1967), p. 39). However, the expression "illicit action" is also employed for example in the decision of the Italian-United States Conciliation Commission (United Nations, *Reports of International Arbitral Awards*, vol. XIV, [United Nations publication, Sales No. 65.V.4], p. 163).

<sup>46</sup> The term "Unrecht" is that used by Kelsen ("Unrecht...", *Zeitschrift...* (op. cit.), pp. 481 et seq.), Verdross (op. cit., pp. 372 et seq.) and Wengler (op. cit., pp. 489 et seq.). Strupp ("Das völkerrechtliche Delikt", *Handbuch...* (op. cit.), pp. 4 et seq.) and most of the older German writers, followed, among the most modern, by von Münch, (op. cit., pp. 11 et seq.) and G. Dahm (op. cit., pp. 177 et seq.), prefer the term "Delikt". The expression "unerlaubte Handlung" (illicit conduct) is used by F. Klein (*Die mittelbare Haftung im Völkerrecht* (Frankfurt-am-Main, Klostermann, 1941), p. 2).

<sup>47</sup> The term "délit" is used by Levin ("Ob otvetstvennosti...", *Sovetskoe...* (op. cit.), p. 339 of the French summary); the terms "nepravomernoe deistvie" and "nepravomernoe bezhddeistvie" (action et inaction illicites) by Tunkin (*Teoria...* [op. cit.], p. 431). The authors of volume V of the *Kurs...* (Institute of the State and Law of the Academy of Sciences of the Soviet Union, op. cit.) use both the term (p. 420) "delikt" and the term "nepravomernoe povedenie" (wrongful conduct).

<sup>48</sup> In this connexion, see R. Ago, "Le délit international", *Recueil des cours...* (op. cit.), pp. 438 et seq.



for the expression "acto ilícito", both in the International Law Commission<sup>49</sup> and later in the Sixth Committee of the General Assembly. The Special Rapporteur will leave the final choice to the Spanish-speaking experts, but would venture to express the belief that the reasons which militate in favour of using the term "fait" rather than "acte" in French should also be valid for the legal terminology of the other Romance languages. In English, the terms previously used as the equivalents of the French expressions "fait illicite international" and "fait internationalement illicite" were "international wrongful act" and "internationally wrongful act". The English-speaking members of the Commission said they still considered those terms the most appropriate, since the term "fait" had no real equivalent in English. For the purposes of the Russian version, the Commission decided to rely on the Russian-speaking members to select the terms which best conveyed the same idea. It is obvious, in any event—and almost goes without saying—that the choice of one particular term rather than another does not affect the determination of the conditions for, and characteristics of, an act generating international responsibility, with which most of the articles in the first part of this report will be concerned.

46. In arbitration cases and legal literature some definitions of the basic principle on international responsibility are to be found which, though the terms vary, all contain the statement that there can be no responsibility in international law without a prior wrongful act.<sup>50</sup> In submitting his second report to the Commission the Special Rapporteur drew attention to the desirability of avoiding formulations of this kind, so as not to convey the erroneous impression that, in the Commission's opinion, responsibility could arise only from a wrongful act. Although, as is mentioned in paragraph 20 of the introduction to this report, the Commission at its twenty-second session, after a lengthy discussion, confirmed its previous decision to devote itself for the time being solely to international responsibility for wrongful acts,<sup>51</sup>

it has nevertheless generally recognized the existence of cases in which States may incur international responsibility by the performance of lawful acts. This is a point which, as recalled in paragraph 20 above, was stressed by several members of the International Law Commission<sup>52</sup> and also by some members of the Sixth Committee. Hence, as has been done in the title of this section, it seems particularly necessary to adopt in the definition of the principle a formula which, though stating that an internationally wrongful act is a source of responsibility, does not lend itself to an interpretation that might automatically exclude the existence of another possible source of international responsibility.

47. In his second report, the Special Rapporteur considered it advisable to mention one more point before passing on to the proposed formulation of the basic general principle on the international responsibility of States. He pointed out that the normal situation which arises as the result of an internationally wrongful act involves the creation of international responsibility borne by the State which has committed the wrongful act. There are, however, some special cases—usually called cases of indirect responsibility, or responsibility for acts of others—which constitute an exception to the normal situation mentioned above. In these cases the responsibility arising from a particular wrongful act does not attach to the State which committed the act, because it is not free to determine its conduct in the sphere in which the wrongful act was committed. The responsibility then attaches to another State, which is in a position to control the action of the first State and to restrict its freedom. The Special Rapporteur observed that these special situations should be studied separately, at which time the Commission would decide whether they should be covered by a special rule. At that stage it was merely a question of deciding whether in the definition of the general principle on responsibility it would be necessary to adopt a formula which expressly leaves open the possibility of allowing for special cases in which international responsibility is attributed to a State other than that to which the internationally wrongful act is attributed. The Commission discussed this aspect of the subject and a large majority of its members seemed disposed to recognize the existence of such cases and the need to deal with them in the draft. In view of their exceptional nature, however, the Commission did not feel it necessary to take them into account in the initial phase of the work, and considered that they should not influence the formulation of the basic principle.

48. In conclusion, and taking into account all the comments made by the members of the Commission during the preliminary discussion, the Special Rapporteur proposes that the first draft article on State responsibility should be formulated as follows:

<sup>49</sup> Especially Mr. Alcívar (see *Yearbook of the International Law Commission*, 1970, vol. I, p. 217, 1080th meeting, paras. 22-24).

<sup>50</sup> On two occasions, for example, the Mexico/United States General Claims Commission, set up under the Convention of 8 September 1923, stated that: "Under international law, apart from any convention, in order that a State may incur responsibility it is necessary that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard" (Case of *Dickson Car Wheel Company* [July 1931], United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No.: 1951.V.1.), p. 678. For a statement in similar terms, see also the case of the *International Fisheries Company* [July 1931] *ibid.*, p. 701).

In the literature, several writers support the view that international responsibility can derive only from an internationally wrongful act. L'Huillier (*op. cit.*, p. 354) is one of the most explicit, when he says that: "*La responsabilité internationale de l'Etat ne peut être mise en jeu que par un fait qui soit imputable à cet Etat et qui présente un caractère illicite au regard du droit international.*" [The international responsibility of a State can be generated only by an act imputable to that State and which is wrongful under international law.] (Translation by the United Nations Secretariat). See also Quadri (*op. cit.*, pp. 590 *et seq.*).

<sup>51</sup> See *Yearbook of the International Law Commission*, 1969, vol. II, p. 233, document A/7610/Rev.1, para 83.

<sup>52</sup> In particular Mr. Ruda, Mr. Ramangasoavina, Mr. Tammes, Mr. Albónico, Mr. Eustathiades and Mr. Castañeda at the twenty-first session of the Commission, and Mr. Sette Câmara, Mr. Ushakov, Mr. Ustor, Mr. Thiam, Mr. Bartoš, Mr. Castañeda and Mr. Elias at the twenty-second session.

**Article 1. Principle attaching responsibility to every internationally wrongful act of the State**

Every internationally wrongful act of a State involves the international responsibility of that State.

**2. CONDITIONS FOR THE EXISTENCE OF AN INTERNATIONALLY WRONGFUL ACT**

49. Having stated the basic general principle that every internationally wrongful act is a source of international responsibility for the State, the problem is to determine, in correlation with that principle, the prerequisites for establishing the existence of an internationally wrongful act. For this purpose, the following two elements are traditionally distinguished, both of which must be present:

(a) An element generally called a *subjective element*, consisting of conduct which must be attributable, not to the individual or group of individuals which has actually engaged in it, but to the State as a subject of international law;

(b) An element usually called an *objective element*: the State to which the conduct in question has been legally attributed must, by that conduct, have failed to fulfil an international obligation incumbent on it.

50. With regard to the first element, it will be noted that in judicial decisions and in practice, as well as in works on international responsibility, the term "imputability" is often used to indicate that the conduct in question must be the conduct of a State, that is, that the conduct can be attributed to the State. The term "imputation" is used to designate that attribution. Experts on international law have long stressed the fact that when these terms are used in relation to the international responsibility of States they do not have the same meaning as, for example, in municipal criminal law, where "imputability" sometimes indicates the agent's state of mind, capacity to understand and to will as the basis of responsibility<sup>53</sup> and where "imputation" may mean the inculcation of a subject by a judicial authority. Despite these explanations by the writers mentioned, the Commission was particularly anxious to avoid the ambiguities inherent in notions which can evoke very different ideas because of their meaning in certain municipal criminal law systems. It is for that reason that at the end of the discussion of the second report on State responsibility at the twenty-second session, the Commission concluded, at the suggestion of some of its members<sup>54</sup> that it would

<sup>53</sup> See D. Anzilotti, *Teoria generale*... (op. cit.), pp. 83 and 121. The same author stresses that in international law the term "imputability" does not and cannot have any meaning other than the general meaning of a term linking the wrongful action or omission with its author. Clearly, the term must be interpreted in this way when it is used in an international judicial or arbitral decision, in a statement of position by a Government or in the theories of a writer on international law. This was also the sense in which the term was used by the Special Rapporteur in his second report.

<sup>54</sup> Particularly Mr. Ushakov (see *Yearbook of the International Law Commission*, 1970, vol. I, p. 221, 1080th meeting, paras. 72-75).

be better for it to avoid using the expressions "imputability" and "imputation" and that when speaking in its own name it would be better for it to use the term "attribution" to indicate the simple fact of attaching to the State a given action or omission. That conclusion is reflected in this report.

51. With regard to the second element, the members of the International Law Commission (and several members of the Sixth Committee) were in general agreement with the Special Rapporteur that expressions such as "failure to carry out an international obligation" or "breach of an international obligation" are clearly more appropriate than the expressions "breach of a rule" or "breach of a norm of international law", which are used by some authors<sup>55</sup> and are sometimes even used simultaneously with the first-mentioned terms.<sup>56</sup> The rule is law in the objective sense. Its function is to attribute in certain conditions subjective legal situations—rights, faculties, powers and obligations—to those to whom it is addressed. It is these situations which, as their global appellation indicates, constitute law in the subjective sense; it is in relation to these situations that the subject's conduct operates. The subject freely exercises or refrains from exercising its subjective right, its faculty or power, and freely fulfils or violates its obligation, but it does not "exercise" the rule and likewise does not "violate" it. It is its *duty* which it fails to carry out and not the principle of objective law from which that duty flows. This does not mean that the obligation whose breach is the constituent element of an internationally wrongful act must necessarily flow from a rule, at least in the proper meaning of that term. The obligation in question may very well have been created and imposed upon a subject by a particular legal act, a decision of a judicial or arbitral tribunal, a decision of an international organization, and so on. The breach of an obligation of this character and origin—as will be brought out later—is just as wrongful under international law as failure to carry out an obligation established by a rule proper; and it would be totally artificial to derive the obligation in question from the rule which lays down certain particular proceedings as separate sources of international obligations.<sup>57</sup>

<sup>55</sup> See K. Strupp, "Das völkerrechtliche Delikt", *Handbuch*... (op. cit.), pp. 6, 8-9, and *Eléments*... (op. cit.), p. 327; P. Schoen, op. cit., p. 21.

<sup>56</sup> This was the case in Anzilotti's earlier works: *Teoria generale*... (op. cit.), p. 84, and *La responsabilité internationale*... (op. cit.), p. 170. The same formula is also to be found in A. Verdross ("Règles générales du droit international de la paix", *Recueil des cours*..., 1929-V [Paris, Hachette, 1931], t. 30, pp. 463 *et seq.*), G. Balladore Pallieri (*Diritto internazionale pubblico*, 8th ed. [Milan, 1962], pp. 245-246), J. Garde Castillo (op. cit., pp. 126-127), P. Guggenheim (op. cit., p. 3), W. Wengler (op. cit., p. 489), A. Schüle (op. cit., pp. 329-330), A. P. Sereni (op. cit., p. 1503), and D. B. Levin (*Otvetstvennost gosudarstv*... (op. cit., p. 51).

<sup>57</sup> Quite apart from this, as far as the characterization of the wrongful act is concerned, the idea of the breach of a rule might also be misleading because there are cases of the invalid exercise of a faculty or power which have nothing to do with a wrongful act, but which nevertheless consist essentially in conduct which is at variance with what the rule would require to produce certain legal effects. In this connexion, see R. Ago, "Le délit international", *Recueil des cours*... (op. cit.), pp. 434 and 441-442; and G. Morelli, op. cit., p. 347.

52. Disregarding these terminological questions and more generally the degree of precision of the expressions which are sometimes used, there is no doubt that the two elements mentioned above are clearly recognizable, for example, in the passage already cited from the judgement of the Permanent Court of International Justice in the *Phosphates in Morocco Case*, in which the Court explicitly connects the creation of international responsibility with the existence of an "act being attributable to the State and described as contrary to the treaty right[s] of another State".<sup>58</sup>

They are also to be found in the arbitral award in the *Dickson Car Wheel Company Case*, delivered in July 1931 by the Mexico/United States of America General Claims Commission, where the required condition for a State to incur international responsibility is stated to be the fact "that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard".<sup>59</sup>

With regard to State practice, attention may be drawn to the terms in which the Austrian Government replied to point II of the request for information addressed to Governments by the Preparatory Committee of the 1930 Conference for the Codification of International Law:

There can be no question of a State's international responsibility unless it can be proved that the State has violated one of the international obligations incumbent upon States under international law.<sup>60</sup>

53. In the literature of international law, the combined facts that a certain conduct is of such a nature that it can be attributed to a State as a subject of international law and that that conduct constitutes a violation of an international obligation of that State are very widely considered to be the essential elements for recognition of the existence of a wrongful act giving rise to an international responsibility. Among the older formulations, that of Anzilotti remains a classic,<sup>61</sup> among the more recent, those by Sereni,<sup>62</sup> Levin,<sup>63</sup> Amerasinghe,<sup>64</sup>

Jiménez de Aréchaga<sup>65</sup> and that given in the *Restatement of the Law* by the American Law Institute<sup>66</sup> are the clearest. But generally speaking it may be said that most writers are substantially in agreement on this point, irrespective of the period in which they were writing.<sup>67</sup> The rare reservations expressed by some

law; (B) the violation of an international obligation manifested in that conduct] (Translation by the United Nations Secretariat).

<sup>58</sup> French summary of "*Ob otvetstvennosti...*" (*op. cit.*), [see foot-note 36 above], p. 210:

"Pour qu'il y ait responsabilité internationale, deux éléments doivent être réunis: un élément objectif, la violation d'une norme de droit international qui cause un préjudice; un élément subjectif, l'imputation de cette violation à l'Etat ou à un autre sujet du droit international."

[For international responsibility to exist, two elements must be present: an objective element, the violation of a norm of international law which causes injury; a subjective element, the imputation of that violation to a State or to another subject of international law] (Translation by the United Nations Secretariat).

<sup>59</sup> C. F. Amerasinghe, *op. cit.*, p. 37. In stating the first three of the four conditions he considers necessary for the existence of State responsibility for an injury to an alien, Amerasinghe expresses himself as follows:

"(1) There must be an act or omission of an individual or an organ consisting of a group of individuals;

"(2) This act or omission must be in breach of an obligation laid down by a norm of international law;

"(3) The act or omission must be imputable to the defendant State;"

<sup>60</sup> E. Jiménez de Aréchaga, *op. cit.*, p. 534. The first two of the three elements which this author considers essential for the establishment of international responsibility are summarized as follows:

"(i) An act or omission that violates an obligation established by a rule of international law in force between the State responsible for the act or omission and the State injured thereby.

"(ii) The unlawful act must be imputable to the State as a legal person."

<sup>61</sup> American Law Institute, *Restatement of the Law, Second, Foreign Relations Law of the United States* (Saint Paul (Minn.), American Law Institute Publishers, 1965), pp. 497 *et seq.* Part IV of this work (see above, page 193, document A/CN.4/217/Add.2), devoted to the responsibility of States for injuries to aliens, gives in section 164 as the first rule in the context of the general principles of responsibility the rule that:

"(1) A State is responsible under international law for injury to an alien caused by conduct subject to its jurisdiction, that is attributable to the State and wrongful under international law."

<sup>62</sup> See, among many other writers: Ch. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (*op. cit.*), pp. 90-91; R. Ago, "Le délit international", *Recueil des cours...* (*op. cit.*), pp. 441 *et seq.*, 450 *et seq.*; J. G. Starke, "Imputability of International Delinquencies", *The British Year Book of International Law*, 1938 (London), p. 106; C. Th. Eustathiades, "Principes généraux de la responsabilité internationale des Etats", *Etudes de droit international*, 1929-1959 (Athens, Klissionis, 1959), t. 1, p. 515, and "Les sujets...", *Recueil des cours...* (*op. cit.*), p. 422; A. V. Freeman, *op. cit.*, p. 22; A. Ross, *op. cit.*, p. 242; J. L'Huillier, *op. cit.*, p. 354; J. Garde Castillo, *op. cit.*, p. 124; G. Morelli, *op. cit.*, pp. 342 *et seq.*; Ch. Rousseau, *op. cit.*, p. 361; P. Guggenheim, *op. cit.*, pp. 1-2 and 4-5; B. Cheng, *op. cit.*, p. 170; T. Meron, "International Responsibility of States for Unauthorized Acts of their Officials", *The British Year Book of International Law*, 1958 (London, 1959), pp. 86-87; G. Schwarzenberger, *A Manual of International Law*, 4th ed. (London, Stevens, 1960), vol. 1, p. 163; P. Reuter, "Principes...", *Recueil des cours...* (*op. cit.*), p. 585; C. G. Ténékidès, "Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, pp. 783 *et seq.*

Some of these authors and others cited previously add a further element to the two constituent elements of an internationally wrongful act suggested here. This will be discussed later. It should

(Continued on next page.)

<sup>58</sup> *Phosphates in Morocco Case* (Preliminary objections), 14 June 1938. See *P.C.I.J.*, series A/B, No. 74, p. 28. [Italics supplied by the Special Rapporteur.]

<sup>59</sup> United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No.: 1951.V.1), p. 678. [Italics supplied by the Special Rapporteur.]

<sup>60</sup> League of Nations, *Bases of Discussion...* (*op. cit.*), p. 21. [Italics supplied by the Special Rapporteur.]

<sup>61</sup> *Teoria generale...* (*op. cit.*), p. 83:

"La responsabilità nasce dall'ingiusta violazione del diritto altrui e genera l'obbligo della riparazione in quanto sia collegata con un soggetto agente, sia cioè è imputabile a questo".

[Responsibility arises from the wrongful violation of the right of another and generates the obligation to make reparation in so far as it is attributable to a subject which acts, that is, imputable to it] (Translation by the United Nations Secretariat). See also the same author's *La Responsabilité internationale...* (*op. cit.*), pp. 161-162, and *Corso...* (*op. cit.*), p. 386.

<sup>62</sup> *Diritto internazionale* (*op. cit.*), p. 1505:

"Due sono quindi gli elementi costitutivi dell'atto illecito internazionale: A) un comportamento di un soggetto di diritto internazionale; B) la violazione, che in tale comportamento si concreta, di un obbligo internazionale."

[There are, therefore, two constituent elements of the internationally wrongful act: (A) a conduct by a subject of international

writers concerning the necessity or utility of what has been called the subjective element of the internationally wrongful act are sometimes prompted by the idea, isolated and clearly contradicted by judicial decisions and practice, that the State is never responsible for "its own" acts, but only for acts of individuals—individuals who are State organs or else simply private persons. In other cases it is because of logical coherence with the premises adopted that some authors think they must eliminate the legal operation of attaching the activity of the individual-organ to the collective entity. According to one view, the only possible "legal imputation" is that of attributing to a certain entity the legal effects of a fact, and thus the attribution of a fact as such to the entity could be only a material or a psychological imputation. According to another view, it is necessary to replace the idea of legal imputation by that of recognition of a link of material causality because of the "real" character of collective entities: the State first and foremost. More often, finally, such reservations are simply the reflection of the concern caused by the usual recourse in this connexion to the terms "imputability" and "imputation", which are a source of confusion, and which the Commission specifically decided to set aside and replace by others less likely to give rise to misunderstanding.<sup>68</sup> It is therefore easy to understand why the Commission, at its twenty-second session, had no difficulty in confirming the

(Foot-note 67 continued)

also be noted that in some of the works mentioned the concept of the "wrongful act" is used to denote the objective element which must be combined with the subjective element if international responsibility is to exist. In reality, the subjective element is also a condition for the existence of an internationally wrongful act, not an extraneous condition for the creation of responsibility by a wrongful act.

<sup>68</sup> The first type of reservation is exemplified by A. Soldati (*La responsabilité des Etats dans le droit international* (Paris, Librairie de jurisprudence ancienne et moderne, 1934), pp. 75 *et seq.*). For the second view, one may quote G. Arangio-Ruiz (*Gli enti soggetti dell' ordinamento internazionale* (Milan, Giuffrè, 1951), vol. I, pp. 128 *et seq.*, 357 *et seq.*); and for the third, Quadri (*op. cit.*, pp. 587-588). The last type of reservation is exemplified by a young Soviet writer: V. N. Elynchev ("Problema vmenenia v mezhdunarodnom prave", *Pravovedenie* (Leningrad, 1970), No. 5, pp. 83 *et seq.*) seems primarily concerned with preventing the introduction, through the notion of imputability, of the erroneous idea that international responsibility would only be created following a subsequent external operation corresponding to some extent to the inculcation carried out by a judicial organ in municipal law. In that connexion, he criticizes the idea of another Soviet writer, Petrovskij, who, precisely, conceives imputation as having to be established in international law by an agreement between the offending State and the injured State. Elynchev draws attention to an undeniable fact, namely, that the responsibility is created at the time when the internationally wrongful act is committed and that it is entirely independent of a verification voluntarily undertaken by the State which committed the wrongful act. However, the idea of imputation which he thus criticizes has really nothing to do with the very simple idea of attaching the conduct of the individual-organ to the State. As explained at the beginning of this section—a point to which we shall revert later—what is called the subjective element of the internationally wrongful act expresses merely the requirement that the conduct which is recognized as constituting a failure to fulfil an international obligation should appear, at the international level, as conduct of the State and not as conduct which is alien to the State. Brownlie (*op. cit.*, p. 356), fears—although the reason is not apparent—that the notion of imputability may imply the application of the idea of vicarious responsibility to cases in which he considers it is entirely irrelevant.

agreement it had previously reached as to the need to recognize, in any internationally wrongful act, the presence of the two elements, one subjective and one objective, mentioned here: two elements whose logical distinction does not prevent them from being indissolubly linked in any specific situation.<sup>69</sup>

54. In the analysis of each of these two elements—namely, on the one hand the fact that some particular conduct is attributed to the State as a subject of international law and on the other the failure to fulfil an international obligation incumbent on the State which that conduct constitutes—various aspects stand out, for some of which specific criteria have been established in general international law. The following chapters will be devoted to a detailed examination of these aspects. They will deal, in particular, with the conditions under which international law permits some particular conduct to be considered as conduct of the State in the different cases that may occur, and the conditions for establishing, again in the different possible cases, that the violation of an international obligation has been brought about by that conduct. However, in order to define in principle the conditions for the existence of an internationally wrongful act, certain points relating to the two elements in question must first be established, precisely in order to permit a formulation of those conditions which will not be open to criticism. In the same connexion, the question must also be raised whether these are the only two elements required for the existence of a wrongful act in international law or whether others are also necessary. We must therefore pause for a moment for a preliminary examination of these questions.

55. With regard to the conduct which must be susceptible of being considered as conduct of the State, what can be said in general is that it can be either positive (action) or negative (omission). It can even be said that the cases in which the international responsibility of a State has been invoked on the basis of an omission are perhaps more numerous than those based on action taken by a State. There have been innumerable cases in which States have been held responsible for damage caused by individuals. As will be shown later, these alleged cases of State responsibility for the acts of individuals are really cases of responsibility of the State for omissions by its organs: the State is responsible for having failed to take appropriate measures to prevent or punish the individual's act.

56. Even apart from this hypothesis, moreover, there are many cases in which an internationally wrongful act consists in an omission, and whenever an international tribunal has found a wrongful omission to be a source of international responsibility, it has done so in terms just as unequivocal as those used with reference to active conduct.<sup>70</sup> Similarly, the States which

<sup>69</sup> The close connexion between the two elements was particularly stressed by Mr. Kearney (see *Yearbook of the International Law Commission*, 1970, vol. I, p. 218, 1080th meeting, paras. 38 *et seq.*).

<sup>70</sup> The international responsibility of a State for a wrongful omission was explicitly affirmed by the International Court of

replied to point V of the request for information submitted to them by the Preparatory Committee for the 1930 Conference for the Codification of International Law expressly or implicitly recognized the principle that the responsibility of the State can be involved by the omissions as well as by the actions of officials,<sup>71</sup> and this principle is confirmed in the articles adopted by the Third Committee of the Conference on first reading.<sup>72</sup> Finally it can be said that the principle has been accepted without question by writers<sup>73</sup> and explicitly or implicitly adopted in all the private codification drafts.<sup>74</sup> Thus, since this point is not disputed, and was accepted without opposition in the Commission, there is no need to dwell on it further, except perhaps to stress that it seems particularly advisable to state expressly, in the statement of conditions for the existence of an internationally wrongful act, that internationally wrongful

conduct attributed to a State can equally well be an omission as an action.

57. What is meant by stipulating that some particular conduct, in order to be qualified as an internationally wrongful act, must first and foremost be attributable to a State? This question can be answered easily by observing that what we are seeking to stress is simply that it must be possible to consider the action or omission in question as an "act of the State". And since the State, as a legal person, is not physically capable of conduct,<sup>75</sup> it is obvious that all that can be attributed to a State is the action or omission of an individual or of a group of individuals, whatever its composition may be.<sup>76</sup> It is not that the State is merely

Justice in the *Corfu Channel Case*. After specifying that "the obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them" and noting that Albania "neither notified the existence of the minefield nor warned the British warships of the danger they were approaching", the Court concluded that: "These grave omissions involve the international responsibility of Albania" [Italics supplied by the Special Rapporteur] [*Corfu Channel Case (Merits)*, Judgment of 9 April 1949, *I.C.J. Reports 1949*, pp. 22-23]. See also the arbitral award of 10 July 1924 in the *Affaire relative à l'acquisition de la nationalité polonaise*: United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No.: 1948.V.2), p. 425.

<sup>71</sup> League of Nations, *Bases of Discussion...* (op. cit.), pp. 70 et seq.; and *Supplement to volume III* (op. cit.), pp. 2, 3, 12 et seq.

<sup>72</sup> See *Yearbook of the International Law Commission, 1956*, vol. II, pp. 225-226 (articles 6, 7, 8), document A/CN.4/96, annex 3.

<sup>73</sup> For studies concerning the specific character of the delict of omission in international law, see: R. Ago, "Illecito commissivo...", *Diritto internazionale* (op. cit.), pp. 9 et seq.; P. A. Zannas, *La responsabilité internationale des Etats pour les actes de négligence* (Montreux, Imprimerie Ganguin et Laubscher, 1952); G. Perrin, "L'agression contre la Légation de Roumanie à Berne et le fondement de la responsabilité internationale dans les délits d'omission", *Revue générale de droit international public* (Paris), 3rd series, t. XXVIII, No. 3 (July-Sept. 1957), pp. 410 et seq.; D. Lévy, "La responsabilité pour omission et la responsabilité pour risque en droit international public", *ibid.*, t. XXXII, No. 4 (Oct.-Dec. 1961), pp. 744 et seq.

<sup>74</sup> See rule I of the draft on "international responsibility of States for injuries on their territory to the person or property of foreigners", adopted by the Institute of International Law in 1927 (*Annuaire de l'Institut de droit international, 1927 (session de Lausanne)* (Paris), t. III, p. 330; *Yearbook of the International Law Commission, 1956*, vol. II, p. 227, document A/CN.4/96, annex 8); article 1 of the draft treaty concerning the responsibility of a State for internationally illegal acts, prepared by Karl Strupp in 1927 (*ibid.*, 1969, vol. II, p. 151, document A/CN.4/217 and Add. 1, annex IX); article 1, para. 2, of the draft convention prepared by the Deutsche Gesellschaft für Völkerrecht in 1930 (*ibid.*, p. 149, annex VIII); article 1 of the draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School in 1961 (*ibid.*, p. 142, annex VII); article II of the Principles of international law that govern the responsibility of the State in the opinion of Latin American countries, prepared by the Inter-American Juridical Committee in 1962 (*ibid.*, p. 153, annex XIV); point 3 of the General Rule of State responsibility formulated in section 164 of the *Restatement of the Law by the American Law Institute* (see above, p. 193, document A/CN.4/217/Add.2).

<sup>75</sup> "States can act only by and through their agents and representatives" (Advisory Opinion No. 6, of February 3rd 1923, on

certain questions relating to settlers of German origin in the territory ceded by Germany to Poland, *P.C.I.J.*, series B, No. 6, p. 22).

The expression "legal person" is not used here in its strictly technical meaning, but only as opposed to the expression "physical person", to indicate a collective entity that can act only through the actions of human beings. According to the strictly technical meaning of the expression "legal person", the State is not a "legal person" of international law, but only of national law. See, on this point—and without taking into account the description of the State as a subject of international law which is respectively made by these authors—Giuliano, *La comunità internazionale e il diritto* (Padua, 1950), pp. 241 et seq.; and especially Arangio-Ruiz, *op. cit.*, pp. 26 et seq., 95 et seq., 378 et seq.

<sup>76</sup> See M. Marinoni, *La responsabilità degli Stati per gli atti dei loro rappresentanti secondo il diritto internazionale* (Rome, Arthenaem, 1913), pp. 33 et seq.: "Gli Stati, come le così dette persone giuridiche, non possono non ricorrere all'opera di individui, la cui attività debba giuridicamente valere per gli Stati medesimi [...]. Nella realtà fisica non v'è un ente Stato [...], ma vi sono soltanto azioni, voleri di individui, che l'ordine giuridico può far valere per un soggetto di diritto diverso da quella persona fisica che li ha posti in essere" [States, like so-called legal entities, cannot but have recourse to the action of individuals, whose activities must be legally attributable to the States themselves [...]. In physical reality, there is no entity "State" [...], but only actions and expressions of will of individuals, which the legal order can attribute to a subject of law other than the physical person who is their author] (Translation by the United Nations Secretariat); K. Strupp, "Das völkerrechtliche Delikt", *Handbuch...* (op. cit.), pp. 35-36: "Denn der Staat [...] bedarf physischer Personen [...], deren Willen und Handeln in der physisch-natürlichen Welt Akte von Individuen, in der juristischen solche der Gesamtheit, d. h. des Staates, sind" [For the State [...] requires physical persons [...] whose will and conduct in the physical-natural world are acts of individuals, but in the legal world are acts of the whole community, i.e. the State.] (Translation by the United Nations Secretariat); D. Anzilotti, *Corso...* (op. cit.), p. 222: "ci sono atti e volizioni d'individui che valgono giuridicamente come atti e volizioni dello Stato, perché il diritto li imputa allo Stato, ossia ne fa il presupposto di doveri e di diritti dello Stato" [There are actions and expressions of will of individuals which are in law deemed to be actions and expressions of will of the State, because the law imputes them to the State, i.e. makes them the origin of duties and rights of the State] (Translation by the United Nations Secretariat); H. Kelsen, "Unrecht...", *Zeitschrift...* (op. cit.), pp. 496-497; *Principles...* (op. cit.), p. 117; and "Théorie...", *Recueil des cours...* (op. cit.), p. 88: "L'Etat est responsable des violations du droit international qui sont le résultat de comportements individuels pouvant être interprétés comme des comportements de l'Etat. Il faut donc que les comportements de certains individus puissent être imputés à l'Etat" [The State is responsible for violation of international law resulting from individual conduct which can be interpreted as being the conduct of the State. Accordingly, the conduct of certain individuals must be imputable to the State.] (Translation by the United Nations Secretariat); and p. 78: "Quand nous disons de

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an abstract idea or a figment of the imagination, as certain jurists claim. In our view the State is an absolutely real entity, in municipal law as well as in international law.

58. That being so, the essential question is when and how an "act of the State" can be discerned in an action physically committed by an individual or a group of individuals. The problems which arise in this connexion consist precisely in determining what individual conduct can be attributed to the State for the purposes with which we are concerned and in what conditions such conduct must have taken place in order for that attribution to be possible. The many difficult problems involved will be analysed in detail in due course; for the time being, a general outline would seem to be sufficient. The first point to be made is that attribution to the State is necessarily, because of the very nature of the State, a legal connecting operation which as such has nothing to do with a link of natural causality or with a link of "material" or "psychological" character.<sup>77</sup> One can sometimes—but not always—speak of natural causality in reference to the relationship between the action of an individual and the result of that action,

(Foot-note 76 continued)

l'acte d'un individu déterminé qu'il est un acte de l'Etat nous imputons cet acte à une personne distincte de l'individu qui l'a accompli, à une personne qui se trouve, pour ainsi dire, derrière lui" [When we say of the act of a particular individual that it is an act of the State, we impute this act to a person other than the individual who committed it, to a person who is, so to speak, behind him.] (Translation by the United Nations Secretariat); T. Perassi, *Lezioni di diritto internazionale* (Rome, Edizioni Italiane, 1942 [reprint of the 1941 edition], Part I, p. 97: "Un ente [...] in tanto può assumere la qualità di soggetto in un ordinamento giuridico in quanto mediante l'attitudine naturale di volere ed agire di determinati uomini si ponga come unità operante, cioè come unità a cui sono riferite come proprie una volontà ed una azione". [An [...] entity may assume the character of a subject of a legal order in so far as, through the natural disposition of certain men to will and act, it becomes an operative unity, that is to say, a unity to which are attributed a will and action of its own] (translation by the United Nations Secretariat); and W. Wengler, *op. cit.*, pp. 425 and 490: "[...] die Völkerrechtsnorm eindeutig nur von einem bestimmten Menschen durch dessen eigenes Verhalten befolgt oder verletzt werden kann" [(...) in any case, a rule of international law can be complied with or infringed only by the individual behaviour of a particular person] (Translation by the United Nations Secretariat).

<sup>77</sup> D. Anzilotti (*Corso*... [*op. cit.*], p. 222) points out that: "L'imputazione giuridica si distingue così nettamente del rapporto di causalità; un fatto è giuridicamente proprio di un soggetto, non perchè prodotto o voluto da questo, nel senso che tali parole avrebbero nella fisiologia o nella psicologia, ma perchè la norma glielo attribuisce" [Legal imputation is thus clearly distinguishable from causal relationship; an act is legally deemed to be that of a subject of law not because it has been committed or willed by that subject in the physiological or psychological sense of those words, but because it is attributed to him by a rule of law.] (Translation by the United Nations Secretariat). See also J. G. Starke, *op. cit.*, p. 105: "The imputation is thus the result of the intellectual operation necessary to bridge the gap between the delinquency of the organ or official and the attribution of breach and liability to the State"; C. Th. Eustathiades, "Les sujets...", *Recueil des cours*... (*op. cit.*), p. 422: "Cette imputation est le résultat d'une opération logique effectuée par une règle de droit, donc un lien juridique" [This imputation is the result of a logical operation effected by a rule of law, and is therefore a legal relationship.] (Translation by the United Nations Secretariat). For Wengler (*op. cit.*, p. 39), the "Zurechnung" (imputation) is a normative technical process.

but not in reference to the relationship between the person of the State and the action of an individual.<sup>78</sup>

59. The second point to be made is that the State to which an individual's conduct is connected is the State as a person, a subject of law, and not the State in the sense of a legal order or system of norms.<sup>79</sup> This is true not only, and *a fortiori*, of an attribution under international law, but also of an attribution under municipal law. It is because of the failure to maintain a clear distinction between these two notions that difficulties have arisen in this connexion, even if only of a theoretical nature.<sup>80</sup> At the same time, it should be emphasized that the attribution to the State which is in question here is attribution to the State as a person under international law and not as a person under municipal law.<sup>81</sup>

<sup>78</sup> There are no activities of the State which can be called "its own" from the point of view of natural causality as distinct from that of legal attribution; it should be noted that this applies at the municipal as well as the international level, for even in municipal law the individual-organ remains a distinct entity capable of actions which are "legally" attributed not to the State, but to the individual himself.

On the other hand, what Arangio-Ruiz (*op. cit.*, *loc. cit.*), calls the "material-psychological imputation" of an act to its author is not sufficient to explain on which basis the rule of international law takes into consideration the material conduct of a certain human being in order to attribute responsibility to the State as a legal consequence of that conduct, whereas it does not operate in the same way with other conducts of the same human being. When one considers, as this author does, every activity of the individual belonging to a group as the activity of the collective entity which is the subject of international law, the problem remains, even more clearly, of determining the criteria for distinguishing the activities to which international law attaches legal consequences for the group from the activities to which no such consequences are attached. The criteria that may be suggested to solve this problem are in any case the same ones adopted by the majority of the authors in order to distinguish the acts of the State from other acts. Moreover when we speak of the legal attribution of the conduct of individuals to the State as a subject of international law, we do not maintain that the legal attribution is the specific effect of rules having this particular purpose. The fact of considering a material act of an individual as an act of the State is only one of the conditions of the operating of the rule of international law which, under certain circumstances, attributes international responsibility to the State.

<sup>79</sup> The position of normative writers on this subject is severely criticized by Elynchev (*op. cit.*, pp. 85 *et seq.*).

<sup>80</sup> It should be noted that the identification of the legal person with a legal order led writers such as M. Kelsen ("Über Staats-unrecht", *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* [Vienna, Hölder, K.U.K. Hof- und Universitäts-Buchhändler, 1914], Bd. 40, p. 114) and W. Burckhardt (*Die völkerrechtliche Haftung der Staaten* [Berne, Haupt, Akadem. Buchhandlung vorm. Max Drechsel, 1924], pp. 10 *et seq.*) to conclude that a wrongful act cannot be imputed to the legal person which is the expression of the unity of the special legal order that constituted that person. Kelsen ("Unrecht...", *Zeitschrift für öffentliches Recht* (*op. cit.*), p. 500) later tried to overcome the difficulty by saying that an act of an organ of the partial legal order of the State, although necessarily lawful as regards that order, could be imputed to the State as a wrongful act by a total legal order such as the international order. All this seems both artificial and unrealistic. The internal legal order can perfectly well impute the conduct of an organ to the person of the State as a wrongful act; that person is the creation of that order and as a person has subjective legal situations like any other subject.

<sup>81</sup> For a recent reaffirmation of this important point, see Institute of the State and Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 426.



60. The last and most important of the three preliminary points to be made at this stage is that an individual's conduct can be attributed to the State as an internationally wrongful act only under international law. It is quite unthinkable that the operation of connecting an action or omission with a subject of international law so as to produce consequences in the sphere of international legal relations should take place in a framework other than that of international law itself.<sup>82</sup> The attribution of an act to the State as a subject of international law and the attribution of an act to the State as a person under municipal law are two entirely distinct operations which are necessarily governed by two different systems of law. It is possible and even normal that in international law the situation existing in municipal law should be taken into account for such purposes, although we shall have to see in what sense and to what extent. But, this taking into account of municipal law will simply be an instrument used for an operation falling entirely within the international legal order. We shall have occasion to see that many of the specific difficulties met with in this connexion are due to an insufficiently clear grasp of this point. Its importance as a principle should be noted here and now.

61. The second condition for the existence of an internationally wrongful act was defined at the beginning of this section, namely, that the conduct attributed to the State must constitute a failure by that State to comply with an international obligation incumbent upon it. This is what is called the *objective* element of the internationally wrongful act, the specific element

which distinguishes it from the other acts of the State to which international law attaches legal consequences. The contrast between the State's actual conduct and the conduct required of it by law constitutes the essence of the wrongfulness. The wrongful act is above all a failure to fulfil a legal duty, a breach of an obligation; and it is precisely this kind of act which the legal order considers, as we saw earlier, for the purpose of attaching responsibility to it, i.e. of making it a source of new obligations and, more generally, of new legal situations whose common characteristic is that they are unfavourable to the subject to which the act in question is attributed. If we bear in mind the link between the condition and the result, between the breach of an obligation and the incurring of further obligations or of sanctions as a consequence of that breach, we shall see that, in a sense, the rules relating to State responsibility are complementary to other substantive rules of international law—to those giving rise to the legal obligations which States may be led to violate.<sup>83</sup>

62. It is widely acknowledged in judicial decisions, practice and authoritative literature that the objective element which characterizes an internationally wrongful act is represented by the violation of an international obligation incumbent upon the State. In its judgment on the jurisdiction in the *Case concerning the Factory at Chorzów*,<sup>84</sup> to which reference has already been made, the Permanent Court of International Justice used the words "breach of an engagement". It employed the same expression in its subsequent judgment on the merits of the case.<sup>85</sup> The International Court of Justice referred explicitly to the Permanent

<sup>82</sup> Anzilotti, who in his earlier works seemed to uphold the idea that, in all cases, an individual's conduct should be imputed to the State solely by municipal law, later became a firm supporter of the opposite view. See *Corso*... (*op. cit.*), p. 224.

For the same approach, see J. G. Starke, *op. cit.*, pp. 106-107; T. Perassi, *op. cit.*, p. 98; R. Ago, "Le délit international", *Recueil des cours*... (*op. cit.*), pp. 461-462; A. Ross, *op. cit.*, p. 251; C. Th. Eustathiades, "Les sujets...", *Recueil des cours*... (*op. cit.*), p. 417; K. Furgler, *Grundprobleme der völkerrechtlichen Verantwortlichkeit der Staaten unter besonderer Berücksichtigung der Haager Kodifikationskonferenz, sowie der Praxis der Vereinigten Staaten und der Schweiz* (Zürich, Polygraphischer Verlag, 1948), pp. 19-20; G. Morelli, *op. cit.*, p. 184; P. Reuter, *La responsabilité internationale* (*op. cit.*), p. 87; T. Meron, *op. cit.*, p. 87; A. P. Sereni, *op. cit.*, p. 1506; J.-P. Quéneudec, *La responsabilité internationale de l'Etat pour les fautes personnelles de ses agents* (Paris, Librairie générale de droit et de jurisprudence, 1966), p. 119.

Kelsen's particular conception of the State and legal persons in general also led him to maintain in principle ("Théorie...", *Recueil des cours*... (*op. cit.*), p. 88) that "la question de savoir si un acte accompli par un individu est un acte étatique, c'est-à-dire imputable à l'Etat, doit être examinée sur la base de l'ordre juridique national" [The question whether an act performed by an individual is an act of State, i.e. imputable to the State, must be considered on the basis of the national legal order]. (Translation by the United Nations Secretariat). The same view is expressed by Kelsen in *Principles*... (*op. cit.*), p. 117. It should be noted that in the second edition of this work, edited and revised by Tucker, foot-note 13 (pp. 197-198) contains the following statement: "It remains true, however, that international law may, and does, also determine that certain acts are to be considered as acts of state, and therefore to be imputed to the state, even though the acts in question cannot be imputed to the state on the basis of national law." It may be possible, however, that this statement reflects only the opinion of the reviser.

<sup>83</sup> This idea was clearly expressed by various members of the International Law Commission (in particular, Mr. Tammes and Mr. Eustathiades) during the discussion of the first report on State responsibility submitted by the present Special Rapporteur at the twenty-first session. It is reflected in paragraph 80 of the report on the work of the twenty-first session (*Yearbook of the International Law Commission*, 1969, vol. II, p. 233, document A/7610/Rev.1).

Among modern writers on international law, Reuter, for instance ("Principes...", *Recueil des cours*... (*op. cit.*), p. 595), has specifically remarked in this connexion that "un des traits dominants de la théorie de la responsabilité est son caractère *non autonome*" [one of the predominant features of the theory of responsibility is its *non-autonomous* character] (Translation by the United Nations Secretariat). In this context, he stressed the link between the previous obligation and the new obligation generated by the incurring of the responsibility. Another author (I. Brownlie, *op. cit.*, pp. 353-354) has clearly brought out the complementary nature of the rule of responsibility by comparison with the primary rules of international law:

"Today one can regard responsibility as a general principle of international law, a concomitant of substantive rules and of the supposition that acts and omissions may be categorized as illegal by reference to the rules establishing rights and duties. Shortly, the law of responsibility is concerned with the incidence and consequences of illegal acts..."

On the question of the need to avoid confusing a rule of law establishing an obligation the breach of which is considered an internationally wrongful act and a rule attaching responsibility to the effect of the breach, see R. Ago "Le délit international", *Recueil des cours*... (*op. cit.*), pp. 445 *et seq.*

<sup>84</sup> Case concerning the factory at Chorzów (Jurisdiction), Judgement No. 8 of 26 July 1927. *P.C.I.J.* series A, No. 9, p. 21.

<sup>85</sup> Case concerning the factory at Chorzów (Merits), Judgement No. 13 of 13 September 1928. *P.C.I.J.* series A, No. 17, p. 29.

Court's words in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*.<sup>86</sup> In its advisory opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)* the Court held that "refusal to fulfil a treaty obligation" involved international responsibility.<sup>87</sup> In the arbitration decisions, the classic definition is the one referred to above<sup>88</sup> which was given by the Mexico/United States of America General Claims Commission in the *Dickson Car Wheel Company Case*:

Under international law, apart from any convention, in order that a State may incur responsibility, it is necessary that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard.<sup>89</sup>

63. In State practice, the terms "non-execution of international obligations", "acts incompatible with international obligations", "breach of an international obligation" and "breach of an engagement" are commonly used to indicate the very essence of an internationally wrongful act, source of responsibility. These expressions recur frequently in the replies by Governments, particularly on point III, to the request for information addressed to them by the Preparatory Committee for the 1930 Conference for the Codification of International Law.<sup>90</sup> Moreover, article 1 unanimously adopted at the first reading by the Third Committee of the Conference contains these words: "any failure [...] to carry out the international obligations of the State".<sup>91</sup> Similar terminology was used in article 1 of the preliminary draft prepared by Mr. García Amador in 1957 as the Special Rapporteur on State responsibility. This speaks of "some act or omission [...] which contravenes the international obligations of the State".<sup>92</sup> Those words are also to be found in article 2 of the revised preliminary draft prepared in 1961.<sup>93</sup>

64. The same consistency of terminology is to be found in the draft codifications of State responsibility prepared by private individuals and institutions. Article 1 of the draft code prepared by the Japanese Association of

International Law in 1926 lays down that a State is responsible in the case of an act or default constituting a violation of an international duty incumbent upon the State;<sup>94</sup> article I of the resolution adopted by the Institute of International Law at Lausanne in 1927 speaks of "any action or omission" of the State contrary to its international obligations;<sup>95</sup> article 1 of the draft prepared in 1930 by the *Deutsche Gesellschaft für Völkerrecht* mentions the violation by a State of an obligation towards another State under international law;<sup>96</sup> and article 1 of the draft prepared by Strupp in 1927 refers to acts of the responsible State which conflict with its duties to the injured State.<sup>97</sup> As to the language used by the leading authors, the expression "breach of an international obligation"<sup>98</sup> or equivalents such as "violation of an obligation established by an international norm",<sup>99</sup> "failure to carry out an international obligation",<sup>100</sup> "act" or "conduct conflicting with" or "contrary to an international obligation",<sup>101</sup> and "breach of a duty" or of an "international legal duty",<sup>102</sup> are by far the most prevalent phrases used to designate what we have defined as the objective element of the internationally wrongful act. All this evidence confirms the appropriateness of the terminology chosen in that connexion by the Commission.<sup>103</sup>

65. It should be noted that in international law the idea of the breach of an obligation can be regarded as

<sup>94</sup> Draft code of international law adopted by the Kokusaiho Gakkwai (International Law Association of Japan) in co-operation with the Japanese branch of the International Law Association. See *Yearbook of the International Law Commission*, 1969, vol. II, p. 141, document A/CN.4/217 and Add. 1, annex II.

<sup>95</sup> *Ibid.*, 1956, vol. II, p. 227, document A/CN.4/96, annex 8.

<sup>96</sup> *Ibid.*, 1969, vol. II, p. 149, document A/CN.4/217 and Add. 1, annex VIII.

<sup>97</sup> *Ibid.*, p. 151, annex IX.

<sup>98</sup> See J. G. Starke, *op. cit.*, p. 106; H. Kelsen, *Principles...* (*op. cit.*), p. 196; K. Furgler, *op. cit.*, p. 16; G. Morelli, *op. cit.*, p. 347; G. Schwarzenberger, *A. Manual...* (*op. cit.*), pp. 162-163; B. Cheng, *op. cit.*, pp. 170-171; F. V. García Amador, "State Responsibility..." *Recueil des cours...* (*op. cit.*), p. 376; A. Schüle, *op. cit.*, p. 336; P. Reuter, "Principes..." *Recueil des cours...* (*op. cit.*), p. 599; A. P. Sereni, *op. cit.*, pp. 1506 and 1512; C. F. Amerasinghe, *op. cit.*, pp. 37 *et seq.*, 41 *et seq.*; E. Jiménez de Aréchaga, *op. cit.*, p. 534. See also the working documents submitted to the Sub-Committee on State Responsibility of the International Law Commission in 1962-1963 by Mr. Tsuruoka and Mr. Ago (*Yearbook of the International Law Commission*, 1963, vol. II, pp. 247 and 251).

<sup>99</sup> See P. Guggenheim, *op. cit.*, p. 1.

<sup>100</sup> See J. Basdevant, *op. cit.*, p. 671; Ch. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (*op. cit.*), p. 91; Ch. Rousseau, *op. cit.*, p. 361; and the working paper submitted by Mr. Yasseen in 1962 (*Yearbook of the International Law Commission*, 1963, vol. II, p. 250).

<sup>101</sup> See R. Ago, "Le délit international", *Recueil des cours...* (*op. cit.*), pp. 441 and 445; J. L'Huillier, *op. cit.*, p. 359; R. Monaco, *Manuale di diritto internazionale pubblico* (Turin, Unione Tipografico-Editrice Torinese, 1960), p. 359.

<sup>102</sup> See D. Anzilotti, *Teoria generale...* (*op. cit.*), p. 111, and *Corso...* (*op. cit.*), pp. 385-386; C. C. Hyde, *op. cit.*, p. 882; L. Oppenheim, *op. cit.*, pp. 337-338; G. Ballardore Pallieri, *Diritto internazionale pubblico* (*op. cit.*), p. 245; H. Accioly, *op. cit.*, p. 249; A. Ulloa, *op. cit.*, p. 251; G. Dahm, *op. cit.*, p. 178; S. R. Patel, *A Textbook of International Law* (London, Asia Publishing House, 1964), p. 103.

<sup>103</sup> See para. 51 above.

<sup>86</sup> *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion of 11 April 1949. *I.C.J. Reports* 1949, p. 184.

<sup>87</sup> *Interpretation of peace treaties with Bulgaria, Hungary and Romania (Second Phase)*, Advisory Opinion of 18 July 1950. *I.C.J. Reports* 1950, p. 228.

<sup>88</sup> See paras. 46 and 52 above.

<sup>89</sup> *Dickson Car Wheel Company Case* (July 1931). United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No.: 1951.V.1), p. 678 [Italics supplied by the Special Rapporteur]. See also the decision in the *Affaire relative à l'acquisition de la nationalité polonaise* (10 July 1924): *ibid.*, vol. I (United Nations publication, Sales No.: 1948.V.2), p. 425.

<sup>90</sup> League of Nations, *Bases of Discussion...* (*op. cit.*), pp. 25 *et seq.*, 30 *et seq.*, 33 *et seq.*; and *Supplement to vol. III* (*op. cit.*), pp. 2, 6 *et seq.*

<sup>91</sup> See *Yearbook of the International Law Commission*, 1956, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>92</sup> *Ibid.*, 1957, vol. II, p. 128, document A/CN.4/106, annex.

<sup>93</sup> *Ibid.*, 1961, vol. II, p. 46, document A/CN.4/134 and Add. 1, addendum.



the exact equivalent of the idea of the violation of the subjective rights of others.<sup>104</sup> The Permanent Court of International Justice, which normally uses the expression "violation of an international obligation" spoke of an "act [...] contrary to the treaty right of another State" in its judgement in the *Phosphates in Morocco Case*.<sup>105</sup> The correlation between a legal obligation on the one hand and a subjective right on the other admits of no exception; as distinct from what is said to be the situation in municipal law, there are certainly no obligations incumbent on a subject which are not matched by an international subjective right of another subject or subjects, or even, for those who take a view referred to in the previous section, of the totality of the other subjects of the law of nations. This must be borne in mind in seeking a precise interpretation of the definition proposed here of the conditions for the existence of an internationally wrongful act.

66. At the suggestion of the Special Rapporteur, the Commission, during its discussion of the second report at the twenty-second session, considered whether there should not be an exception to the principle that the characteristic of the internationally wrongful act is to constitute a failure by the State to carry out an international obligation incumbent upon it. This question was prompted by the idea that in certain circumstances the abusive exercise of a right could amount to internationally wrongful conduct and thereby generate international responsibility. In other words, if, as some maintain, it is true that international law, like the municipal law of certain countries, recognizes the theory of abuse of right, would that mean that in some cases the characteristic element of an internationally wrongful act would be conduct based on a subjective right and not conduct conflicting with a legal obligation?

67. In his second report the Special Rapporteur pointed out that a really clear statement on the doctrine of abuse of right has never been made in international decisions; this is understandable in view of the dangers which both an absolute denial and a general affirmation of the principle could entail. The Permanent Court of International Justice did no more than make very guarded allusions to the theory, and in any case excluded its application to the cases contemplated and indicated in general that abuse of right could not be presumed.<sup>106</sup> The theory of abuse of rights has also been explicitly contested in certain well-known dissenting opinions.<sup>107</sup>

<sup>104</sup> The equivalence in international law between failure to carry out a legal duty and violation of a subjective right of others is noted by D. Anzilotti (*Teoria generale...* (op. cit.), pp. 83, 91 et seq., and 121); G. Balladore Pallieri ("Gli effetti...", *Rivista di Diritto Pubblico...* (op. cit.), p. 66, and *Diritto internazionale pubblico* (op. cit.), p. 245), R. Ago ("Le délit international", *Recueil des cours...* (op. cit.), p. 441), G. Morelli (op. cit., p. 347), and A. P. Sereni (op. cit., p. 1514).

<sup>105</sup> *Phosphates in Morocco Case* (Preliminary Objections), 14 June 1938, *P.C.I.J.*, series A/B, No. 74, p. 28.

<sup>106</sup> See the judgment in the Case concerning certain German interests in Polish Upper Silesia (Merits), 25 May 1926 (*P.C.I.J.*, series A, No. 7, pp. 30, 37-38), and the judgment in the Case of the Free Zones of Upper Savoy and the District of Gex, 7 June 1932 (*P.C.I.J.*, series A/B, No. 46, p. 167).

As regards the more recent decisions, Reuter's commentary contains a very apt summary of the criterion underlying them: "The decisions refer to the notion as a warning in cases in which they do not rely on it, whereas if they relied on the notion they would probably refrain from mentioning it."<sup>108</sup> The only clear formulation of the need to carry over the condemnation of abuse of right into international law is that of Judge Alvarez in some of his dissenting opinions.<sup>109</sup> In the literature, the idea of the application of the theory of abuse of right to international law has found and continues to find both firm supporters<sup>110</sup> and determined opponents.<sup>111</sup>

68. However, the Special Rapporteur observed that, as far as the present work of the International Law Commission is concerned, there seems to be no compelling reason for taking a position on this theory, on its possible justifications, and the grounds for them, on its alleged advantages for the development and progress

<sup>107</sup> See the dissenting opinion of Judge Anzilotti in the Case of the Electricity Company of Sofia and Bulgaria (Preliminary Objection), 4 April 1939 (*P.C.I.J.*, series A/B, No. 77, p. 98).

<sup>108</sup> P. Reuter, "Principes...", *Recueil des cours...* (op. cit.), p. 600. According to the author, an example of the first case is the Arbitral Tribunal's award of 16 December 1957 in the Lake Lanoux Case (for the text, see United Nations, *Reports of International Arbitral Awards*, vol. XII [United Nations publication, Sales No.: 1963.V.3], pp. 285 et seq.), and of the second, the judgment of the International Court of Justice of 12 April 1960 in the *Case concerning right of passage over Indian Territory (Portugal v. India)* [Merits] (*I.C.J. Reports* 1960, pp. 36-37). There is also an incidental reference to the subject by the International Court of Justice in its judgment of 18 December 1951 in the *Fisheries Case (United Kingdom v. Norway)* [*I.C.J. Reports* 1951, p. 142].

<sup>109</sup> *I.C.J. Reports* 1949, p. 48; *ibid.*, 1950, p. 15; *ibid.*, 1951, p. 149; *ibid.*, 1952, pp. 128 and 133.

<sup>110</sup> See in particular N. Politis, "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux", *Recueil des cours...*, 1925-I (Paris, Hachette, 1926), t. 6, pp. 77 et seq.; S. Trifu, *La notion de l'abus de droit dans le droit international* (Paris, Domat-Montchrestien, 1940); van Bogaert, *Het Rechtsmisbruik in het Volkenrecht* (Antwerp, 1948); van der Molen, *Misbruik van Recht in het Volkenrecht—Opstellen op het gebied van Recht, Staat en Maatschappij* (Amsterdam, 1949), pp. 266 et seq.; M. Sibert, *Traité de droit international public* (Paris, Dalloz, 1951), t. II, pp. 205 and 283; A.-Ch. Kiss, *L'abus de droit en droit international* (Paris, Librairie générale de droit et de jurisprudence, 1953), especially pp. 179 et seq.; and F. V. García Amador, "State Responsibility...", *Recueil des cours...* (op. cit.), pp. 376 et seq., and fifth report on State responsibility (*Yearbook of the International Law Commission*, 1960, vol. II, pp. 57 et seq., document A/CN.4/125, paras. 66 et seq.).

<sup>111</sup> Among many others, see M. Scerni, *L'abuso di diritto nei rapporti internazionali* (Rome, Anonima Romana Editoriale, 1930); A. Cavaglieri, *Corso di diritto internazionale*, 3rd ed. (Naples, 1934), p. 508; H. J. Schlochauer, "Die Theorie des *abus de droit* im Völkerrecht", *Zeitschrift für Völkerrecht* (Breslau, Kern's Verlag, 1933), Bd. XVII, pp. 373 et seq.; and, among the more recent writers, G. Schwarzenberger, "Uses and Abuses of the 'Abuse of Rights' in International Law", *The Grotius Society: Transactions for the Year 1956: Problems of Public and Private International Law* (London, The Grotius Society, 1957), vol. 42, pp. 47 et seq.; J.-D. Roulet, *Le caractère artificiel de la théorie de l'abus de droit en droit international public* (Neuchâtel, Histoire et Société d'aujourd'hui, Baconnière, 1958); I. Brownlie, op. cit., pp. 365 et seq. For some circumscribed and extremely guarded approaches, see H. Lauterpacht, *The Development of International Law by the International Court* (London, Stevens, 1958), pp. 162 et seq.; and P. Guggenheim, "La validité et la nullité des actes juridiques internationaux", *Recueil des cours...*, 1949-I (Paris, Sirey, 1950), t. 74, pp. 250 et seq.

of international law, or on the dangers it would entail for the security of international law. The Special Rapporteur considers that in actual fact, the problem of abuse of right has no direct influence on the determination of the premises of international responsibility. The question is one of substance, concerning the existence or non-existence of a "primary" rule of international law—the rule whose effect is apparently to limit the exercise by the State of its rights, or, as others would maintain, its capacities, and to prohibit their abusive exercise. Clearly, therefore, if it was recognized that existing international law should accept such a limitation and prohibition, the abusive exercise of a right by a State would inevitably constitute a violation of the obligation not to exceed certain limits in exercising that right, and not to exercise it with the sole intention of harming others or of unduly encroaching upon their sphere of competence. If the existence of an internationally wrongful act was recognized in such circumstances, the constituent element would still be represented by the violation of an obligation and not by the exercise of a right.<sup>112</sup> The Special Rapporteur consequently concluded that a reference to the failure to carry out an international legal obligation as an objective element of an internationally wrongful act should be quite sufficient for the purpose of defining in principle the conditions for the existence of an act of that nature. That reference would certainly also cover the case of a breach of the contemplated obligation, if its existence was established: it would therefore be unnecessary to provide expressly for an alleged exception. Furthermore, the Special Rapporteur was very doubtful whether it was necessary to provide for the insertion of an article concerning a question which does not relate specifically to responsibility in a draft on the international responsibility of States.<sup>113</sup>

69. The Commission devoted particular attention to this problem; many of its members expressed interest in the notion of abuse of right. The trend which emerged during the discussion in the Commission—which was to some extent echoed in the Sixth Committee—was to agree to allow some time for reflection on the substance of the problem. Later, when it examines in detail the various questions which arise in connexion with the objective element of an internationally wrongful act, the Commission will decide whether or not abuse of right should be given a place in the draft. However, with regard to defining in prin-

<sup>112</sup> Even early on (in *Teoria generale...* (*op. cit.*), p. 89) Anzilotti had noted that responsibility does not flow from an excess in the exercise of the right but from the fact of acting in contravention of that right. For developments along these lines see R. Ago, "Le délit international", *Recueil des cours...* (*op. cit.*), pp. 443-444; B. Cheng, *op. cit.*, pp. 129 *et seq.*; E. Jiménez de Aréchaga, *op. cit.*, p. 540.

<sup>113</sup> In the revised preliminary draft which he prepared in 1961, Mr. García Amador introduced a provision in article 2, paragraph 3, to the effect that "the expression 'international obligations of the State' also includes the prohibition of the 'abuse of rights', which shall be construed to mean any action contravening the rules of international law, whether conventional or general, which govern the exercise of the rights and competence of the State". See *Yearbook of the International Law Commission, 1961*, vol. II, p. 46, document A/CN.4/134 and Add. 1, addendum.

ciple the conditions for the existence of an internationally wrongful act, the Commission agreed with the Special Rapporteur that the reference to failure to fulfil an obligation would also cover the case where the obligation in question was specifically an obligation not to exercise certain of the State's own rights in an abusive or unreasonable manner.

70. It might also be questioned whether another aspect mentioned by the Special Rapporteur in his second report should be taken into consideration in defining the conditions for the existence of an internationally wrongful act. He observed that an act of this kind consists in essence of conduct connected to a State and constituting a failure by that State to carry out an international obligation. Two separate cases can, however, arise. On some occasions, the conduct as such may in itself suffice to constitute a failure to carry out an international obligation incumbent upon the State: a refusal by the State's legislative organs to pass an act which the State, by treaty, has specifically undertaken to adopt; an attack by one country's armed forces upon the territory of another country with which the former maintains peaceful relations; a refusal by a coastal State to allow the vessels of another country friendly passage through its territorial waters in peacetime; an inspection of a foreign country's diplomatic bag by a Customs official; an unauthorized entry by police into the premises of a foreign embassy; a denial of justice to an alien by judicial organs—all these are examples of the case envisaged.

71. There are nevertheless cases in which the situation is different. If an aircraft on a war mission drops bombs without taking the necessary precautions to ensure that they do not damage a hospital or a historic monument, the obligation to respect the enemy's health services and cultural property will not be breached unless the hospital or monument in question is hit. Similarly, for a State to be chargeable with having failed in its duty to provide effective protection for the premises of a foreign embassy or to safeguard the safety of aliens present in its territory during disturbances, it is insufficient to show that the State was negligent in the matter in that it did not provide adequate police protection; some prejudicial event must also have taken place as a result of that negligence: for instance, a hostile demonstration, an attack on the embassy premises by private individuals or the killing of aliens by a mob. In circumstances of this kind—which are manifestly due primarily to negligence on the part of organs of the State—the conduct of the State does not seem to constitute a breach of an international obligation unless the conduct as such is combined with a supplementary element: an external event—one of those events which the State should seek to prevent—must actually have occurred.<sup>114</sup>

72. The Special Rapporteur indicated that it would be necessary to revert to the distinction mentioned in the

<sup>114</sup> The Special Rapporteur therefore considers that wrongful acts consisting in conduct alone and wrongful acts requiring, in addition, an external event can be distinguished in international as well as in municipal law. See R. Ago, "Le délit international", *Recueil des cours...* (*op. cit.*), pp. 447 *et seq.*; G. Morelli, *op. cit.*, p. 349.

two preceding paragraphs when it came to defining the rules relating to the different cases of failure to carry out an international obligation. However, he had touched on the question primarily in order to put to the Commission the question whether, in its view, that distinction should be mentioned in the definition of principle of the conditions for the existence of an internationally wrongful act. During the discussion which took place at the twenty-second session, several members replied to the question in the affirmative. Others, however, preferred to reserve their position on that point for the time being, while recognizing that it deserved more thorough study at a later stage.<sup>115</sup> Since the distinction will probably have to be referred to specifically in the formulation of the individual rules which will appear later in the draft, the Special Rapporteur feels that there is no harm in refraining from mentioning it in the general principle which is about to be defined. It will suffice to use a formula which is flexible enough to cover all the various cases. The Special Rapporteur applied these criteria in formulating the draft article which is given at the end of this section.

73. One last point should be mentioned before concluding. In his second report, the Special Rapporteur noted that in addition to the two elements, the subjective and the objective, described above, reference is sometimes also made to the existence of an ulterior constitutive element of an internationally wrongful act, and that this alleged third element was usually termed "damage".<sup>116</sup> However, the Special Rapporteur also showed that there was some ambiguity in such references. In some instances, those who stress the requirement that damage should exist are in fact thinking of the requirement that an external event should have occurred; as noted in the preceding paragraphs, such an event must in some cases be present in addition to the actual conduct of the State if that conduct is to constitute a failure to carry out an international obligation. It may indeed happen that when the obligation in question is one of those duties of the State—so common in international law—to protect or safeguard certain persons or property, the event in question may be an action prejudicial to certain persons committed by third parties. However, when certain writers refer to "damage" they often have in mind not an injury caused to a State at the international level but rather an injury caused to an individual at the municipal level.<sup>117</sup> The importance accorded to the element of damage is thus a consequence of having considered only cases of State responsibility for injuries to aliens, and of having combined the consideration of the rules relating to responsibility with that of the substantive rules relating to the treatment of aliens. The essence of a State's obligations with respect to the status of aliens is that it must not wrong-

fully injure them or allow them to be injured. And it is clear that if the obligation itself is so defined, there can be no breach of this obligation where the individual alien has not in fact suffered any injury. But the injury to an individual, which is precisely what the international obligation is designed to prevent, has nothing in common with the damage at the strictly international level which some consider must occur in addition to the breach of the obligation for an internationally wrongful act to exist. Such damage can only be damage suffered by a State.

74. Most of the members of the Commission agreed with the Special Rapporteur regarding the preceding considerations; in particular, they recognized that the economic element of damage referred to by certain writers was not inherent in the definition of an internationally wrongful act as a source of responsibility, but might be part of the rule which lays upon States the obligation not to cause certain injuries to aliens. Furthermore, with regard to the determination of the conditions essential for the existence of an internationally wrongful act, the Commission also recognized that under international law an injury, material or moral, is necessarily inherent in every violation of an international subjective right of a State.<sup>118</sup> Hence the notion of failure to fulfil an international legal obligation to another State seemed to the Commission fully sufficient to cover this aspect, without the addition of anything further. The economic injury, if any, sustained by the injured State may be taken into consideration, *inter alia*, for the purpose of determining the amount of reparation, but is not a prerequisite for the determination that an internationally wrongful act has been committed. The discussion thus confirmed the Special Rapporteur's belief that there is no need to take account of the so-called "damage" element in defining in principle the conditions for the existence of an internationally wrongful act.

75. In view of the foregoing exposition and comments, the Special Rapporteur believes that the following formulation of the article defining the conditions for the existence of an internationally wrongful act can be proposed to the Commission:

**Article 2. Conditions for the existence of an internationally wrongful act**

An internationally wrongful act exists when:

(a) Conduct consisting of an action or omission is attributed to the State in virtue of international law; and

<sup>115</sup> In particular, Sir Humphrey Waldock (see *Yearbook of the International Law Commission*, 1970, vol. I, pp. 189-190, 1076th meeting, paras. 29 *et seq.*).

<sup>116</sup> See in particular A. V. Freeman, *op. cit.*, p. 22; A. Ross, *op. cit.*, pp. 242 and 255; K. Furgler, *op. cit.*, p. 16; P. Guggenheim, *Traité...* (*op. cit.*), p. 1; A. Schüle, *op. cit.*, p. 336; E. Jiménez de Aréchaga, *op. cit.*, p. 534.

<sup>117</sup> This is clear in, for example, Amerasinghe, *op. cit.*, p. 55.

<sup>118</sup> D. Anzilotti (*Teoria generale...* (*op. cit.*), p. 89, and especially *Corso...* (*op. cit.*), p. 425) indicates that *international responsibility derives its raison d'être purely from the violation of a right of another State and every violation of a right is a damage* [Special Rapporteur's underlining]. The author brings out the importance in international law of the honour and dignity of States, which are often given more weight than their economic interests, so that injury is equated in international law with the breach of an obligation. For similar views expressed by more recent writers, see G. Schwarzenberger, *A Manual...* (*op. cit.*), p. 164; A. P. Sereni, *op. cit.*, pp. 1522-1523. Even Jiménez de Aréchaga (*op. cit.*, p. 534) states that "in inter-State relations the concept of damage does not, however, have an essentially material or patrimonial character."

(b) That conduct constitutes a failure to comply with an international obligation of the State.

### 3. SUBJECTS WHICH MAY COMMIT INTERNATIONALLY WRONGFUL ACTS

76. Chapter I, section III, of the second report was entitled "Capacity to commit internationally wrongful acts". This title reflected current usage. Many writers on international law agree that, in principle, any State which is a subject of international law has what they term "international delictual capacity" or "capacity to commit internationally wrongful acts". It is impossible to visualize a State possessing international personality but not having international obligations; and if it has such obligations, it may logically violate them as well as carry them out.

77. The Special Rapporteur nevertheless wished from the outset to draw the Commission's attention to the need to take care not to be misled by the use of the word "capacity", because its employment might lead us to see an analogy between the principle that in international law every State possesses the capacity to commit wrongful acts and the rule in article 6 of the Vienna Convention on the Law of Treaties, which provides that "every State possesses capacity to conclude treaties".<sup>119</sup> Capacity to conclude treaties and capacity to commit internationally wrongful acts are, however, two entirely separate notions. Capacity to conclude treaties, which is the international equivalent of capacity to contract, is the most prominent aspect of a subjective legal situation, namely, the situation which, to continue using municipal law terminology, is definable as the State's "capacity to act" in international law: i.e., the legal power of the State to perform "legal acts" and to produce legal effects by manifesting its will.

78. The term "delictual capacity", on the other hand, obviously denotes neither a legal power nor yet another subjective legal situation. In fact, if we reflect carefully, we shall realize the absurdity of the idea that a legal order can endow its subjects with "capacity", in the proper sense of the term, to conduct themselves in contravention of their legal obligations. It therefore seems impossible to support the view, apparently cherished by German jurists, that delictual capacity (*Deliktsfähigkeit*) is a sub-category of the "capacity to act" (*Handlungsfähigkeit*).<sup>120</sup> The terms "delictual capacity" and "capacity to commit wrongful acts" cannot be anything more than convenient labels for denoting that a subject may, in fact, engage in conduct contrary to an international obligation which is incumbent upon it and thereby fulfil the conditions necessary to be considered the author of an internationally wrongful act.<sup>121</sup>

<sup>119</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 290.

<sup>120</sup> K. Strupp, "Das völkerrechtliche Delikt", *Handbuch...* (op. cit.), pp. 21-22; F. Klein, op. cit., pp. 34-35; A. Schüle, op. cit., p. 330; I. von Münch, op. cit., p. 130.

<sup>121</sup> This is what some writers refer to as the "active subject" of the wrongful act (see Monaco, op. cit., p. 362; and Vitta, "Res-

ponsabilità degli Stati", *Novissimo Digesto Italiano* (Turin, 1968), vol. XV, p. 733) or of responsibility (see first report by García Amador on State responsibility, in *Yearbook of the International Law Commission, 1956*, vol. II, pp. 184 et seq., document A/CN.4/96, chap. IV); and what the Soviet writers term the "subject of an international delict" (Institute of the State and Law of the Academy of Sciences of the Soviet Union, op. cit., p. 426).

79. On the basis of this explanation the Commission, during its discussion of the second report, acknowledged the soundness of the principle which the aforementioned writers mean to express by using the terms referred to above. This principle must be included in the draft in one form or another, for it would be dangerous to take the idea which it embodies for granted. To give only one example, a very new State might be tempted to invoke for certain purposes the immaturity or inadequacies of its structure, claiming that for that reason it was incapable of fulfilling its international obligations, or at least some of them, and, hence, that it could not be considered to have committed an internationally wrongful act by violating those obligations. Such a position would, however, be indefensible. There can be no possible comparison between the status of a newly-formed State in international law and that of a minor or any person lacking delictual capacity in municipal law. States come of age as soon as they attain independent and sovereign existence and become full members of the international community. The obverse of sovereignty is the possibility of asserting one's rights, but the reverse is the duty to fulfil one's obligations.<sup>122</sup> The principle that no State can escape the possibility of being considered as the author of an internationally wrongful act if, by its conduct, it fails to fulfil an international obligation, must therefore be clearly stated for all members of the international community.

80. Some members of the Commission, while agreeing with the substance of the principle, questioned the advisability of using the term "capacity" to describe the physical ability of a State to commit a wrongful act. The reasons they gave were similar to those used by the Special Rapporteur to bring out the clear distinction between the meaning which the word "capacity" may have in relation to wrongful acts and its meanings in other spheres of law. At the close of the debate on that point at the twenty-second session, the Special Rapporteur agreed to explore the possibility of finding other terms that would express the same principle without giving rise to misunderstanding.

81. The first solution which might come to mind would be that of simply replacing the term "capacity", which has a marked legal character, by a term indicating directly a physical ability or possibility. After reflecting further on the question, however, the Special Rapporteur became convinced that the real sense of the principle to be defined would perhaps be clearer if, in connexion with wrongfulness, stress was placed on a passive situation of the State rather than an active

ponsabilità degli Stati", *Novissimo Digesto Italiano* (Turin, 1968), vol. XV, p. 733) or of responsibility (see first report by García Amador on State responsibility, in *Yearbook of the International Law Commission, 1956*, vol. II, pp. 184 et seq., document A/CN.4/96, chap. IV); and what the Soviet writers term the "subject of an international delict" (Institute of the State and Law of the Academy of Sciences of the Soviet Union, op. cit., p. 426).

<sup>122</sup> In this connexion, see the comments made by Mr. Thiam at the twenty-second session of the International Law Commission (*Yearbook of the International Law Commission, 1970*, vol. I, p. 214, 1079th meeting, paras. 36-38).

situation. In other words, it seems preferable to say that the State may be considered the author of an internationally wrongful act rather than to describe it as having the "capacity" or "ability" to commit such an act.<sup>123</sup> In fact, what we are seeking to express here is primarily the idea that every State is on an equal footing with others with regard to the possibility of having its conduct characterized as internationally wrongful, and that no State can hope to prevent its own actions or omissions from appearing as actions or omissions which are regarded as reprehensible by international law, if all the conditions for the existence of an internationally wrongful act are present.

82. At its twenty-second session, the Commission was able to give only very rapid consideration to the question of the possible limitations to which this principle, described by some writers as that of the "delictual capacity" of all States, might be subject in specific cases. The Special Rapporteur, reviewing those cases in his second report, indicated that he felt it unnecessary to pay attention, from that point of view, to the situation of a State member of a federal union. The cases in which federated States still possess some international personality—because they have retained, even in a very limited form, capacity to make certain agreements with States outside the federation—are becoming increasingly rare. Furthermore, it is not absolutely certain that if the federated State, by its action or omission, should fail to fulfil an international obligation contracted directly by it, that act would not be attributed, at the international level, to the federal State rather than the federated State. Consequently, the Special Rapporteur still feels that there is no point in taking these marginal cases into account, especially in view of the evidence at the Vienna Conference on the Law of Treaties that federal States as a whole are firmly opposed to any mention of a separate international personality for federated States.<sup>124</sup>

<sup>123</sup> If the course proposed here is adopted, care must be taken not to confuse the designation of a subject as author of a wrongful act with the designation of that subject as "responsible" as a result of that act. Considering a subject as being the author of an internationally wrongful act and calling upon it to assume a responsibility flowing from that act are two operations which are logically separate and consecutive. Furthermore, they do not always necessarily follow each other. There may be cases—to which we have already referred, indicating that it would be necessary to revert to them in due course—where because of one State's situation in relation to another State, the latter may be called upon to answer in place of the former for an internationally wrongful act which the former has committed. Consequently, in cases of this kind, the former State is considered to be the subject which is the author of the internationally wrongful act, even if it is the responsibility of another State which is involved as a result of that act.

There is quite often confusion regarding this point. Anzilotti, for example (*La Responsabilité internationale*... (op. cit.), p. 180), translates the German term "Deliktsfähigkeit" (i.e. capacity to commit a delict) by the expression "capacité de répondre des actes contraires au droit" [capacity to answer for acts contrary to law] (Translation by the United Nations Secretariat). There seems to be a similar confusion in Strupp ("Das völkerrechtliche Delikt", *Handbuch*... (op. cit.), pp. 21-22), and Dahm (op. cit., p. 179).

<sup>124</sup> In article 5 ("Capacity of States to conclude treaties") of its draft the International Law Commission proposed the inclusion of a paragraph 2 providing that "States members of a federal union may possess a capacity to conclude treaties if such capacity is

83. On the other hand, the Special Rapporteur felt it his duty to draw the Commission's attention to the situation which may arise when in the territory of a given State another subject or subjects of international law are acting in its place.<sup>125</sup> The other subject or subjects concerned may sometimes entrust certain activities, normally exercised by organs of the territorial State and within the framework of its legal system, to elements of their own organization, either for purposes of their own or sometimes because of the need to fill gaps in the organization of the territorial State. The organs of the territorial State, through which it normally discharges some of its international obligations, are then prevented from performing some of their functions.<sup>126</sup> In other words, the territorial State is deprived of part of its organization, a part which previously gave it the physical ability to discharge and violate certain international obligations. It is therefore no longer able to commit an internationally wrongful act in the sphere affected by that deprivation, and if the breach of an international obligation should occur it cannot be attributed to that State: it must be attributed to the other subject or subjects who have replaced the organs of the territorial State by their own.<sup>127</sup> It is therefore understandable that, when confronted with such cases, those who accept the notion of an "inter-

admitted by the federal constitution and within the limits there laid down." (*Yearbook of the International Law Commission*, 1966, vol. II, p. 191, document A/6309/Rev.1). After a long discussion, the Committee of the Whole adopted this paragraph in 1968, but in 1969, at the plenary meetings of the Conference itself, certain federal States resumed their attack on this paragraph with renewed vigour and it was finally rejected, so that it does not appear in article 6 of the Vienna Convention on the Law of Treaties (see foot-note 119 above).

<sup>125</sup> The other subject or subjects concerned may also be States. But they may also be subjects of a different nature, such as an insurrectional movement or even, to take an extreme case, an international organization.

<sup>126</sup> This situation may arise in cases of the survival of one of those legal relationships of dependence which have often furnished the textbooks with classic examples of the situation described here but which are, fortunately, now disappearing (see R. Ago, "La responsabilità indiretta nel diritto internazionale", *Archivio di diritto pubblico*, January-April 1936-XIV (Padua, CEDAM, 1936), vol. 1, fasc. 1, pp. 27 et seq.; and "Le délit international", *Recueil des cours*... (op. cit.), p. 455 et seq.). It may also arise in other cases, for example, that of a military occupation, whether in time of war or time of peace, whether partial or total, temporary or permanent, in brief, regardless of the title, reason and character of the occupation. Nor is there any need, for the purposes with which we are concerned here, to draw any distinction based on whether the occupation is regarded as legitimate or illegitimate by international law. Even apart from the case of military occupation, there are other situations where elements of the organization of a State or of an international institution act in the territory of another State, replacing the action of the latter's organization. The organs whose activity is thus replaced are sometimes judicial organs and sometimes administrative organs, such as the police and so on.

<sup>127</sup> In this case we are concerned with direct responsibility arising from an act by the subject concerned. This case should not be confused with that in which a State might incur indirect responsibility, i.e., as a result of an act by others and not by its own act. It is hardly necessary to add that, since the organs of one State are acting here in place of those of another State and within the framework of the latter's legal order, they are obliged, in their action, to respect the international obligations incumbent upon the organs of the territorial State which they are replacing.

national delictual capacity" of States are obliged to recognize that the latter may be subject to some restrictions. In referring to that recognition in his second report, the Special Rapporteur felt obliged to refer both to the question of the significance of this alleged "capacity" and that of possible limitations of that capacity. He merely wished to stress the need to remove any doubts concerning the determination of the author of an internationally wrongful act in a situation such as that described above. One must be careful not to attribute an internationally wrongful act to a State whose organs were in fact unable to commit any act<sup>128</sup> and at the same time to grant a sort of impunity to the State whose organs actually committed the act concerned.

84. However, this requirement probably does not make it necessary to insert a special provision in the definition of the general principle to which this section is devoted, especially if it is decided to set aside the formula acknowledging that every State has the "capacity to commit internationally wrongful acts" and to replace it by a form of wording stating that each State may be considered the author of an internationally wrongful act. On the basis of a definition of this kind, it becomes clear that a State cannot be regarded as the author of an internationally wrongful act unless, in that particular case, the conditions for the existence of such an act have been fulfilled. Now in cases such as those where part of the organization of the State has been replaced by the organs of another State, one essential condition is lacking, namely, that which requires that the conduct constituting the breach of an international obligation should be attributable to the State having suffered the deprivation mentioned. The adoption of new wording thus seems to have the additional advantage of preventing the text of the article from raising the question of the limitations of the alleged "delictual capacity". It will suffice to deal with it in the commentary to the article.

85. In view of all the preceding considerations, the following wording is proposed for the formulation of the general principle in question :

<sup>128</sup> In the case envisaged here, the fact that the State may not be considered the author of an internationally wrongful act in a given sphere is the consequence of a restriction occurring at a given time in an organization which was previously complete. The same impossibility may also be the effect of a structure which, by its very nature, is essentially partial. This is the case for certain subjects of international law other than States, even if they are often treated as States in drafts for the codification of international law. Insurrectional movements, for example, are not States in the proper sense of the term and are not States even when they have affirmed their authority over a given territory and their international personality is no longer in doubt. However, it may precisely be questioned whether, in a given sphere, an insurrectional movement may or may not be considered the author of an internationally wrongful act which would be a source of international responsibility for the movement itself. It seems clear that an affirmative answer to this question can only be given if the sphere in question is one of those in which a subject of that nature may, by its very structure, be the subject of international obligations. Where this essential condition is not fulfilled, the subject in question is clearly deprived of the physical ability to fulfil or violate an international obligation.

*Article 3. Subjects which may commit internationally wrongful acts*

Every State may be considered the author of an internationally wrongful act.

4. IRRELEVANCE OF MUNICIPAL LAW TO THE CHARACTERIZATION OF AN ACT AS INTERNATIONALLY WRONGFUL

86. The independence of the characterization of a given act as wrongful in international law with regard to any characterization of that act, whether similar or not, by the municipal law of the State, may certainly be regarded as a general principle of international responsibility.

87. This independence is evident from several points of view. We have already had occasion to observe<sup>129</sup> that the attribution of a given action or omission to the State as a subject of international law can only take place under international law. At the same time, it was pointed out that this attribution is completely distinct from the attribution of an act to the State as a person under municipal law, effected on the basis of the latter law. It was also briefly indicated—pending further discussion of the subject in chapter II—that international law may take into account certain situations existing in municipal law as a factual premise for the attribution which takes place within the sphere of international law. We hastened to point out, however, that that in no way detracted from the full autonomy of the legal operation of attributing an act to the State which takes place under international law. In other words, the existence of an "act of the State" at the international level does not depend on the existence of an "act of the State" at the national level.

88. However, the irrelevance in international law of the conclusions which may be reached on the basis of municipal law is revealed primarily by other aspects, and it is above all in connexion with those aspects that it is necessary to stress the independence of the conclusions of international law and municipal law regarding the characterization of a given act or situation. The wrongfulness of some particular conduct attributed to the State at the international level can be defined only by reference to an international legal obligation incumbent on that State; the conclusion in that connexion is in no way influenced by the fact that, in municipal law, the conduct in question may also seem to constitute the breach of an obligation or, on the contrary, perfectly lawful conduct or even the performance of a duty. This is the principle which we intend to stress in the present section.

89. An internationally wrongful act cannot be said to exist when there is no breach of an international obligation but only a failure by the State to fulfil an obligation established by its own legal system: there seems to be no need for a lengthy demonstration of

<sup>129</sup> See para. 60 above.



the soundness of this proposition. The principle which it embodies constitutes the foundation of judicial decisions and international practice and has often been expressly confirmed.

90. The clearest expression of this principle in a judicial decision is found in the advisory opinion (4 February 1932) of the Permanent Court of International Justice concerning the "Treatment of Polish nationals and other persons of Polish origin or speech in the Danzig Territory".<sup>130</sup> The problem before the Court was to determine whether the Polish Government possessed the right to submit to the organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the constitution of the Free City of Danzig. In its advisory opinion, the Court sought first and foremost to show that the special character of the Danzig Constitution concerned only the relations between the Free City and the League of Nations, and that with regard to Poland the Danzig Constitution was and remained the constitution of a foreign State. That being so, the Court stated that the Polish Government did not have the right which it invoked, for :

[...] according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law [...].

The application of the Danzig Constitution may however result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law, [...] However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City".

91. With regard to State practice, there is certainly no need to refer here to the numerous cases in which States wrongfully accused of bearing international responsibility for what was in fact nothing more than a failure to observe a provision of municipal law have successfully opposed on that basis the unfounded claims advanced against them. More generally, it will be remembered that the request for information submitted to States by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930) drew a distinction between the international responsibility of the State flowing from the breach of an international obligation, and the purely internal responsibility flowing from the breach of an obligation established by the constitution or laws of that State. The Governments which replied to the request for information were in agreement on that point.<sup>131</sup> At the Hague Conference, article 1 of the draft

convention on State responsibility, which was approved unanimously at the first reading, implicitly confirmed the same conclusion.<sup>132</sup> We do not feel it necessary to dwell on the conclusions relating to this subject which may be drawn from international judicial decisions and State practice by citing the views of writers on international law. It is enough to say that the principle in question is generally accepted and in fact is uncontested.<sup>133</sup>

92. The essential importance of the principle relating to this aspect of the relationship between international law and municipal law is, however, revealed in the proposition which inverts the one given in paragraph 89 above: the fact that some particular conduct conforms to the provisions of national law or is even expressly prescribed by those provisions does not make it possible to deny its internationally wrongful character when it constitutes a breach of an obligation established by international law. As has been clearly stated,

The principle that a State cannot plead the provisions (or deficiencies) of its constitution as a ground for the non-observance of its international obligations [...] is indeed one of the great principles of international law, informing the whole system and applying to every branch of it [...].<sup>134</sup>

Judicial decisions, State practice and the works of writers on international law leave not the slightest doubt on that subject.

93. It has even been said that the Permanent Court of International Justice "affirmed this rule and elaborated it into one of the corner stones of its jurisprudence."<sup>135</sup> The Court expressly recognized the principle in its first Judgment, of 28 June 1923, in the *Case of the S.S. "Wimbledon"*. The German Government was seeking to justify having prohibited—contrary to the provisions of Article 380 of the Treaty of Peace of Versailles<sup>136</sup>—the *Wimbledon* from passing through the Kiel Canal during the war between the Soviet Union and Poland, arguing, *inter alia*, that the passage of the ship through the Canal would have constituted a violation of the German neutrality orders. The Court rejected that argument, observing that

international law has been broken. If this condition is not fulfilled when a law is infringed to the detriment of a foreigner, there can never be any question of a request put forward under international law by a foreign State; the injured party alone would be entitled to seek a remedy under internal law." (League of Nations, *Bases of Discussion* ... (op. cit.), p. 16).

<sup>132</sup> For the text of the article, see *Yearbook of the International Law Commission*, 1956, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>133</sup> The principle is set out very clearly in the commentary to section 167 of the *Restatement of the Law of the American Law Institute* (American Law Institute, op. cit., p. 509):

"[...] just as compliance with state law does not preclude violation of international law, [...] violation of state law does not necessarily involve violation of international law [...]."

<sup>134</sup> G. G. Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law", *Recueil des cours* ..., 1957-II (Leyden, Sijthoff, 1958), t. 92, p. 85.

<sup>135</sup> G. Schwarzenberger, *International Law* (op. cit.), p. 69.

<sup>136</sup> G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1923), 3rd series, t. XI, p. 636.

<sup>130</sup> P.C.I.J., series A/B, No. 44, pp. 24-25. In this connexion, see also the opinion expressed by the Court in its judgment of 7 September 1927 in the *Lotus Case* (P.C.I.J., series A, No. 10, p. 24).

<sup>131</sup> League of Nations, *Bases of Discussion* ... (op. cit.), p. 16 *et seq.*; and *Supplement to vol. III*, (op. cit.), pp. 2, 4 *et seq.* The principle in question was clearly set out in the reply of the German Government. After stressing the distinction between obligations incumbent on the State under international law and obligations of the State under its own laws, the German Government added:

"International responsibility—the sole form of responsibility under consideration—can only become involved when a rule of

"[...] a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace.

"[...] under Article 380 of the Treaty of Versailles, it was her [Germany's] definite duty to allow it [the passage of the *Wimbledon* through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article".<sup>137</sup>

The principle thus formulated was subsequently reaffirmed by the Court on several occasions. The most explicit formulations include the following:

"[...] it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."<sup>138</sup>

"[...] it is certain that France cannot rely on her own legislation to limit the scope of her international obligations";<sup>139</sup>

"[...] a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."<sup>140</sup>

The same principle, viewed from a different angle, is also affirmed in the Advisory Opinions of 21 February 1925 on the *Exchange of Greek and Turkish Populations*<sup>141</sup> and of 3 March 1928 on the *Jurisdiction of the Courts of Danzig*.<sup>142</sup> Finally, in the same connexion, we may recall the observations by Lord Finlay on the Advisory Opinion of 15 September 1923 on the question concerning the *Acquisition of Polish Nationality*. These observations are particularly interesting because they refer to a case in which the actual absence of provisions of municipal law is shown not to be an excuse for the non-fulfilment of international obligations.<sup>143</sup>

94. The existence of a principle of international law according to which a State cannot evade the observance of its international obligations by pleading its municipal law is confirmed by an examination of the decisions of the International Court of Justice. Although the decisions of this Court do not provide affirmations of this

principle which are as explicit as those to be found in the decisions of the Permanent Court, it is nevertheless true that the principle in question was recognized expressly in the Advisory Opinion concerning *Reparation for injuries suffered in the service of the United Nations*<sup>144</sup> and implicitly in several other judgements. It is interesting to note that numerous judges of the Court have seen fit to set forth explicitly, in their separate or dissenting opinions on these same judgements, the principle which the majority of members of the Court had implied. In this context, reference should be made to the Judgement of 18 December 1951 in the *Fisheries Case*,<sup>145</sup> with the individual opinion of Judge Alvarez<sup>146</sup> and the dissenting opinion of Judge McNair;<sup>147</sup> the Judgement of 18 November 1953 in the *Nottebohm Case* (Preliminary Objection)<sup>148</sup> with the declaration of Judge Klaestad;<sup>149</sup> and above all the Judgement of 28 November 1958 in the *Case concerning the application of the Convention of 1902 Governing the Guardianship of Infants*,<sup>150</sup> with the separate opinions of Judge Badawi,<sup>151</sup> Judge Lauterpacht<sup>152</sup> and Judge Spender,<sup>153</sup> and the dissenting opinions of Judge Winiarski<sup>154</sup> and Judge Córdova.<sup>155</sup>

95. Similarly, there are no doubt on this subject in arbitral decisions. As early as 1872, in the decision in the famous *Alabama Case* (Great Britain v. the United

<sup>144</sup> *I.C.J. Reports 1949*, p. 180: "As the claim is based on the breach of an international obligation on the part of the Member held responsible by the Organization, the Member cannot contend that this obligation is governed by municipal law..."

<sup>145</sup> *I.C.J. Reports 1951*, p. 132.

<sup>146</sup> *Ibid.*, p. 152: "International law takes precedence over municipal law. Acts committed by a State which violate international law involve the responsibility of that State."

<sup>147</sup> *Ibid.*, p. 181: "It is a well-established rule that a State can never plead a provision of, or lack of a provision in, its internal law or an act or omission of its executive power as a defence to a charge that it has violated international law."

<sup>148</sup> *I.C.J. Reports 1953*, p. 123.

<sup>149</sup> *Ibid.*, p. 125: "With regard to the allegations of the Government of Guatemala that provisions of its national law prevent that Government and its officials from appearing before the Court, it suffices to say that such national provisions cannot be invoked against rules of international law."

<sup>150</sup> *I.C.J. Reports, 1958*, p. 67.

<sup>151</sup> *Ibid.*, p. 74: "... it has been established by many judicial decisions that a State cannot evade the obligations imposed by an international convention by invoking its own law, or indeed even its own constitution."

<sup>152</sup> *Ibid.*, p. 83: "A State is not entitled to cut down its treaty obligations in relation to one institution by enacting in the sphere of another institution provisions whose effect is such as to frustrate the operation of a crucial aspect of the treaty."

<sup>153</sup> *Ibid.*, especially pp. 125-126, and 128-129: "Treaty and convention obligations, whatever they are, must be faithfully observed. The provisions of municipal law cannot prevail over those of a treaty or convention."

<sup>154</sup> *Ibid.*, pp. 137 and 138. In this connexion, Judge Winiarski recalls the positions taken by the Permanent Court and expressed support for them.

<sup>155</sup> *Ibid.*, p. 140: "In my opinion there is no national law, whatever its classification might be, either common or public or with different aim and scope, which in the face of a treaty dealing with the same subject-matter can juridically claim priority in its application."

<sup>137</sup> Case of the *S.S. Wimbledon* (*P.C.I.J.*, series A, No. 1, pp. 29-30).

<sup>138</sup> Case of the Greco-Bulgarian "Communities", Advisory Opinion of 31 July 1930, (*P.C.I.J.*, series B, No. 17, p. 32).

<sup>139</sup> Case of the Free Zones of Upper Savoy and the District of Gex (second phase), Order of 6 December 1930 (*P.C.I.J.*, series A, No. 24, p. 12) and *idem*, Judgment of 7 June 1932 (*P.C.I.J.*, series A/B, No. 46, p. 167).

<sup>140</sup> Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion of 4 February 1932 (*P.C.I.J.*, series A/B, No. 44, p. 24).

<sup>141</sup> *P.C.I.J.*, series B, No. 10, p. 20: "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken."

<sup>142</sup> *P.C.I.J.*, series B, No. 15, p. 27: "Poland could not avail herself of an objection [based on Polish national law] which [...] would amount to relying upon the non-fulfilment of an obligation imposed upon her by an international engagement."

<sup>143</sup> *P.C.I.J.*, series B, No. 7, p. 26: "By the express words of Article 4 [of the treaty] they are *ipso facto* Polish nationals. If Polish law requires registration or any other formality for the effective exercise of their rights as Polish citizens, the Polish Government is bound to provide for this; and most certainly the Polish Government could not set up any wrongful refusal of theirs as justifying their contention that these persons are not Polish citizens."



States of America), the Arbitral Tribunal, endorsing the arguments advanced by the United States,<sup>156</sup> stated :

"[...] the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed".<sup>157</sup>

During the period between the First and Second World Wars, there were many decisions along the same lines, of which we shall recall the most important. In the arbitral award of 1922 concerning the *Norwegian Shipowners' Claims*, we read :

The Tribunal cannot agree [...] with the contention of the United States that it should be governed by American Statutes whenever the United States claim jurisdiction.

This Tribunal is at liberty to examine if these Statutes are consistent with the equality of the two Contracting Parties, with Treaties passed by the United States, or with well established principles of international law, including the customary law and the practice of judges in other international courts.<sup>158</sup>

In 1923, the arbitrator William H. Taft, in the award concerning the *Aguilar-Amory and Royal Bank of Canada Claims* [Tinoco Case] (Great Britain v. Costa Rica), concluded :

In an international tribunal [...] the unilateral repeal of a treaty by a statute would not affect the rights arising under it and its judgement would necessarily give effect to the treaty and hold the statute repealing it of no effect.<sup>159</sup>

An even clearer affirmation of the same principle is to be found in the award concerning the *Shufeldt Claim*, rendered in 1930 by an Arbitral Tribunal established by the United States of America and Guatemala :

The Guatemala Government contend further that the decree of the 22nd May 1928 was the constitutional act of a sovereign State exercised by the National Assembly in due form according to the Constitution of the Republic and that such decree has the form and power of law and is not subject to review by any judicial authority. This may be quite true from a national point of view but not from an international point of view, for "it is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject."<sup>160</sup>

Lastly, with regard to more recent years, mention must be made of the decisions of the Italian-United

States of America Conciliation Commission, established under article 83 of the 1947 Treaty of Peace,<sup>161</sup> and particularly the decision in the *Wollemborg Case*, rendered on 24 September 1956. The Commission stated :

... one thing is certain : the Italian Government cannot avail itself, before an international court, of its domestic law to avoid fulfilling an accepted international obligation. Judicial decisions of the Permanent Court of International Justice are all identical on this point.<sup>162</sup>

96. The principle that a State cannot invoke its municipal law to show that it has not violated an international obligation is affirmed as frequently in State practice as in international decisions. We shall confine ourselves to recalling here the most important positions taken during the past fifty years.<sup>163</sup> In this context we shall examine the attitude of States to the disputes discussed in the League of Nations or submitted to the Permanent Court of the International Court of Justice, as well as the work on the codification of international law undertaken under the auspices of the League of Nations and the United Nations.

97. In the aforementioned disputes, the plaintiff States firmly supported the principle that conformity to municipal law does not exclude international responsibility. It should be noted, moreover, that the defendant States too generally agreed with that view. In the Memorandum submitted to the League of Nations regarding the dispute between the Swiss Confederation and other States concerning *Reparation for damage suffered by Swiss citizens as a result of events during the war*, the Swiss Federal Council stated that :

Municipal law cannot relieve a State from the necessity of fulfilling its international obligations. It is obvious, indeed, that any State is free to give itself such laws as it may choose ; but these laws engage its international responsibility if they infringe the principles of international law or if they are defective to the point of preventing an international obligation of the State in question from becoming effective.<sup>164</sup>

<sup>161</sup> United Nations, *Treaty Series*, vol. 49, p. 126.

<sup>162</sup> United Nations, *Reports of International Arbitral Awards*, vol. XIV (United Nations publication, Sales No. 65.V.4), p. 289. See also in the same connexion the decision in the *Flegenheimer Case* of 20 September 1958, rendered by the same Commission (*ibid.*, especially p. 360).

<sup>163</sup> It might also be advisable to recall the very clear affirmation of the principle contained in a memorandum sent by the United States Department of State to the Legation of Cuba in 1913 (reproduced in G. H. Hackworth, *Digest of International Law* (Washington, U.S. Government Printing Office, 1940), vol. I, pp. 28-29), as well as those contained in the statement by the Netherlands Minister of Justice to the Second Chamber in 1916 (quoted in League of Nations, *Bases of Discussion...* (*op. cit.*), p. 219), although these affirmations date back to a somewhat earlier era than the one with which we are concerned.

<sup>164</sup> League of Nations, *Official Journal*, 15th year, No. 11 (November 1934), p. 1486. The same position was adopted in the legal statement drawn up by Mr. Sauser-Hall annexed to the memorandum (*ibid.*, pp. 1494-1495) and in the statements of the Swiss representative, Mr. Motta, to the League of Nations (*ibid.*, p. 1438). It should be noted that the other parties to the dispute in question did not question the soundness of the affirmation. The same principle had been energetically affirmed by the Hungarian Government in the dispute concerning the Expropriation by the Roumanian Government of the immovable property of Hungarian optants (*ibid.*, 4th year, No. 7 [July 1923], p. 729; *ibid.*, No. 8 [August 1923],

<sup>156</sup> For the United States position, see the note dated 25 September 1869 from Mr. Fish to Mr. Motley, in *Fontes Juris Gentium*, Series B, Sectio I, Tomus I, Pars 1 (Berlin, Heymanns 1932), No. 2038, p. 899.

<sup>157</sup> J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, U.S. Government Printing Office, 1898), vol. I, p. 656.

<sup>158</sup> Award rendered on 13 October 1922 by the Arbitral Tribunal established under the agreement of 30 June 1921 between Norway and the United States of America (United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No. 1948.V.2), p. 331).

<sup>159</sup> Award of 18 October 1923, rendered by the Arbitral Tribunal established under the Convention of 12 January 1922 (*ibid.*, p. 386). See also the award rendered on 19 October 1928 by the French-Mexican Claims Commission (Convention of 25 September 1924) in the *Georges Pinson Case* (*ibid.*, vol. V (United Nations publication, Sales No. 1952.V.3), pp. 393-394).

<sup>160</sup> Award of 24 July 1930 rendered by the Tribunal established by the Agreement of 2 November 1929 (*ibid.*, vol. II (United Nations publication, Sales No. 1949.V.1), p. 1098).

During the discussion in the Permanent Court of International Justice on the question of the *Jurisdiction of the Danzig Courts*, Mr. Gidel, representing the Danzig Government, stated :

It is a universally accepted principle that the provisions or deficiencies of municipal law cannot be invoked by a State to avoid fulfilling international obligations or to evade the responsibilities flowing from the non-fulfilment of those obligations.

The sole task of international courts is to determine what obligations are incumbent upon the Parties to the dispute; the inadequacy or non-existence of the laws of a State do not suffice to exonerate that State from its international responsibility.<sup>165</sup> [Translation from the French.]

Mr. Limborg, representing the Polish Government, replied :

My adversary, the eminent Professor, is quite right : generally speaking, a State can never plead in an international court that its laws are inadequate.<sup>166</sup> [Translation from the French.]

In the *Case of the Free Zones of Upper Savoy and the District of Gex*, the Swiss Government stated :

There is no doubt [...] that the French Government cannot avail itself of the *de facto* situation or the consequences of the *de facto* situation which it created *contrary to the law*, in 1923, by installing its customs cordon at the political frontier of the small zones of Savoy and Gex on its own authority.<sup>167</sup> [Translation from the French.]

In its reply, it repeated :

The Swiss Government, for its part, considers first that *international commitments take precedence over national law and that consequently all French legislation—and not only the customs legislation—must be applied in such a way that the de jure situation created by the provisions of 1815 and 1816 is respected.*<sup>168</sup> [Translation from the French.]

The French Government did not deny the soundness of this argument. In his reply, Mr. Paul-Boncour, Counsel for the French Government, stated :

We were also told : you have no right to avail yourselves of the results obtained since 1923, when you transferred the customs cordon to your political frontier ; you have no right to avail yourselves of the results which are the consequences of your violation of the law [...].

But we are not adducing a legal argument, we are invoking factual arguments, we are citing statistics.<sup>169</sup> [Translation from the French.]

In its *Contre-Mémoire* on the *Losinger and Co. Case*, the Yugoslav Government acknowledged that

[...] It is true that international law does not permit a State to invoke its laws and the decisions of its courts in order to evade its international commitments [...].<sup>170</sup> [Translation from the French.]

The validity of the principle in question was reaffirmed once again by the parties to the *Phosphates in Morocco* case. The Italian Government having stated that :

It is an elementary principle of international law, which is constantly followed in practice, that the State cannot avail itself of the provisions of its municipal law to evade the fulfilment of its international obligations.<sup>171</sup> [Translation from the French.]

The French Government replied :

[The Italian Government has contended] that the State cannot avail itself of its freedom of judicial organization to evade its international obligations and to refuse to treat aliens in accordance with international conventions. The Government of the Republic agrees on that point.<sup>172</sup> [Translation from the French.]

Lastly, reference must be made to the *Nottebohm Case*, in connexion with which the Government of Liechtenstein energetically supported the principle,

[...] Which is so clear as to require the minimum citation of authority, [...] that no State may rely upon the provisions of its own law as a sufficient excuse for failure to comply with its obligations under international law.<sup>173</sup>

98. Above all, it is in the work on the codification of State responsibility undertaken under the auspices of the League of Nations and the subsequent work on the codification of the rights and duties of States and the law of treaties undertaken under the auspices of the United Nations that we find the most formal affirmation of the rule that any objection based on the fact that a State's conduct conforms to its own municipal legislation is invalid at the international level. In point I of the request for information sent to States by the Preparatory Committee of the 1930 Conference for the

pp. 886-887; *ibid.*, 9th year, No. 4 [April 1928], pp. 562-563 and 570). The Romanian Government did not contest the soundness of the Hungarian position on that point (*ibid.*, 4th year, No. 8 [August 1923], p. 895).

<sup>165</sup> *P.C.I.J.*, series C, No. 14-I, p. 44. See also the Note from the Senate of Danzig to the President of the Council of the League of Nations (*ibid.*, pp. 302-303) and the Memorandum of the Senate of Danzig (*ibid.*, p. 333).

<sup>166</sup> *Ibid.*, p. 59.

<sup>167</sup> Observations of the Swiss Government (*P.C.I.J.*, series C, No. 19, vol. III, p. 1222).

<sup>168</sup> Reply of the Swiss Government (*P.C.I.J.*, series C, No. 19, vol. IV, pp. 1912-1913). See also the statement by Mr. Logoz, agent of the Swiss Government (*ibid.*, series C, No. 19, vol. I, especially pp. 210-211).

Some of the clearest statements of the principle under consideration were made by the Swiss Government. In a recent statement, on December 10th, 1968, Mr. Spühler, Chief of the Federal Political Department, answering a question in Parliament, declared :

"If Swiss municipal law is not in accordance with our international obligations, we must modify our law in order to make it conform to public international law. No State can evade its obligations under international law by invoking the contrary provisions of its constitution or of its municipal law. On the contrary, in such an event the State must create a legal situation which conforms to public international law, and repair the injuries done." (*Société suisse de droit international, Annuaire suisse de droit international, 1969-1970* (Zürich, 1971), vol. XXVI, p. 97).

<sup>169</sup> *P.C.I.J.*, series C, No. 19, vol. I, p. 344. See also the reply of the French Government (*ibid.*, No. 19, vol. IV, pp. 1636-1637).

<sup>170</sup> *P.C.I.J.*, series C, No. 78, p. 181.

<sup>171</sup> Memorandum of the Italian Government (*P.C.I.J.*, series C, No. 84, p. 70). The same affirmation was repeated in the observations and conclusions (*ibid.*, p. 455) and in the additional observations (*ibid.*, p. 826) of the Italian Government and in the statement of its agent, Mr. Montagna (*ibid.*, series C, No. 85, p. 1172).

<sup>172</sup> Reply of the French Government (*P.C.I.J.*, series C, No. 84, p. 712).

<sup>173</sup> Statement of the Government of the Principality of Liechtenstein on 11 May 1953. See *Nottebohm Case* (Liechtenstein v. Guatemala), *I.C.J. Pleadings*, vol. I, p. 181 and generally pp. 180-182. See also the oral argument of Mr. Sauser-Hall, Counsel for Liechtenstein, at the public hearing of 10 November 1953 (*ibid.*, vol. II, pp. 27-28).

Codification of International Law a distinction was drawn between the responsibility incumbent on a State under international law and the responsibility which may be incumbent on it under its municipal law, and it was stated :

In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law.

In their replies, seventeen States expressly stated their agreement with this idea, while six others implicitly agreed with it. One State replied somewhat ambiguously.<sup>174</sup> Consequently, the Preparatory Committee formulated the following basis of discussion [Basis of discussion No. 1] for the Conference :

A State cannot escape its responsibility under international law by invoking the provisions of its municipal law.<sup>175</sup>

During the debate at the Conference, States expressed general approval of the idea embodied in Basis No. 1,<sup>176</sup> and the only subjects of discussion were the advisability of inserting a rule expressing that idea in the convention<sup>177</sup> and the choice of the most appropriate wording. At the end of the debate, the Third Committee of the Conference adopted in first reading the following article (article 5) :

A State cannot avoid international responsibility by invoking the state of its municipal law.<sup>178</sup>

99. The International Law Commission of the United Nations, at its first session (1949), adopted a draft Declaration on Rights and Duties of States. Article 13 of the draft, the contents of which were approved by all the members of the Commission, reads as follows :

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.<sup>179</sup>

<sup>174</sup> League of Nations, *Bases of Discussion* ... (op. cit.), pp. 16 et seq.

<sup>175</sup> See *Yearbook of the International Law Commission*, 1956, vol. II, p. 223, document A/CN.4/96, annex 2. The same principle, although worded somewhat differently, was included in point 3 of the conclusions in the report of the Sub-Committee of Experts on Responsibility of States (*ibid.*, p. 222, annex 1).

<sup>176</sup> Only two States requested that exceptions to the principle be mentioned. In their view, the principle would not be valid in the case of certain matters covered by the capitulatory system and those falling within the reserved domain. However, following statements by other delegates to the Conference, who pointed out that those cases did not constitute real exceptions to the envisaged principle, the two States withdrew their proposed amendments. The existence of exceptions to the principle was also mentioned by another delegate (see League of Nations, *Acts of the Conference for the Codification of International Law* [The Hague, 13 March-12 April 1930], volume IV, *Minutes of the Third Committee* [document C.351 (c)M.145(c).1930.V], pp. 120 et seq.).

<sup>177</sup> Some delegates considered that the principle expressed in Basis No. 1 was already clearly brought out in the text of the articles which stated that a State may be held responsible for the conduct of its legislative and judicial organs. This argument, which is not very sound, was not accepted by the Conference.

<sup>178</sup> See *Yearbook of the International Law Commission*, 1956, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>179</sup> See *Official Records of the General Assembly, Fourth Session, Supplement No. 10* (A/925). The English text is also reproduced in *Yearbook of the International Law Commission*, 1949, p. 288. For the debate in the Commission, see *ibid.*, pp. 104-105 (14th meeting,

100. With regard to the early work of the International Law Commission on State responsibility, it should be noted that the wording of the clause included in article 1, paragraph 3, of the preliminary draft prepared in 1957 by the Special Rapporteur, Mr. García Amador, was very similar to that of the article on that subject adopted at the 1930 Codification Conference :

The State may not plead any provisions of its municipal law for the purpose of repudiating the responsibility which arises out of the breach or non-observance of an international obligation.<sup>180</sup>

This clause was incorporated unchanged in article 2, paragraph 4, of the preliminary draft prepared by Mr. García Amador in 1961.<sup>181</sup>

101. At the first session of the United Nations Conference on the Law of Treaties (1968), the delegation of Pakistan proposed in the Committee of the Whole that a clause specifying that no party to a treaty could invoke the provisions of its municipal law to justify the non-observance of a treaty should be inserted in the draft convention. Ten delegations spoke on that point and they all accepted the principle in question. Although some of them expressed misgivings, they did so only in connexion with the need to insert the provision in the Convention on the Law of Treaties. At the end of the discussion, the clause was adopted in first reading by 55 votes to none, with 30 abstentions, and was referred to the Drafting Committee.<sup>182</sup> In second reading, the Committee of the Whole approved the article submitted by the Drafting Committee without a formal vote.<sup>183</sup> At the second session of the Conference (1969),

paras. 1-16), 147 (20th meeting paras. 78-80), 171 (24th meeting, paras. 4-8). The text of the article adopted by the Commission reproduces, without substantive modifications, article 12 of the draft declaration on rights and duties of States submitted to the General Assembly by the Government of Panama and used by the Commission as a basis of discussion (A/285). The text of the draft also appears in the *Preparatory study concerning a draft Declaration on the Rights and Duties of States* (memorandum by the Secretary-General of the United Nations) [United Nations publication, Sales No. 1949.V.4], p. 35. The soundness of the principle set out in those articles was stressed by several Governments in their comments on the Panamanian draft (*ibid.*, pp. 80, 84-85), on the draft of the International Law Commission (*Official Records of the General Assembly, Sixth Session, Annexes*, agenda item 48, documents A/1338 and Add.1 and A/1850), and in the debate in the General Assembly on the Commission's report (*ibid.*, *Fourth Session, Sixth Committee*, 168th-173rd and 175th-183rd meetings; and *ibid.*, *Plenary Meetings*, 270th meeting).

<sup>180</sup> *Yearbook of the International Law Commission*, 1957, vol. II, p. 128, document A/CN.4/106, annex.

<sup>181</sup> *Ibid.*, 1961, vol. II, p. 46, document A/CN.4/134 and Add.1.

<sup>182</sup> The States which spoke in favour of the principle in the debate included the Byelorussian Soviet Socialist Republic, Chile, France, Israel, Italy, the USSR, the United Kingdom, the United States of America and Turkey. The United States delegation indicated that, in its view the principle would be more appropriately placed in a convention on State responsibility. See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), pp. 150 et seq., 28th meeting of the Committee of the Whole, paras. 49-70, and 29th meeting.

<sup>183</sup> The text of the clause was approved at the 72nd meeting of the Committee of the Whole (*ibid.*, pp. 427-428, 72nd meeting of the Committee of the Whole, paras. 29-48). The amendment

(Continued on next page.)

some delegations thought they saw a contradiction between this rule and the principle laid down in paragraph 1 of draft article 43 (article 46 of the final Convention), according to which :

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

In order to allay that concern, it was pointed out that there was no contradiction between the two provisions, since the one concerned treaties already in force and the other competence to conclude treaties. Following upon that brief discussion, the Conference, at its thirteenth plenary meeting, finally adopted (by 73 votes to 2, with 24 abstentions) the following provision, which became article 27 of the Convention :

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.<sup>184</sup>

102. The principle thus sanctioned by international judicial decisions and State practice is also expressly confirmed by writers belonging to different legal systems.<sup>185</sup> It is also included in most of the draft codifications of State responsibility prepared by individuals or private institutions. We may cite article 5 of the draft code prepared by the Japanese Association of International Law in 1926 ;<sup>186</sup> rule I, second paragraph, of the draft adopted by the Institute of International

(Foot-note 183 continued)

proposed by the delegation of Pakistan used the terms "constitution" and "laws". The Drafting Committee replaced those words by the term "internal law" which is thus used in the text approved by the Committee of the Whole. The Drafting Committee also added the phrase indicating that this rule is without prejudice to the article concerning the provisions of internal law regarding competence to conclude a treaty. When the new form of the clause was introduced, the representative of Venezuela expressed some reservations about the formulation of the principle.

<sup>184</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), pp. 53-54, 13th meeting, paras. 30-40.

Concerning article 27 of the Vienna Convention on the Law of Treaties, see E. De La Guardia and M. Delpech, *El derecho de los tratados y la Convención de Viena* (Buenos Aires, La Ley, 1970), pp. 286 *et seq.*; S. Rosenne, *The Law of Treaties, A Guide to the Legislative History of the Vienna Convention* (Leyden, Sijthoff, 1970), pp. 200-201.

<sup>185</sup> See, besides the course by Fitzmaurice cited above (see foot-note 134 above), C. Eagleton, *The Responsibility of States...* (*op. cit.*), pp. 63 *et seq.*; A. Verdross, *Völkerrecht (op. cit.)*, p. 114; H. W. Briggs, *The Law of Nations*, 2nd ed. (London, Stevens, 1953), pp. 62-63; Vitta, *La responsabilità degli Stati per fatti di organi legislativi* (Milan, 1953), pp. 29 *et seq.*; M. Sørensen, "Principes de droit international public", *Recueil des cours...* 1960-III, (Leyden, Sijthoff, 1961), vol. 101, pp. 110-111; H. Waldock, "General course on public international law", *Recueil des cours...* 1962-II, (Leyden, Sijthoff, 1963), vol. 106, pp. 125 *et seq.*; I. Brownlie, *op. cit.*, pp. 32-33; L. Cavaré, *Le droit international public positif*, 3rd ed. brought up to date by J.-P. Quéneudec (Paris, Pédone, 1967), t. I, pp. 177 *et seq.*; and Institute of the State and of Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 428.

<sup>186</sup> "A State cannot evade the responsibility established by the present rules for reasons of its own constitutional law or practice." (*Yearbook of the International Law Commission*, 1969, vol. II, p. 141, document A/CN.4/217 and Add. 1, annex II).

Law at Lausanne in 1927 ;<sup>187</sup> article 2 of the draft prepared by the Harvard Law School in 1929<sup>188</sup> and article 2, paragraph 2, of the draft prepared by the same institute in 1961 ;<sup>189</sup> article 7 of the draft prepared by the Deutsche Gesellschaft für Völkerrecht in 1930 ;<sup>190</sup> article 4, third paragraph, of the draft prepared by Professor Strupp in 1927 ;<sup>191</sup> and article 4 of the draft prepared by Professor Roth in 1932.<sup>192</sup>

103. There is no exception to the principle that municipal law has no effect on the characterization of an act of the State as internationally wrongful. One cannot cite as an exception the cases where certain rules of international law—such as those dealing with the treatment of aliens—prescribe that the State should have some particular kind of conduct when that conduct is also required by municipal law. It is true that in such cases there can be no internationally wrongful act when the conduct of the State conforms to municipal law, but even then it is not the conformity of the conduct to national legal rules which precludes international wrongfulness, but the fact that conduct conforming to municipal law constitutes, by the very fact of that conformity, the performance of the international obligation.

104. The search for appropriate wording to define the principle dealt with in this section does not seem to entail any major difficulties. At the Conference for the Codification of International Law (The Hague, 1930), States indicated certain requirements they wished to see respected in the "technical" formulation of the article on that subject. The wording adopted should be such that a State could not evade its international obligations by invoking constitutional or other provisions or legislative provisions or by seeking to plead the non-existence or existence in its national legal order of the provisions or means of implementation necessary for the execution of a given international obligation. In fact, it is primarily a question of ensuring that the definition adopted expresses precisely the idea that the identification of an act as an internationally wrongful act of the State is totally independent of the way in which that same act is regarded by the internal legal order of that State. It is also necessary to ensure that the definition encompasses all the different aspects of that independence. In view of those requirements, a brief, comprehensive reference to municipal law seems

<sup>187</sup> *Annuaire de l'Institut de droit international, 1927 (session de Lausanne)* (Paris), t. III, p. 330; *Yearbook of the International Law Commission*, 1956, vol. II, p. 227, document A/CN.4/96, annex 8.

<sup>188</sup> "The responsibility of a state is determined by international law or treaty, anything in its national law, in the decisions of its national courts, or in its agreements with aliens, to the contrary notwithstanding." (*Yearbook of the International Law Commission*, 1956, vol. II, p. 229; document A/CN.4/96, annex 9).

<sup>189</sup> "A State cannot avoid international responsibility by invoking its municipal law." (*ibid.*, 1969, vol. II, p. 143, document A/CN.4/217 and Add.1, annex VII).

<sup>190</sup> *Ibid.*, p. 150, annex VIII.

<sup>191</sup> "Defective legislation, and particularly in federal States constitutional limitations upon the legislative power of the central government, can neither release nor diminish the responsibility of a State." (*ibid.*, p. 151, annex IX).

<sup>192</sup> *Ibid.*, p. 152, annex X.

to be the most appropriate, since it is both the simplest and most general:<sup>193</sup> besides constitutional and legislative provisions, it encompasses provisions emanating from any other source provided for in the internal legal order and in particular the decisions of courts.

105. In view of the preceding considerations, we feel we can propose, for the definition in question, the following text:

**Article 4. Irrelevance of municipal law to the characterization of an act as internationally wrongful**

**The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law.**

## CHAPTER II

### The "act of the State" according to international law

#### 1. PRELIMINARY CONSIDERATIONS

106. At the beginning of chapter I, section 2, it was stated that in international law the first prerequisite for establishing that an internationally wrongful act has been committed is what has been called the subjective element of the wrongful act. It was also pointed out that this subjective element consisted of conduct by human beings which, by reason of its characteristics, must be attributable, not to the human being or group of human beings which actually engaged in it, but to the State as a subject of international law. It was then shown that the conduct in question could consist of either an action or an omission. Lastly, as a preliminary step, the following three comments were made concerning the general features of the problem:

(a) The attribution to the State of the conduct actually engaged in by physical persons is necessarily based on juridical data and not on the recognition of a link of natural causality.

(b) The attribution to the State of the action or omission of an individual or group of individuals as an internationally wrongful act which is a source of international responsibility concerns the State as a "person under international law". The notion of the State with which we are concerned here has therefore nothing to do with the notion of the State as a legal order; furthermore, it should not be confused with the notion of the State as a person under municipal law.

(c) The attribution to the State as a subject of international law can take place only on the basis of interna-

tional law itself. Such attribution is thus completely distinct from and independent of the attribution of the same act to the State as a subject of municipal law which may, possibly but not necessarily, take place under the latter law (without prejudice to the possibility that international law may take the situation existing in municipal law into account for its own purposes).

107. Our task now is to develop this basic notion of the "act of the State" according to international law, that is, the attribution to the State of the conduct of an individual for the purpose of attaching legal consequences to that conduct at the international level. In particular, we shall have to determine when, in what circumstances and in what conditions such attribution takes place. The problems to be solved have one common denominator: the basic task is to establish what conduct engaged in by individuals can be considered, for the purposes with which we are concerned, as conduct of the State, and in what conditions such conduct must have been engaged in, in order to be attachable to the State as a subject of international law. In this connexion, we must first of all point out that from a theoretical standpoint there is nothing to prevent the conduct of physical persons or groups of physical persons whose link with the State might even have no relation to the latter's organization from being attached to the State as a subject of international law: for example, the actions or omissions of a State's nationals or of individuals residing in its territory could be considered acts of the State. In practice, however, we find that what is, as a general rule, attributed to the State at the international level are the acts of persons or groups of persons who form part of its "organization", in other words, the acts of its "organs" or "agents". As indicated in paragraphs 25-28 of the introduction, we shall see in the following sections of this chapter how this basic principle is defined and completed, and determine its scope and the limitations and derogations to which it is subject. We shall examine the question whether the activities of certain categories of agents and organs should be considered as acts of the State as a subject of international law. We shall also have to consider whether, in addition to the conduct of persons who form part, properly speaking, of the machinery of the State, the conduct of other persons is also attributed to the State at the international level: the conduct of persons who are organs of institutions other than the State itself or who engage in what are in fact public activities although they are not, in the proper sense of the term, "organs", or, in any case, organs of that particular State. We shall then examine the question whether one should consider as acts of the State under international law certain conduct which persons whose activities are in principle attributed to the State adopt in conditions which could, in the specific case in question, cast doubt on the legitimacy of that attribution. Lastly, we shall complete the picture by examining the treatment accorded by international law to the conduct of private individuals acting solely in that capacity and the conduct of groups whose activities are directed against the State.

108. In this complicated, multifaceted analysis we shall, of course, be guided by the criteria which have been

<sup>193</sup> The Third Committee of the 1930 Conference for the Codification of International Law preferred the expression "municipal law" to the wording "provisions of its municipal law" used by the Preparatory Committee in the bases of discussion.<sup>a</sup> At the United Nations Conference on the Law of Treaties, the Drafting Committee—as has already been noted (see above para. 101)—generally preferred to use the term "internal law" rather than "constitution" and "laws".

<sup>a</sup> For the text of the bases of discussion, see *Yearbook of the International Law Commission, 1956*, vol. II, p. 223, document A/CN.4/96, annex 2.

applied throughout the preparation of this report, in other words, we shall use an essentially inductive method, proceeding from the examination of the practical application of principles in judicial decisions and State practice to the theoretical formulation of those principles. It must be acknowledged, however, that certain theoretical points have long influenced these problems and obscured the approach to them. In order to be able to understand the substance of the problem of the attribution of the acts of its "organs" to the State as a subject of international law, and in order to be able to overcome the difficulties which arise in that connexion, it therefore seems useful to clear away in advance the influence of certain premises which are, in our view, erroneous, and of certain confusions which constitute an obstacle at every stage of the course we must follow.

109. The first point to be stressed is the need to avoid identifying the situations with which we are concerned too closely with others which are basically different despite certain common general features. As is well known, international law takes the machinery or "organization" of the State into consideration for purposes which greatly exceed those of the attribution to the State of an internationally wrongful act. All activities of the State at the international level are activities exercised by persons who, as a rule, form part of its "organization": in the first place, the completely lawful activities which consist of performing acts or producing manifestations of will with a view to attaining certain legal consequences. It may even be said that it is in this connexion that the problem of defining the "act of the State" for international purposes has been studied most thoroughly. However, the solutions proposed by the various schools of thought with regard to the specific aspects with which we are concerned often consist only of the application of a position adopted with regard to a more general and sometimes different aspect of the problem. For it is wrong to believe that the questions arise in the same way and call for an identical solution in every sphere. Attaching to the State a manifestation of will which is valid, for example, in order to establish its participation in a treaty, and attributing some particular conduct to the State in order to impose international responsibility upon it are not operations which are comparable in every respect, calling for the application of exactly the same criteria.<sup>194</sup> In any case, our present task is simply to determine the conditions in which an internationally wrongful act is attributed to the State in international law; we are not required to do anything more.

110. The aforementioned differences of opinion may also originate in terminological misunderstandings, that is to say, they may be caused by the fact that a different sense is attributed to certain basic notions. As we have said, however, the origin of these differences and difficulties is more frequently to be found in a confusion not only between different notions but between different realities. For example, this may be seen in the case of two operations which, in our view, are quite separate: the

operation of establishing the "organization" of the State (that is to say, determining which are the individual and collective "organs" which, taken as a whole, make up the State machinery) and on the other hand the operation of attributing to the State, for some purpose or other, the conduct adopted in certain conditions by persons belonging to the State organization. In this case, the original confusion is combined with the additional confusion—which is perhaps even more serious—between the definition of the act of a given person as an "act of the State" in municipal law and the corresponding definition in international law.

111. This double confusion is largely to blame for the difficulties encountered by one school of thought which has had and still has many supporters and which takes as its basic premise the statement—in itself irrefutable—that the term "organization" does not and cannot mean anything but the organization which the State autonomously gives itself. According to the writers belonging to this school of thought, the "organs" of the State can therefore only be those which the State considers as such within its own legal system and whose action it regulates for its own purposes. The same writers, however, also feel obliged to deduct from this premise a consequence which is in no way a logical corollary to it. In their view, it would not be admissible in international law or municipal law to consider a manifestation of will or an action as being a manifestation of will or action of the State unless (a) the will was manifested or the action performed by a person whose status as an organ of the State is incontestable according to that State's municipal law, and (b) that person's conduct was in conformity with the rules of municipal law which define his functions and the scope of his competence. In other words, persons who in the internal legal order do not possess the status of "organs of the State" in the proper sense of the term, even when they perform, in one way or another, public functions which are clearly separate from their private activities, should be considered merely as private individuals. The same attitude should be adopted towards persons who, although organs of the State in the strict sense of the term and acting in that capacity, do not comply with the criteria established to regulate their activities. In both cases it would be inconceivable, both in international law and in municipal law, to consider an action or omission committed in such circumstances as an act of State ("acte étatique", "Hoheitsakt").

112. The advocates of this line of reasoning are then obliged to resort to artificial or contradictory solutions if they do not wish to arrive quite simply at the conclusion—which is, as we shall see, clearly contradicted by State practice—that the State is not responsible for acts committed by persons whom that State's system of municipal law does not consider as part of the State machinery or for acts committed by organs of the State in violation of the rules to which their action is subject.<sup>195</sup> In

<sup>194</sup> See, in this connexion, C. Eagleton, *The Responsibility of States* . . . (*op. cit.*), pp. 54-55; A. Ross, *op. cit.*, pp. 251-252.

<sup>195</sup> The older writers completely excluded any international responsibility of the State in such cases, or, at most, admitted it by basing it on the fact that the superior organs of the State had not prevented or at least disavowed the reproachable acts in question. See, for example, P. Fiore, *Trattato de diritto internazionale pubblico*,



such cases the writers sometimes have recourse to the idea of international responsibility for an act committed by others, which, according to some of these writers, would be comparable to the responsibility which, in their view, the State would also assume for the acts of private individuals, although it would perhaps be stricter.<sup>196</sup> On the other hand, they sometimes affirm that international practice—disregarding truth and logic or applying purely opportunist criteria—regards as acts of State, for the determination of international responsibility, acts which should not really be characterized as such, since in law such characterization can take place only under municipal law.<sup>197</sup> In this connexion, these writers often refer to the

3rd ed. (Milan, 1887), vol. I, pp. 426-427; Ch. Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Guillaumin), t. 3, pp. 135-136; F. Despagne, *Cours de droit international public*, 3rd ed. (Paris, 1905), p. 564. This idea was also supported in the report prepared by J. G. Guerrero for the Commission of Experts of the League of Nations. See also, by the same author, *La codification du droit international* (Paris, Pédone, 1930), pp. 111-112. Levin (*Orverstevnmost gosudarstv . . .* [op. cit.], pp. 72 et seq.) now maintains an analogous position.

<sup>196</sup> This is the idea advanced in the first edition of his work by Oppenheim, who uses the term "vicarious responsibility", as opposed to "original responsibility", to designate the responsibility of States for certain actions or omissions other than their own, including certain wrongful acts committed by their agents without authorization. See L. Oppenheim, *op. cit.*, pp. 337-338 and 362. According to A. Jess (*Politische Handlungen Privater gegen das Ausland und das Völkerrecht* [Breslau, Marcus, 1923], pp. 103 et seq.), the responsibility of States for acts committed outside the acknowledged competence of their author is in fact responsibility for the acts of individuals. See also in this connexion E. M. Borchard, *op. cit.*, p. 180; and A. V. Freeman, *op. cit.*, pp. 25-26.

<sup>197</sup> This theory was developed primarily in connexion with acts committed by officials which did not conform to the provisions of the law to which those officials were subject. H. Triepel (*Völkerrecht und Landesrecht* [Leipzig, Mohr (Siebeck), 1899], p. 349) observes that the State should also be responsible for the acts of its organs when they exceed the limits of their competence, despite the fact that "strictly speaking these acts, from the legal standpoint, are not acts of State" ("diese Akte sind zwar rechtlich genommen keine Staatsakte").

Anzilotti, too, in his earlier works (*Teoria generale . . .* [op. cit.], p. 132, and also *Il diritto internazionale nei giudizi interni* (Bologna, Zanichelli, 1905), reprinted in *Scritti di diritto internazionale pubblico* (Padua, CEDAM, 1956), vol. II, t. 1, pp. 429 et seq.) took as his basic premise the statement that municipal law alone determined the respective competence of the various organs of the State, and went on to deduce the corollary that the conduct adopted by an organ in violation of municipal law or in excess of its competence was not an act of State but purely the act of an individual, from whatever point of view it was examined. He nevertheless observed that in such cases international law provided that the State was responsible for wrongful acts by its officials: that responsibility was created immediately by the conduct of the official and not (as in the case of acts of private individuals) by the attitude to that conduct adopted by the State. According to Anzilotti, wrongful acts committed by officials who abuse their position, although not acts of the State, possess the external characteristics of such acts, and the State must therefore answer for the prejudicial consequences of those acts. Strupp ("Das völkerrechtliche Delikt", *Handbuch . . .* [op. cit.], pp. 37 et seq.) developed his ideas along similar lines. Concerning the theories of those who regard any organ which acts in violation of its competence as a private individual and consider the responsibility of the State following such an action as a case of responsibility for the acts of a private individual, Strupp remarks: "Diese, der Rechtslogik konforme Auffassung steht jedoch in schroffem Widerspruch zu der Rechtsauffassung der Staaten, soweit eine Kompetenzüberschreitung in Betracht kommt." (*ibid.*, p. 39) ("This view, which is in conformity with legal logic, is nevertheless in clear contradiction with the legal concept of States, inasmuch as it concerns an act in excess of

security of international relations as a condition which would in fact make it necessary to assume that all the actions and omissions of an organ are in conformity with the law and the organ's competence so long as they have the external appearance, if not the intrinsic reality, of conformity.<sup>198</sup> Now this assumption may have the effect of reconciling the conclusions with State practice, but it nevertheless remains in clear contradiction with the premises adopted by the jurists mentioned above.

113. In other schools of thought we find the negative consequences of the lack of a distinction between the determination of the organization of the State and the definition of the conditions in which the actions or omissions of persons forming part of that organization can be attributed to the State as a subject of international law. In particular, these consequences may be noted in the case of the advocates of a concept which is very different from and indeed almost diametrically opposed to the concept adopted by the writers mentioned above. The starting-point is still the idea that the two operations in question are inseparable. However, the writers belonging to the second school quite rightly wish to restore to international law the task of determining the conditions in which some particular conduct or manifestation of will can be recognized as being conduct or will of the State at the international level. They conclude that everything should be attributed to international law, that is to say, they also assign to it the task of determining the organization of the State as a subject of international law. Of course, such a conclusion is inconceivable unless one adopts a notion of "organization" which is highly distorted in comparison with the usual meaning of this term. According to the view which is expressed clearly by some writers in this group, the "organization" of an entity,

competence"). [Translation by the United Nations Secretariat.] Strupp (*ibid.*, p. 42) goes on to observe that according to the legal concept of States, the State answers for the acts of its organs, even when they have acted in excess of their competence, provided that they remained within the general framework of their functions and thus appeared to be acting as organs.

Dahm (*op. cit.*, pp. 181-182), considers that the organization of the State is established by the norms of its municipal law, which determine which persons act for the State and define their competence. According to Dahm, that very fact establishes the limits of responsibility in international law; in that respect, the international legal order follows municipal law. However, for reasons pertaining to justice and security it is essential that the conduct of organs of the State which act in excess of their competence while appearing to perform their functions should be considered as conduct of the State.

Among modern Italian writers, Monaco (*op. cit.*, p. 368) adopts as a general criterion the consideration that "if the organ, in exercising the powers of its function, violates international law, it is not illogical for the injured State to interpret broadly the sphere of attributions of the organ and to seek to attribute the responsibility for that act to the State to which the organ belongs."

<sup>198</sup> See Triepel, *op. cit.*, loc. cit.: Anzilotti, *Teoria generale . . .* (*op. cit.*), p. 132; Jess, *op. cit.*, p. 104 (this jurist, however, criticizes the view that organs which act in excess of their competence should be considered, in practice, if not theoretically, as real organs); Strupp, "Das völkerrechtliche Delikt", *Handbuch . . .* (*op. cit.*), p. 43; Dahm, *op. cit.*, p. 182. Subsequently, when we examine in greater detail the question of the international responsibility of the State for acts committed by its organs in excess of their competence, we shall see the influence which the various opinions outlined here have had in practice on the official positions of certain governments.



considered as a subject by a given legal order, should be taken to mean the set of rules which establish the conditions under which that legal order may attribute to the entity concerned a declaration of will, an action or an omission by certain individuals. Of course, if one were to agree that the term "organization" should be given such a meaning it would be easy and even necessary to deduce that the organization of the State as a subject of the law of nations would be established by the same law.<sup>199</sup> But it seems certain that in the end such a definition of the organization of the State bears no relation to the phenomenon it is supposed to define. The "organization" of the State cannot be described as a set of "rules relating to attachment"; it is a complex of real structures, the machinery by which the State reveals its existence and works to achieve its purposes. And it is the State itself which "organizes" itself, which gives itself this machinery and provides for its functioning according to its own criteria and prescriptions. It is not the task of international law to "organize" the State, even if only for international purposes.<sup>200</sup> In order to make the contrary statement more acceptable the advocates of this theory are careful to add that in establishing its own organization of the State, international law uses, at least in principle, the rules of law established by the internal organization of the State<sup>201</sup> or refers to the internal *de facto* organization of the State.<sup>202</sup> The idea in itself is nevertheless unacceptable.

<sup>199</sup> Perassi (*op. cit.*, p. 98) reaches this conclusion precisely on the basis of the premise mentioned above. Balladore Pallieri (*Diritto internazionale pubblico* [*op. cit.*], pp. 123-124) also conceives of the organization of a subject-legal person as the process by which the will or action of private individuals are taken into consideration by law as being the will or action of the subject-legal person; from that, he deduces that the organization of States as subjects of international law is determined by international legal rules. Similarly, Morelli (*op. cit.*, pp. 185-186) considers that the imputation of actions or manifestations of will by individuals to subjects of a given legal order may be identified with the organization of those subjects and, hence, that the rules providing for the organization of subjects of international law cannot be other than the rules of international law. Sereni (*op. cit.*, 1958, t. II, pp. 456-457) considers that it is for international law to indicate which individuals or groups of individuals possess the status of organs of its subjects and to define their competence.

It should be noted that if the concept referred to here were developed to its most extreme consequences, it would be necessary to admit that in cases where it was acknowledged, if only on an exceptional basis, that the State was responsible for the acts of private individuals or other persons having no link with the organization of the State, these persons would automatically be elevated to the rank of organs of the State from the standpoint of international law.

<sup>200</sup> In criticizing the theory referred to here, G. Biscottini ("Volontà ed attività dello Stato nell'ordinamento internazionale", *Revista di diritto internazionale*, Padua, XXXIVth year, series IV, vol. XXI (1942), p. 14) rightly observes that international legal rules have nothing to do with the determination of the organization of the State for the purposes of international law.

<sup>201</sup> In determining the organization of the State-subject of international law, international law would therefore endorse the content of the rules which establish the organization of the State-subject of municipal law. See Perassi, *op. cit.*, p. 99; Sereni, *op. cit.*, t. II, p. 457.

<sup>202</sup> Morelli (*op. cit.*, p. 187) considers that for the purposes of the referral effected by international law, the *de facto* organization of the subject should prevail over its legal organization. See also V. Bellini, "Il principio generale dell'effettività nell'ordinamento internazionale", *Annuario di diritto comparato e di studi legislativi*, Rome, 3rd series (special), vol. XXVII, fasc. 3, 1951, pp. 293 *et seq.*

114. Still other writers adopt a starting-point similar to those of the schools of thought examined thus far, a choice which is facilitated by their strictly monistic concept of the relationship between international law and municipal law. This concept leads them to speak of the power of the State to determine its own organization as a concession or delegation by international law. When confronted by some of the problems mentioned above, they are thus obliged to argue that international law does not always leave it to municipal law to determine the organization of the State. According to these writers, there are exceptional cases in which international law intervenes directly in this sphere in order to determine whether a given person should be considered as an organ of the State.<sup>203</sup> The difficulties encountered by the jurists belonging to the aforementioned schools of thought would thus seem to have been overcome, but only on condition that one is satisfied with a construction which, on reflection, seems to be even more artificial and unrelated to reality than that of the jurists who assign to international law the task of determining the organization of the State as a subject of international law. In fact, according to their reasoning, international law would not merely establish directly a part of the State organization; even the remaining "normal" part of this organization would be established by the State only by virtue of an alleged "faculty" granted by the international legal order. The existence of the organization of the State, even at the purely internal level, would thus depend, in the final analysis, on international law.

115. The preceding examination of some of the best-known trends in legal literature and the impasse to which they lead, in one way or another, merely confirms the belief which was expressed at the beginning of these preliminary considerations: only a clear and clean-cut definition of the distinctions which we have mentioned will enable us to find a satisfactory solution to the problems which arise in this connexion and, above all, to eliminate those which, in the final analysis, are nothing more than artificial problems and hence, in fact, non-existent.

<sup>203</sup> A. Verdross ("Règles générales...", *Recueil des cours...* [*op. cit.*], pp. 335-336, and *Völkerrecht*, [*op. cit.*], p. 380) states that the rule according to which the organs of a State must be persons declared competent by its municipal law is valid only for *normal* cases. In exceptional cases, international law itself may "establish which individuals should be considered as organs of the State". The two cases in which that occurs are the case of a population of a non-occupied territory which, when the enemy approaches, spontaneously takes up arms to combat the invader, and the case of organs which do not possess competence under municipal law. Verdross nevertheless feels obliged to justify these exceptions by the principle of efficacy. For ideas which are in part similar, see Guggenheim, *Traité...* (*op. cit.*), pp. 5-7.

Kelsen, who in his early works whole-heartedly defended the principle that it is for national law to determine whether an act performed by an individual is or is not an act of State, that is to say, imputable to the State, has more recently contended that international law, too, may in exceptional cases determine which persons are competent to act as organs of the State and thus to perform acts of State. In his view, this is the only way of explaining why even an act performed by an individual who is neither authorized nor compelled by national law to perform it is considered as an act of State (see Kelsen, "Théorie...", *Recueil des cours...* [*op. cit.*], pp. 88-89; and *Principles...* [*op. cit.*], pp. 117-118).

116. The first misconception which must be eliminated is precisely the idea that the determination of the criteria according to which the conduct of certain persons can be attributed to the State is the same as the determination of what constitutes the organization of the State. We have already pointed out, in passing, that the term "organization" of the State must be taken to mean the machinery of the State, the complex of concrete structures through which it manifests its existence and performs its actions. Of course, the formation of these structures and provision for this action are the subject of legal regulation, which can be established only by the State itself. Logically, this regulation is a prerequisite for the operation which consists of attributing to the subject-State the conduct of a person forming part of those structures. This is necessarily true even if the question is raised only within the framework of the internal order, that is to say, if the conduct in question is considered only as an act of the State as a subject of national law. When one attributes to the State a certain action or omission of a person or group of persons, one does not thereby give them the status of organs of the State; one simply establishes a consequence of the fact that these persons are organs and have the legal capacity to act on behalf of the State. In other words, the status of organs possessed by the person whose conduct is being examined is the premise or condition and not the effect of considering that conduct as an act of the State.

117. This statement is even more valid when the conduct of a person or group of persons is attributed to the State as a subject of international law and not as a subject of municipal law. For the national legal order, the organization of the State—structures and functioning of which are determined wholly by legal norms pertaining to that order—has a legal character. On the other hand, the formation and regulation of the same organization are entirely alien to the legal provisions of the international order; for the latter system, the internal organization of the State is, as a whole, merely a fact,<sup>204</sup> just as the municipal law criteria which govern the action of the State are merely facts. This is nothing but an application of the general principle recognized by the Permanent Court of International Justice in its Judgment No. 7 of 25 May 1926 and confirmed by the Court in subsequent decisions, according to which "from the standpoint of international law [...] municipal laws are merely facts".<sup>205</sup> Thus, although it is true that the fact that an individual or group

of individuals forms part of the organization of the State should be considered only as a possible premise for the attribution of conduct engaged in by that individual or group to the State as a subject of international law, it should nevertheless be stressed that from the standpoint of international law this premise is a *de facto* premise and not a *de jure* premise. The State machinery is always a fact for the international legal system; its structures are not "received" into that system and do not acquire the character of legal structures in it, even if international law takes them into consideration for its own purposes. One must not be misled by the use of the term "referral" (*renvoi*) which is sometimes used to describe this phenomenon.<sup>206</sup> International law merely presupposes the organization which the State has adopted within the framework of its internal law; it takes account of its existence in the national legal order as a fact on which it bases some of its findings.<sup>207</sup>

118. On the basis of the preceding considerations it would seem useful to sum up the essential conclusions which emerge from the line of reasoning developed thus far.

119. The first conclusion concerns the meaning which should be attributed, if one wishes to be exact, to the frequently repeated statement that in international law the conduct of the agents or organs of the State subject of that law is attributed to the State in order to impose responsibility upon it, if appropriate. This does not mean that the persons concerned possess or acquire by virtue of that attribution the legal status of an organ of the State in international law. Correctly interpreted, the aforementioned proposition simply means that in international law the conduct of persons or groups of persons to whom the legal status of organ of the State is attributed in the internal order, and solely in that order, is in principle considered as an act of the State. It should also be noted that this statement is not valid solely in the usual case, in which the State determines its organization in complete freedom. From this point of view the situation remains the

<sup>204</sup> This idea is stated clearly by Marinoni (*op. cit.*, pp. 115 *et seq.*). This writer observes that "The State exists and manifests itself through the organization of agents and officials; if the State exists internationally, it pre-exists in and through this organization [...]. This organization of State officials exists also for international law, as an expression of the existence of the State, [...] but in a different way than for municipal law, from which that organization emanates immediately and exclusively. For municipal law that organization has a legal character, for it depends directly on that law; for international law it is a fact, precisely because it is alien to that law and is merely presupposed." (*ibid.*, pp. 117-118) [Translation by the United Nations Secretariat].

For a cogent criticism of the idea that the organization of the State as a subject of international law is an organization established by international law, see Arangio-Ruiz, *Gli enti soggetti* . . . , *op. cit.*, pp. 343 *et seq.*

<sup>205</sup> Case concerning certain German interests in Polish Upper Silesia (Merits), 25 May 1926, *P.C.I.J.*, series A, No. 7, p. 19.

<sup>206</sup> This is certainly not the form of referral by which the norms of international law would take over and endorse the content of the norms of municipal law, as some have argued (for example, Perassi, *op. cit.*, p. 99; and Monaco, *op. cit.*, p. 320). Anzilotti (*Corso* . . . , *op. cit.*, p. 387), while referring in this connexion to "referral" to municipal norms by international norms, stresses that international law, by imputing the action of an individual to the State, merely makes the relationship between the individual and the State, which is recognizable on the basis of municipal law, a prerequisite ("*presupposto*") for that imputation.

<sup>207</sup> See Ago, "Le délit international", *Recueil des cours* (*op. cit.*), pp. 464-465:

"The internal organization of the State and the status of organ possessed by certain persons within that organization have no legal value for international law. They are merely facts, the material premises which the law of nations uses as guide-marks for the legal judgements which it seeks to formulate. [...] recourse [to the internal organization] does not imply the attribution of any legal value to that organization in the system which has recourse to it. In short, the organ of the State has the legal status of an organ only within the internal legal order; from the standpoint of the international order, the status of organ is regarded only as a factual condition necessary in order to examine the conduct of that organ and evaluate it as legal conduct of the State." (Translation by the United Nations Secretariat).

J.-P. Quéneudec (*op. cit.*, pp. 29-30) agrees with these views.

same in the exceptional cases in which international law limits the freedom of the State to establish its organization as it wishes. In such cases, international law does not itself establish directly the machinery of the State or part of that machinery; it merely imposes on the State an obligation which the State respects in choosing to adopt one type of organization rather than another. However, the organs established in conformity with such an obligation are not organs of international law. Like the other organs which are freely chosen, they are organs of municipal law and the international legal order may regard the provisions of municipal law concerning both types of organ as a factual condition for the attribution of their actions or omissions to the State subject of international law.

120. The second conclusion is that international law is completely free when it takes into consideration the situation existing in the internal legal order. The attribution of an act to a State in international law is clearly wholly independent of the attribution of that act in national law.<sup>208</sup> In the context of the national legal system, it may be logical to attribute to the State (for example, for the purpose of imposing an administrative responsibility upon it) only the acts performed by persons having the *de jure* status of organs and to preclude such attribution when those organs act outside the limits fixed by the rules of that system. However, these limitations have no *raison d'être* in the context of international law. As we have already pointed out, international law is perfectly free to make or not to make the attribution of some particular conduct to the State subject of international law dependent on the fact that the individual who engaged in that conduct is or is not regarded as an organ of the State by national law. The consideration of certain acts as acts of the State in international law may be based on criteria which are both wider and more limited than the corresponding consideration in municipal law. Indeed, we shall see that in international practice the conduct of persons who are organs of public institutions other than the State

and the conduct engaged in by organs of the State or other entities outside the limits of the competence attributed to them by municipal law is treated as an act of the State subject of international law. This is not surprising and does not call for exceptional justification through recourse to any explanation or excuse. At the same time, however, it does not indicate any intention on the part of international law to insert into that State machinery "organs" which the State itself has not designated as such or to make any change in the organization of the State from the outside.

121. The third and last conclusion flows automatically from the freedom which we have acknowledged international law possesses with regard to the determination of the conditions in which it admits that some particular conduct should be considered as an act of the State at the international level, and from the independence of that determination with regard to any determination that may be made by national law. As we have said from the outset, the purpose of the lengthy arguments developed in these preliminary considerations and of our detailed examination of the various approaches to the subject is to clear the way for the specific consideration of the questions which form the subject of this chapter. We can now be certain that in our work we can completely disregard the theoretical considerations on which so many jurists have focused their attention. Our work must be based solely on what actually happens in the life of international society and the findings which result from an examination of State practice and the decisions of international tribunals. We must concentrate on determining what conduct international law really attributes to the State which is the subject of that law, and not the conduct which international law should attribute to that State according to a given abstract concept.

## 2. ATTRIBUTION TO THE STATE, SUBJECT OF INTERNATIONAL LAW, OF THE ACTS OF ITS ORGANS

122. In the preceding preliminary considerations<sup>209</sup> it was pointed out that observation of what actually happens in international life makes it possible to formulate an initial indisputable statement: the acts of persons or groups of persons who form part of the internal machinery of the State, in other words the conduct of those who, in the legal order of the State, are properly designated as "organs" or "agents" of the State, are, as a general rule at least, considered as "acts of the State" from the standpoint of international law. We have also seen that many writers have sought to construct theoretical speculations on this basis, by transforming what should have remained a simple description of facts into a sort of absolute principle of logic, flowing from such and such an abstract premise, a procedure which has given rise to many difficulties. In the light of the conclusions drawn at the end of that analysis, we can now see that the statement mentioned above should be regarded strictly as a statement, that is to say, as the objective result of an

<sup>208</sup> The distinction between the two attributions and their independence of one another is clear to many writers. We have seen above (para. 113) that the desire to emphasize the autonomy of international law in determining in what conditions conduct may be attributed to the State at the international level has even led certain jurists, particularly Italian jurists, to put forward the idea that international law itself determines the organization of the State as a subject of international law. Other writers, such as J. G. Starke (*op. cit.*, p. 110), without going so far, also state that international law is fully autonomous in this respect. A. Ross (*op. cit.*, p. 251) says:

It is the latter [international law] which determines whose actions can be ascribed to a State in the sense that they constitute the normal basis of the international responsibility of that State. [Italics supplied by the Special Rapporteur.]

For Meron (*op. cit.*, p. 88), "imputability is an independent process of international, not of domestic, law". Reuter "Principles . . .", *Recueil des cours* . . . [op. cit.], p. 603, and especially *La responsabilité internationale* [op. cit.], p. 87) states effectively that "imputation under municipal law is not necessarily the same as imputation carried out under international law, and it is, of course, the latter which is determinant in the case of international responsibility" [Translation by the United Nations Secretariat].

See also C. F. Amerasinghe, "Imputability in the law of State responsibility for injuries to aliens", *Revue égyptienne de droit international* (Cairo), vol. 22, 1966, pp. 96 and 104.

<sup>209</sup> See para. 107 above.

examination of what actually happens in inter-State relations. We are also in a position to affirm that this statement in itself is not necessarily absolute and, above all, that it is not exclusive. In other words, we see that in the sphere of international legal relations the conduct of those who are regarded as organs of the State in the internal legal order is attributed to the State as a subject of international law. However, this should not lead us automatically to draw far-fetched conclusions. It is not implied *a priori* that the actions or omissions of any person regarded as an organ of the State should be considered without more ado as acts of the State at the international level; only further careful analysis of the facts will enable us, if appropriate, to make this further point. Above all, there is no implication that, in acknowledging that the conduct of organs of the State according to the internal legal order is attributed to the State as a subject of international Law, one has exhausted the list of types of conduct which may be considered "acts of the State" for the purposes of attaching international responsibility to those acts. The analysis of the facts will likewise show that the conduct of other persons who are not in such a situation in relation to the State is also attributed to the State in international law and may thus be the source of international responsibility for the State. It must therefore be clearly borne in mind that what we are saying here is merely a starting-point which will subsequently be completed by a series of other points resulting from the additional findings derived from the examination of international life.

123. That being so, our first task is precisely to verify that the point to which we have referred does actually correspond to the facts of international relations. There is no doubt that the principle that the State is responsible for offences committed by its agents has long been recognized in international judicial decisions. We must, however, point out that in most cases this principle is simply presupposed or taken for granted. It is implicitly reaffirmed in innumerable cases and underlies the decisions taken in almost all the cases that we shall examine, for other purposes and from other aspects, in the following sections of this chapter. We shall therefore confine ourselves to mentioning here the cases in which the principle in question has been expressed in a particularly clear and explicit manner.

124. In the *Moses case*, for example, settled on 14 April 1871 by the Mixed Claims Commission Mexico/United States of America, constituted under the Convention of 4 July 1868, the umpire Lieber, affirming that Mexico was responsible for the act of a Mexican officer, commented:

An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority.<sup>210</sup>

An even clearer assertion is given in seven arbitral awards in the *Affaire des réclamations des sujets italiens résidant au Pérou* (concerning the damage suffered by Italian subjects during the Peruvian civil war of 1894-1895) rendered at Lima on 30 September 1901. Each of these awards reiterates that:

[...] a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents" [Translation from French].<sup>211</sup>

The criterion of attributing to the State, for the purposes of international responsibility, the acts of its "leaders", "agents" and "organs" is also confirmed in several other arbitral awards; for example, the award rendered on 8 May 1902 by the arbitral tribunal established by the Protocol of 19 December 1901 between the United States of America and El Salvador in connexion with the claim of the *Salvador Commercial Company*,<sup>212</sup> the undated decision of the Mixed Claims Commission Italy/Venezuela constituted under the Protocols of 13 February and 7 May 1903 in the *Sambiaggio case*,<sup>213</sup> the undated award of the Mixed Claims Commission Netherlands/Venezuela constituted under the Protocol of 28 February 1903 in the *J. N. Henriquez Case*,<sup>214</sup> the award rendered on 9 May 1934 by the arbitrator Algot Bagge in the *Finnish Ship-owners Case* (Great Britain v. Finland),<sup>215</sup> and so on.

125. In State practice, we should note the positions adopted in connexion with specific disputes and, more particularly, the replies by Governments to points III, IV and V of the request for information addressed to them by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930).<sup>216</sup> The replies unanimously express, explicitly or implicitly, the juridical conviction that the actions or omissions of *organs* of the State which give rise to a failure to fulfil an international obligation must be attributed to the State as internationally wrongful acts of the State. At the Conference itself, on 18 March 1930, the French delegate submitted to the members of the Third Committee a proposal designed precisely to establish the responsibility of the State for any failure "on the part of its organs".<sup>217</sup> The Third Committee of the Conference subsequently adopted in first reading, by the unanimous vote of the thirty-five countries represented, article 1—to which we have already referred on more than one occasion—the text of which also provides that international responsibility shall be incurred by a State as a consequence of "any failure on the part of its organs to carry out the international obligations of the State".<sup>218</sup>

126. All the draft codes on international responsibility prepared by public institutions or learned societies for-

<sup>211</sup> United Nations, *Reports of International Arbitral Awards*, vol. XV (United Nations publication, Sales No. 66.V.3), p. 399 (Chiessa claim); p. 401 (Sessarego claim); p. 404 (Sanguinetti claim); p. 407 (Vercelli claim); p. 408 (Queirolo claim); p. 409 (Roggero claim); p. 411 (Miglia claim).

<sup>212</sup> *Ibid.*, p. 477.

<sup>213</sup> *Ibid.*, vol. X (Sales No. 60.V.4), p. 512.

<sup>214</sup> *Ibid.*, pp. 714-715.

<sup>215</sup> *Ibid.*, vol. III (Sales No. 1949.V.2), p. 1501.

<sup>216</sup> League of Nations, *Basis of Discussion...* (*op. cit.*), pp. 25 *et seq.*, 41 *et seq.*, 52 *et seq.*; *Supplement to volume III* (*op. cit.*), pp. 2-3, 6 *et seq.* The three points of the request for information refer respectively to acts of the legislative organ, acts relating to the operation of the tribunals and acts of the executive organ.

<sup>217</sup> See A. Ch. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, C.N.R.S., 1965), vol. III, No. 898, pp. 524.

<sup>218</sup> See *Yearbook of the International Law Commission, 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>210</sup> J. B. Moore, *op. cit.*, vol. III, p. 3129.

multate in similar terms the principle that the conduct of the organs of the State is attached to the State for the purpose of determining international responsibility.

Article 1 of the draft code of International Law prepared in 1926 by the Kokusaiho Gakkwai, provides for the attribution to the State as a source of responsibility of any

wilful act, default or negligence of the official authorities in the discharge of their official functions.<sup>219</sup>

Rule I of the draft on "International responsibility of States for injuries on their territory to the person or property of foreigners", prepared by the Institute of International Law in 1927, refers in this connexion to

any action or omission [. . .] whatever be the authority of the State whence it proceeds: constitutional, legislative, governmental, administrative or judicial.<sup>220</sup>

Article 7 (a) and (b) of the draft convention on "Responsibility of States for damage done in their territory to the person or property of foreigners", prepared in 1929 by the Harvard Law School, refers to the wrongful act or omission of "higher authorities" or "subordinate officers or employees" within the scope of their office or function.<sup>221</sup> Article 15 of the draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School in 1961, provides for the attribution to the State, as a wrongful action or omission, of

the act or omission of any organ, agency, official or employee of the State acting within the scope of the actual or apparent authority or within the scope of the function of such organ, agency, official or employee."<sup>222</sup>

Article 1 of the draft prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht refers in paragraph 3 to the

"[. . .] acts or omissions of the constituent or legislative power, of the Government, of the administrative authorities, of the courts or of the corporations and agencies which perform public functions in its [the State's] territory." ("Akte oder Unterlassungen der verfassungsgesetzenden oder gesetzgebenden Gewalt, der Regierung, der Verwaltungsbehörden, der Gerichte oder der Korporationen und Anstalten [. . .] die auf seinem Gebiete öffentliche Aufgaben erfüllen.")<sup>223</sup>

Article V of the Principles of international law that govern the responsibility of the State in the opinion of Latin American countries, prepared in 1962 by the Inter-American Juridical Committee, provides for State responsibility only in the case of "the fault of duly constituted authorities";<sup>224</sup> articles II, III and IV of the Principles of international law that govern the responsibility of the State in the opinion of the United States of America, prepared in 1965 by the Inter-American Juridical Committee, provide successively for State responsibility for acts and omissions of the legislative organ, of tribunals

and of executive officials.<sup>225</sup> The "General rule as to attribution" (of conduct to the State) given in section 169 of the *Restatement of the Law of the American Law Institute* reads as follows:

Conduct of any organ or other agency of a State, or of any official, employee, or other individual agent of the State or of such agency, that causes injury to an alien, is attributable to the State [. . .] if it is within the actual or apparent authority, or within the scope of the functions, of such agency or individual agent.<sup>226</sup>

The draft codes prepared by individual jurists contain clauses couched in similar terms.<sup>227</sup> We may also recall here that in his "Bases of discussion", prepared in 1956, Mr. García Amador, Special Rapporteur of the International Law Commission, indicated in Basis No. II that the active subjects of international responsibility included "States, in respect of acts or omissions of State organs".<sup>228</sup> The same author devoted chapter II of his preliminary draft of 1957<sup>229</sup> and article 12 of his revised preliminary draft of 1961<sup>230</sup> to "Acts and omissions of organs and officials of the State".

127. Finally, it may be said that the attribution of the acts of its organs to the State for purposes of determining its international responsibility is accepted by writers on international law, who are practically unanimous on this point, despite the differences of opinion which, as we have seen, separate them on the issue whether all the actions or omissions of the "organs" or "agents" of the State, and they alone, may or may not be attributed to it as internationally wrongful acts.<sup>231</sup> Consequently,

<sup>219</sup> *Ibid.*, p. 153, document A/CN.4/217 and Add.1, annex XV.

<sup>220</sup> See above, p. 193, document A/CN.4/217/Add.2.

<sup>221</sup> Article 1 of the Draft Treaty concerning the responsibility of a State for internationally illegal acts, prepared in 1927 by Karl Strupp, establishes the responsibility of the State "for the acts of persons or groups whom it employs for the accomplishment of its purposes (its 'organs')". (*Yearbook of the International Law Commission*, 1969, vol. II, p. 151, document A/CN.4/217 and Add.1, annex IX). Article 1 of the Draft convention on the responsibility of States for international wrongful acts, prepared by Professor Roth in 1932, provides that a State is responsible for the acts contrary to international law of "any individuals whom or corporations which it entrusts with the performance of public functions" ("natürlichen und juristischen Personen, die er mit der Erfüllung öffentlichen Aufgaben betraut") (*ibid.*, annex X).

<sup>222</sup> *Ibid.*, 1956, vol. II, p. 220, document A/CN.4/96, chap. X.

<sup>223</sup> *Ibid.*, 1957, vol. II, p. 128, document A/CN.4/106, annex.

<sup>224</sup> *Ibid.*, 1961, vol. II, p. 52, document A/CN.4/134 and Add.1, addendum.

<sup>225</sup> For the general principle according to which the actions or omissions committed in violation of an international obligation of a State by one of its "organs" or "agents" are attributed to that State, see Triepel, *op. cit.*, pp. 349 *et seq.*; Anzilotti, *Teoria generale . . .*, (*op. cit.*), pp. 130 *et seq.*, *La responsabilità internazionale . . .* (*op. cit.*), p. 164, and Corso . . . (*op. cit.*), pp. 387 *et seq.*; Marinoni, *op. cit.*, pp. 44 *et seq.*; Borchard, *op. cit.*, p. 189; Schoen, *op. cit.*, p. 43; Strupp, "Das völkerrechtliche Delikt", *Handbuch . . . op. cit.*, pp. 35 *et seq.*; Ch. de Visscher, "La responsabilité des États", *Bibliotheca Visseriana (op. cit.)*, p. 91; A. Decencière-Ferrandière, *La responsabilité internationale des États à raison des dommages subis par des étrangers* (Paris, Rousseau, 1925), pp. 64 *et seq.*; Eagleton, *The Responsibility of States . . . (op. cit.)*, p. 44; Hyde, *op. cit.*, 882; J. Dumas, *De la responsabilité internationale des États* (Paris, Sirey, 1930), p. 243; O. Hoiler, *La responsabilité internationale des États* (Paris, Editions internationales, 1930), pp. 7 *et seq.*; Kelsen, "Unrecht . . .", *Zeitschrift für öffentliches Recht (op. cit.)*, pp. 504 *et seq.*, "Théorie . . .", *Recueil des cours . . . (op. cit.)*, p. 88 *et seq.*,

<sup>219</sup> *Ibid.*, 1969, vol. II, p. 141, document A/CN.4/217 and Add.1, annex II.

<sup>220</sup> *Ibid.*, 1956, vol. II, p. 227, document A/CN.4/96, annex 8.

<sup>221</sup> *Ibid.*, p. 229, document A/CN.4/96, annex 9.

<sup>222</sup> *Ibid.*, 1969, vol. II, p. 142, document A/CN.4/217 and Add.1, annex VII.

<sup>223</sup> *Ibid.*, p. 149, document A/CN.4/217 and Add.1, annex VIII.

<sup>224</sup> *Ibid.*, p. 153, document A/CN.4/217 and Add.1, annex XIV.

there does not seem to be any need to provide further proof that the rule as such forms part of current international law.

128. Our task in this section is therefore to determine the most appropriate formula to express the principle which emerges from our analysis. In this connexion, it should be stressed that the purpose of such a formula is to define the rule which is, so to speak, the initial rule, the basic rule with respect to the possibility of considering as "acts of the State", at the international level, certain conduct engaged in by specific persons, and this, not for general purposes, but for the specific purpose of this draft, namely, that of considering those acts as internationally wrongful. The rule must express the essential idea that the actions or omissions committed by persons or groups of persons possessing the status of organs of the State according to the latter's legal system can, from the standpoint of international law, be taken into consideration as acts of the State for the aforementioned purpose. At the same time, the formula must contain nothing which implies that the rule is absolute or exclusive; the door must be left wide open for the subsequent formulation of other principles which might limit and above all complete the definition of the scope of the first rule.<sup>232</sup>

and *Principles* ... (op. cit.), p. 117 (in the case of this writer, however, the special aspects of his ideas should be set aside); Eustathiades, "Principes généraux...", *Etudes de droit international* ... (op. cit.), p. 514, and "Les sujets...", *Recueil des cours* ... (op. cit.), pp. 416 et seq.; Ago, "Le délit international", *Recueil des cours* ... (op. cit.), pp. 462 et seq.; Starke, op. cit., p. 106; Ross, op. cit., p. 252; Verdross, *Völkerrecht* (op. cit.), p. 379; Oppenheim, op. cit., pp. 340 et seq.; Morelli, op. cit., p. 343; Rousseau, op. cit., p. 361; Guggenheim, *Traité* ... (op. cit.), p. 4; Cheng, op. cit., pp. 192 et seq.; Schwarzenberger, *A Manual* ... (op. cit.), p. 166; Reuter, *La responsabilité internationale* (op. cit.), p. 86; H. Accioly, op. cit., pp. 276 and 279, and "Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence", *Recueil des cours* ... 1959-I (Leyden, Sijthoff, 1960), t. 96, especially p. 371; Ulloa, op. cit., p. 256; Schüle, op. cit., p. 331; Dahm, op. cit., p. 161; Sereni, op. cit., 1962, t. III, p. 1507; Sørensen, op. cit., p. 224; Carlebach, op. cit., p. 23; Münch, op. cit., p. 170; Patel, op. cit., p. 103; O'Connell, op. cit., pp. 1042 et seq.; Brownlie, op. cit., p. 367; Tunkin, *Droit international* ... (op. cit.), p. 192, et *Teoria* ... (op. cit.), p. 431; Amerasinghe, "Imputability...", *Revue égyptienne* ... (op. cit.), p. 95, and *State Responsibility* ... (op. cit.), p. 38; Levin, *Otvetsvennost gosudarstv* ... (op. cit.), pp. 69 et seq.; Jiménez de Aréchaga, op. cit., p. 544; Institute of the State and Law of the Academy of Sciences of the Soviet Union (op. cit.), p. 426; Elynychev, op. cit., p. 87.

<sup>232</sup> Efforts are sometimes made to express in a comprehensive, brief formula all the acts which in international law are attributed to the State for the purposes indicated; some writers speak in this connexion of the conduct of persons belonging to the "effective" or "de facto" organization of the State (see, for example, Morelli, op. cit., p. 343; Sereni, op. cit., t. III, p. 1507). However, we can only reiterate our lack of enthusiasm for such formulas. No doubt international law usually conforms to a criterion of effectiveness and no doubt this criterion also forms the basis for the findings of international law with regard to the attribution of conduct to the State. As has already been pointed out, however, this attribution has no effect on the "organization" of the State and in no way implies the existence of an "effective" organization parallel to the "legal" organization. It should be added that from the normative standpoint with which we are concerned, it would be pointless to use the term "effective organization", for it would still be necessary to determine specifically what was meant by effective organization and in what way that organization differed from the organization existing by virtue of rules of law.

129. Furthermore, there is another point relating to the formula to be adopted which should be made quite clear, even though some might consider that it could be taken for granted. There is a fundamental distinction which must always be drawn when referring to the conduct of persons to whom the State, in setting up its machinery, assigns the task of being its organs. It may be right to say, for example, that the individuals and groups who form the State are wholly integrated into the State's personality and hence completely lose their individuality. However, care must be taken not to draw from this statement conclusions which may go beyond our present purpose.<sup>233</sup> The indubitable element of truth which exists in the idea of identifying the individual-organ with the State should not make us forget that the physical person possessing the status of organ of the State loses his separate individuality only when it is acting as an organ. He is obviously still capable of acting on his own account. In each specific case, it must therefore be verified whether on that occasion the person concerned acted as an organ of the State, under cover of his status as an organ, or as a physical person separate from the person of the State. The practical difficulties which may sometimes arise in connexion with this verification in no way detract from the clarity of the distinction from the standpoint of principles. The dividing line to be established is precisely that which separates on the one hand, the actions or omissions committed by certain persons under cover of their functions as organs of the State and on the other those committed by the same persons in a private capacity. In the latter case the conduct of these persons can be considered only as the conduct of private individuals.

130. This conclusion, with the corollary which in principle precludes attribution to the State, as acts which may give rise to responsibility, of actions or omissions committed by individual-organs in a purely private capacity, is unanimously recognized in international practice and international judicial decisions. It will therefore suffice to recall here just a few examples of that recognition. For instance, Governments took a very clear position on the point at the 1930 Codification Conference. Point V, No. 2, (d) of the request for information submitted by the Preparatory Committee of the Conference concerned the question whether the State becomes responsible for "acts or omissions of officials unconnected with their official duties". The twenty Governments which dealt with that point in their replies all considered that the State was not responsible in such a case.<sup>234</sup> This criterion was subsequently accepted by all the State representatives at the Conference and was implicitly recognized in the text of article 8 of the draft adopted in first reading by the Third Committee of the Conference.<sup>235</sup>

<sup>233</sup> See, for example, Quadri (op. cit., pp. 394-395), who follows up this statement with the assertion that such individuals and groups would thereby completely lose their individuality, so that their actions could never be considered as individual acts.

<sup>234</sup> League of Nations, *Bases of Discussion* ... (op. cit.), pp. 82 et seq.; and *Supplement to Volume III* (op. cit.), pp. 3, 17.

<sup>235</sup> *Yearbook of the International Law Commission, 1956*, vol. II, p. 226, document A/CN.4/96, annex 3.



131. The same idea has been explicitly expressed on more than one occasion in arbitral awards. One of the most frequently quoted is that concerning *Bensley's Case*, rendered on 20 February 1850 by the Commission established under the Act of Congress of the United States of America of 3 March 1849. The following reason was given for the rejection of the reparations claim submitted for the detention of a young United States boy in the house of a Mexican governor:

The detention of the boy appears to have been a wanton trespass committed by the governor, under no color of official proceedings, and without any connection with his official duties.<sup>236</sup>

More recently, the French/Mexico Claims Commission (established under the Convention of 25 September 1924), in its decision of 7 June 1929 concerning the *Caire Case* stated that the State is not responsible

only in the case in which the act had no connexion with the official function and was, in fact, merely the act of a private individual.<sup>237</sup> [Translated from French.]

It should be added that in many other cases the criterion to which we are referring is not stated so explicitly but nevertheless appears to have been implicitly accepted. This is so, for example, in the *Putnam Case*<sup>238</sup> and the *Morton case*<sup>239</sup> decided by the United States of America/Mexico General Claims Commission established by the convention of 8 September 1923. These cases refer to the killing of United States subjects by Mexican policemen when off duty and for purely personal reasons; the private character of the act was obvious and the claimants themselves acknowledged that such acts could not be attributed to the Mexican State.

132. In order to complete the picture, we may recall that generally speaking the various draft codes, whether public or private in origin, set forth the principle of attribution to the State-subject of international law of the acts of its organs,<sup>240</sup> taking care to specify at the same time that these acts must be committed by the persons concerned in the performance of their functions; this is done precisely to exclude attribution to the State of conduct engaged in by the same persons in a purely private capacity. Some of these drafts even incorporate this exclusion in a separate provision.<sup>241</sup> In the case of theoretical works, almost all writers mention the need for such exclusion and some of them even lay particular stress on it.<sup>242</sup>

<sup>236</sup> See J. B. Moore, *op. cit.*, vol. III, p. 3018. See also the decision in the Case of the Castelains, handed down by the Mixed Commission France-United States established under the convention of 15 January 1880 (*ibid.*, pp. 2999-3000).

<sup>237</sup> United Nations, *Reports of International Arbitral Awards*, vol. V (United Nations publication, Sales No. 1952.V.3), p. 531.

<sup>238</sup> *Ibid.*, vol. IV (Sales No. 1951.V.1), pp. 151 *et seq.*

<sup>239</sup> *Ibid.*, pp. 428 *et seq.*

<sup>240</sup> See para. 126 above.

<sup>241</sup> This is the case in the second paragraph of article 2 of the draft of the Kokusaiho Gakkwai (*Yearbook of the International Law Commission*, 1969, vol. II, p. 141, document A/CN.4/217 and Add.1, annex II) and in the draft prepared by the Deutsche Gesellschaft für Völkerrecht (article 1, para. 4, second sentence) (*ibid.*, p. 149, document A/CN.4/217 and Add.1, annex VIII).

<sup>242</sup> See Eagleton, *The Responsibility of States . . .* (*op. cit.*), pp. 58-59; Cheng, *op. cit.*, pp. 197 *et seq.*; A. V. Freeman, "Responsibility of States for Unlawful Acts of their Armed Forces", *Recueil des*

133. In this connexion, it should perhaps be pointed out that the case of an organ of the State acting in a private capacity should not be confused with the quite different case (which we have already mentioned several times and with which we shall subsequently deal specifically) of an organ acting as an organ although in excess of its competence or, more generally, in violation of municipal law. In this case, the person concerned is not acting as a private individual; he may act in violation of the rules to which his official actions are subject, but he is nevertheless acting in the name of the State. Here and elsewhere, international law is free to deal with such actions as it sees fit and to define their consequences as it wishes; whatever the solution adopted, however, these are acts of organs and not acts of private individuals. This distinction has been clearly drawn in international arbitral decisions, for example, the award in the *Mallén Case*, rendered on 27 April 1927 by the United States of America/Mexico General Claims Commission. In this decision, two separate events were successively taken into consideration. The first involved the action of an official acting in a private capacity and the second another action committed by the same person acting in his official capacity, although in an abusive way.<sup>243</sup> In other cases, the application of the distinction has not been so easy and the tribunals have had to analyse the factual circumstances thoroughly before being able to take a decision regarding the act.<sup>244</sup> It

*cours . . . 1955-II* (Leyden, Sijthoff, 1956), t. 88, pp. 291-292; García Amador, first report to the International Law Commission (*Yearbook of the International Law Commission*, 1956, vol. II, document A/CN.4/96), para. 71, and second report to the Commission (*ibid.*, 1957, vol. II, document A/CN.4/106), chap. II, para. 11; Schwarzenberger, *International Law* (*op. cit.*), pp. 615 *et seq.*; Sereni, *op. cit.*, t. III, pp. 1509-1510; O'Connell, *op. cit.*, p. 1045; Quéneudec, *op. cit.*, pp. 82 *et seq.*

<sup>243</sup> United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No. 1951.V.1), pp. 173 *et seq.* The Mexican consul at El Paso (Texas), Mallén, was the victim of two successive assaults by an American police officer, Franco, who had a personal grievance against the consul. In the first case the Commission acknowledged that it was concerned with "a malevolent and unlawful act of a private individual who happened to be an official" and that consequently that action could not be attributed to the United States Government. In fact, this was admitted by the Mexican Government itself. In the second case, however, Franco mistreated and arrested the consul, accusing him of illegally carrying a gun, when according to the law of Texas Mallén was authorized to carry such a weapon. With regard to the second incident, the Commission Stated

It is also essential to note that both Governments consider Franco's acts as the acts of an official on duty, [ . . . ] and that the evidence establishes his showing his badge to assert his official capacity. Franco could not have taken Mallén to jail if he had not been acting as a police officer. Though his act would seem to have been a private act of revenge which was disguised, once the first thirst of revenge had been satisfied, as an official act of arrest, the act as a whole can only be considered as the act of an official. (*Ibid.*, p. 177.)

<sup>244</sup> In the Corrie case, for example, which was decided on 5 March 1929 by the United States-Mexico General Claims Commission (*ibid.*, pp. 416-417), the solution was not very clear. Disorder broke out in the streets of a Mexican town as the result of the behaviour of some United States seamen, and the local Chief of Police intervened. He wore no uniform, although some of the sailors knew he was an official. A struggle broke out between the police officer and the seamen, during which the officer drew his revolver and shot two of the seamen dead. The Commission considered the police officer's action to be an act performed in a private capacity and decided that



should be noted, however, that the principle of the distinction has never been questioned.

134. That being so, we must once again draw attention to the fact that questions may also arise in connexion with actions or omissions which, though having been committed by persons forming part of the State machinery, can be considered only as private conduct. In the more general context of the consideration of the treatment accorded in international law to the conduct of private individuals we shall, among other things, have to determine whether an action or omission by a private individual can, in certain circumstances, be attributed to the State-subject of international law; naturally, in so doing, we shall also have to refer to the specific case referred to above. We shall also have to determine whether the conduct adopted by other organs with regard to an action or omission committed by an individual-organ in a private capacity should be taken into consideration for the purpose of possible attribution to the State of an internationally wrongful act. At this initial stage, however, for the purpose of formulating the rule we are seeking to define, the only point of importance is to ensure that the demarcation line which we have mentioned is indicated with the necessary clarity. To that end, we feel it is sufficient to indicate simply that the conduct of the person-organ who, in the case in question, is acting as an organ, is attributed to the State.

135. Bearing in mind these requirements, we feel we can propose the following wording for the first of the rules established in international juridical life regarding the attribution of an act to the State for the purpose of characterizing that act as internationally wrongful:

**Article 5. Attribution to the State, subject of international law, of the acts of its organs**

For the purposes of these articles, the conduct of a person or group of persons who, according to the internal legal order of a State, possess the status of organs of that State and are acting in that capacity in the case in question, is considered as an act of the State from the standpoint of international law.

it could not be attributed to the Mexican State. In the Gordon case, settled on 8 October 1930 (*ibid.*, pp. 586-593), an officer of the Mexican army was engaged in target practice with another officer and accidentally wounded a United States citizen. The Commission, rejecting the arguments of the United States, which were based on the fact that the person who committed the action in question was a military man, based its decision on the fact that the officer had just bought the pistol in a private capacity and was trying it out. The conclusion contains the following passage:

Everything then leads to the belief that the act in question was outside the line of service and the performance of the duty of a military officer and was a private act, and under those conditions the Mexican Government is not directly responsible for the injury suffered by Gordon.

One sphere in which the application of the distinction to which we have referred has sometimes given rise to difficulties is that of looting and destruction committed by soldiers who were not acting under the command of officers. In the case concerning D. Earnshaw and others (The Zafiro case), settled on 30 November 1925 by a Great Britain-United States arbitral tribunal (*ibid.*, vol. VI (Sales No. 1955.V.3), pp. 160-165), the action of the men concerned was regarded as a private act. The decisions in other cases are less definite. See on this point A. V. Freeman, "Responsibility of States . . .", *Recueil des cours* . . . (*op. cit.*), pp. 325 *et seq.*

**3. IRRELEVANCE OF THE POSITION OF AN ORGAN OF THE STATE IN THE DISTRIBUTION OF POWERS AND IN THE INTERNAL HIERARCHY**

136. Section 2 of the present chapter was devoted to an examination of international jurisprudence, the practice of States and the opinions of writers, which enabled us to bring out the basic principle that may be said to dominate our subject. This is the principle that the conduct of persons who, under the internal legal system of the State, have the character of organs of the State, is regarded as an "act of the State" at the international level, for the purposes of possibly qualifying these acts as internationally wrongful. From the outset, however, it has been stressed that this principle is not necessarily absolute and not necessarily exclusive, and that further verification is required.<sup>245</sup> Such verification, which again must be based on an examination of the facts of international life, should enable us, first, to determine whether or not the acts or omissions of *all* persons having the character of organs of the State within the national legal framework can be regarded as acts of the State at the international level. This is the task to which we must address ourselves in the present section.

137. The question just stated in general terms can be broken down into three separate points. First, it must be asked whether only the conduct of a State organ responsible for "external" relations can constitute a wrongful act of the State under international law, or whether, on the contrary, the conduct of an organ engaged in "internal" activities may also enter into consideration in this regard. Secondly, it must be asked, still in the same context, whether it is only the conduct of a "governmental" or "executive" organ of the State which can give rise to an internationally wrongful act, or whether no distinction should be made in this respect between an act or omission of such an organ and an act or omission of a constituent, legislative, judicial or any other organ. And thirdly, there is the question whether a distinction should or should not be made in the present context between the conduct of a "higher" and that of a "lower" or "subordinate" organ.

138. The first point can be quickly disposed of. It is merely an old and obsolete theory that only an act or omission of an organ responsible for conducting the external relations of the State (Head of State, Minister for Foreign Affairs, diplomatic agent, consul) can constitute an internationally wrongful act of the State.<sup>246</sup> On this view, the State would be called upon to answer for the conduct of its "internal" organs (administrative officials, for example, or judges) only "indirectly", as it is for the action of private persons; it would be responsible only if one of its external relations organs had endorsed the act or omission of the internal organ. This view obviously resulted from the confusion we have already denounced<sup>247</sup> between the consideration of certain conduct as an internationally wrongful act of the State and the

<sup>245</sup> See para. 122 above.

<sup>246</sup> See in particular F. Liszt, *Das Völkerrecht*, 12th ed. (Berlin, Springer, 1925), pp. 281-282.

<sup>247</sup> See para. 109 above.

attribution to the State of a manifestation of will which may constitute a valid international legal act or establish participation in such an act. Without dwelling any further on this point, let us say simply that a glance at the international jurisprudence and practice is enough to show that there is no justification for the view referred to. For a long time now writers, too, have mentioned this view only to reject it.<sup>248</sup>

139. The second point may seem more complex. As already explained, the problem is to determine whether an organ whose conduct may give rise to an internationally wrongful act of the State can belong to any sector of the machinery of State or whether certain sectors must be excluded.

140. The study of possible cases of internationally wrongful acts by particular organs has often been taken up separately for the different main traditional branches of the State organization: the legislature (and constituent power), the executive and the judiciary. This procedure made it easier to analyse certain particular aspects. The study of the possible international repercussions of certain conduct on the part of legislative organs has thus been the occasion for detailed analysis of various points. One of the questions examined, for example, has been in what cases an act and, especially, an omission on the part of such an organ can in itself constitute the commission of an internationally wrongful act, and in what cases such a result is produced only when the act or omission of the legislature is directly followed by an act or omission on the part of an executive or judicial organ. Another question examined has been that of determining the moment at which the specific breach of an international obligation by an act of the legislature can be said to have been committed, when such an act involves the successive intervention of different individual or collective organs. The study of this subject has also included attempts to show that the conduct of legislative organs may enter into consideration for the purposes of attributing an internationally wrongful act to the State, either as the conduct of these organs taken as a whole, or, in certain cases, as the conduct of one of them taken separately; and sometimes it has been held that even the conduct of an individual member of a collective organ may give rise to an internationally wrongful act of the State.<sup>249</sup> The study of the

possible conduct of the various categories of executive and administrative organs has been the context in which a series of familiar questions has most frequently been raised. These have ranged from the distinction between externally acting and internally acting organs, to the distinctions between higher and subordinate organs, civil and military organs, organs acting on national territory and those acting on foreign territory, *de jure* and *de facto* organs, organs of the State administration and those of other public institutions or other collective entities, etc.; all of this, of course, from the point of view of the possible consequences at the international level of an act or omission of these different types of organ.<sup>250</sup> As to judicial organs, studies dealing specially with problems of international responsibility connected with their activities have been the occasion not only for distinguishing between the various possible cases of breach of an international obligation through the act or omission of a judge, but also for examining a number of other questions. It is in this connexion that attention has been drawn to the implications, for our problems, of the subordination of the judiciary to the legislature, to the difference (again from the point of view of possible international consequences) between a decision of first instance and a decision of last instance, to the exhaustion of local remedies, especially in connexion with that difference, and, once again, to the problem of the moment at which the commission of an internationally wrongful act can be said to have been completed. Finally, it is largely within this same framework that attempts have been made to find a definition of "denial of justice", and that attention has been drawn to certain consequences of the principle of independence of the judiciary for compensation procedures, etc.<sup>251</sup>

*degli Stati per fatti degli organi legislativi* (Rome, 1939); M. Sibert, "Contribution à l'étude des réparations pour les dommages causés aux étrangers en conséquence d'une législation contraire au droit des gens", *Revue générale de droit international public* (Paris), t. XV, vol. I, 1941-1945, pp. 5 et seq.; A. S. Bilge, *La responsabilità internazionale degli Stati e son application en matière d'actes législatifs* (thesis No. 471) (Istanbul, Tsitouris, 1950); Vitta, *La responsabilità degli Stati per fatti di organi legislativi* (op. cit.).

Among the general works which contain a separate and very detailed analysis of the acts and omissions of the organs of the different "powers" and, especially, of legislative organs, see, in particular Strupp, "Das völkerrechtliche Delikt", *Handbuch...* (op. cit.), pp. 63 et seq.; Furgler, op. cit., pp. 28 et seq.; and Münch, op. cit., pp. 183 et seq.

<sup>250</sup> For a detailed study of these questions and, in general, of the responsibility of the State for acts of administrative organs, see Strupp, "Das völkerrechtliche Delikt" *Handbuch...* (op. cit.), pp. 85 et seq.; Hoijer, *La responsabilità internazionale degli Stati* (op. cit.), pp. 75 et seq.; Furgler, op. cit., pp. 28 et seq.; Münch, op. cit., pp. 195 et seq. On the specific question of the responsibility for the acts of armed forces, see Freeman, "Responsibility of States...", *Recueil des cours...* (op. cit.), pp. 267 et seq.

<sup>251</sup> On the international responsibility of States for the acts or omissions of their judicial organs, see Strupp, "Das völkerrechtliche Delikt", *Handbuch...* (op. cit.), pp. 70 et seq.; O. Hoijer, "Responsabilità internazionale degli Stati in materia d'actes judiciaires", *Revue de droit international* (Paris, t. V, 1930), pp. 115 et seq. and *La responsabilità internazionale degli Stati* (op. cit.), pp. 39 et seq.; C. Th. Eustathiades, *La responsabilità internazionale de l'Etat pour les actes des organes judiciaires et le problème du déni de justice en droit international* (Paris, 1936); Pau, "Responsabilità internazionale dello Stato per atti di giurisdizione", Istituto di scienze giuridiche, economiche e politiche della Università di Cagliari, *Studi economico-giuridici*, Padua, vol. XXXIII, 1949-50, pp. 197 et seq.; Furgler,

<sup>248</sup> See Ch. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (op. cit.), p. 94; Ross, op. cit., p. 253; Balladore Pallieri, *Diritto internazionale pubblico* (op. cit.), pp. 126-127; Reuter, *La responsabilità internazionale* (op. cit.), pp. 86-87; Vitta, *La responsabilità degli Stati per fatti di organi legislativi* (op. cit.), p. 24; Münch, op. cit., p. 170; Quéneudec, op. cit., pp. 41 et seq.; Jiménez de Aréchaga, op. cit., p. 544. The authors of volume V of the *Kurs...* (Institute of the State and Law of the Academy of Sciences of the Soviet Union, op. cit.) indicate, however (p. 427), that in their view the responsibility of the State is greater in the case of acts or omissions of organs having authority to represent it internationally.

<sup>249</sup> Various writers have devoted special monographs or articles to international responsibility resulting from the acts of legislative organs. See O. Hoijer, "La responsabilità internazionale degli Stati in materia d'actes législatifs", *Revue de droit international* (Paris, t. IV, 1929), p. 577 et seq., and *La responsabilità internazionale degli Stati* (op. cit.), pp. 7 et seq.; L. Kopelmanas, "Du conflit entre le traité international et la loi interne", *Revue de droit international et de législation comparée*, (Bruxelles, 1937), No. 1, pp. 88 et seq., and No. 2, pp. 310 et seq.; Musacchia, *La responsabilità internazionale*

141. On reflection, however, one look at the list of these questions is enough to show that, by examining them, writers have gone far beyond the limits of the problem we are concerned with here, which is merely to establish whether or not it is permissible to consider as an "act of the State", for the purposes of qualifying that act as internationally wrongful, the conduct of all State organs, whatever their position in a classification of State powers. True, most of the questions mentioned come within the general framework of determining conditions for the existence of an internationally wrongful act, but this produces different effects from those we have to consider at the present stage. In most cases, the questions amount to asking not whether the conduct of a given person should or should not be attributed to the State as a subject of international law, but whether the conduct does or does not constitute, objectively, a breach of an international obligation. The answer does not depend on the position the organ occupies in the machinery of State; it depends on the type and nature of the obligation violated by the conduct of the organ. For instance, when we ask whether failure to adopt a certain law represents, as such, an internationally wrongful act by the State, we are not questioning the possibility of attributing to the State an omission by a legislative organ; we are, rather, raising a problem that relates to the distinction to be made between

the breach of an international obligation which directly requires the adoption of a legislative instrument, and failure to fulfil an obligation whose general object is only to produce a result that can also be achieved, if need be, by action other than legislation. The determination of the moment at which the commission of an internationally wrongful act can be regarded as completed is linked to the same distinction, and is part of the problem of determining the aspects of the offence, not of determining the acts attributable to the State.

142. A separate and isolated study of the international responsibility arising from acts or omissions of legislative, executive or judicial organs sometimes has the disadvantage of creating difficulties which have no real *raison d'être*. To mention only one of them, it is well known that the separation of powers is by no means as clear cut in practice as it would seem to be from the textbooks, and that it is very differently conceived in the different legal and political systems. Hence, the discussions as to whether a given act or omission is attributable to one power rather than to another <sup>252</sup> discussions which in the last resort are pointless since, whatever conclusion is reached on the delimitation of powers, the act or omission in question will still be attributed to the State under international law, will be defined as an internationally wrongful act and will generate responsibility of the State.

*op. cit.*, pp. 44 *et seq.*; H. Urbanek, "Das völkerrechtsverletzende nationale Urteil", *Österreichische Zeitschrift für öffentliches Recht*, vol. IX, 1958-1959, fasc. 2, pp. 213 *et seq.*; Münch, *op. cit.*, pp. 209 *et seq.*

On the specific notion of the denial of justice, see, in addition, A. S. Hershey, "Denial of Justice", *Proceedings of the American Society of International Law (at its twenty-first annual meeting, Washington, D.C., April 28-30, 1927)* (Washington, 1927), vol. I, pp. 27 *et seq.*; C. Eagleton, "Denial of Justice in International Law", *American Journal of International Law* (Washington, vol. 22, July 1928), pp. 538 *et seq.*; J. Dumas, "Du déni de justice considéré comme condition de la responsabilité internationale des Etats en matière criminelle", *Revue de droit international et de législation comparée* (Brussels, 3rd series), t. X, 1929, p. 277 *et seq.*; J. W. Garner, "International Responsibility of States for Judgments of Courts and Verdicts of Juries amounting to Denial of Justice", *The British Year Book of International Law*, 1929 (London), pp. 181 *et seq.*; Ch. Durand, "La responsabilité internationale des Etats pour déni de justice", *Revue générale de droit international public* (Paris, 3rd series, t. V, 1931), pp. 694 *et seq.*; G. G. Fitzmaurice, "The Meaning of the Term Denial of Justice", *The British Year Book of International Law*, 1932 (London) pp. 93 *et seq.*; Rabasa, *Responsabilidad internacional del Estado con referencia especial a la responsabilidad por denegación de justicia* (Mexico, 1933); A. Moussa, "L'étranger et la justice nationale", *Revue générale de droit international public* (Paris, 3rd series, t. VIII, No. 4 (July-August 1934), pp. 441 *et seq.*; Ch. de Visscher, "Le déni de justice en droit international", *Recueil des cours . . . 1935-II* (Paris, Sirey, 1936), t. 52, pp. 369 *et seq.*; O. J. Lissitzyn, "The Meaning of the Term Denial of Justice in International Law", *American Journal of International Law* (Washington), vol. 30, No. 4, October 1936, pp. 632 *et seq.*; Freeman, *The International Responsibility of States . . .* (*op. cit.*); H. W. Spiegel, "Origin and Development of Denial of Justice", *American Journal of International Law* (Washington), vol. 32, No. 1, January 1938, pp. 63 *et seq.*; C. G. Ténékidès, "Les jugements nationaux 'manifestement injustes' envisagés comme source de la responsabilité internationale des Etats", *Revue générale de droit international public*, Paris, 3rd series, t. XIII, No. 4 (July-August 1939), pp. 373 *et seq.*; J. Irizarry y Puente, "The Concept of 'Denial of Justice' in Latin America", *Michigan Law Review*, Ann Arbor (Mich.), vol. 43, No. 2, October 1944, pp. 383 *et seq.*; Gutierrez Castro, *La denegación de justicia como causa de reclamaciones internacionales* (Mexico, 1965).

143. Lastly, it should be mentioned that some of the specialized studies referred to here have been the occasion for research deliberately going beyond the sphere of the international wrong and responsibility. Some writers, though they may perhaps have started out with the idea of determining whether and in what forms also the organs of a certain branch of the State power are able to commit internationally wrongful acts, have lost sight of this objective in the course of their analysis and have indirectly engaged in a different enquiry to determine the international obligations relating to a specific sector of inter-State relations. To give some examples, when, in a study on responsibility for acts and omissions of legislative organs, a writer attempts to establish whether a law ordering expropriation without compensation constitutes a breach of an international obligation, what he is asking is not whether the legislative organs of the State can commit a wrongful act from the standpoint of international law, but whether or not the State has an international obligation not to expropriate aliens without adequate compensation. When some writers speak of aggravated responsibility of the State for the acts of military organs, what they are really trying to do is to determine the specific content of the international obligations the State is required to fulfil in its military activities. When, in a study of acts or omissions of the judiciary, writers refer to the denial of justice and its various aspects, what they are asking, albeit indirectly, is not whether judicial organs can commit breaches of international obligations, but what are the international obligations of the State in regard to the administration of justice. In other words, instead of studying the various rights and duties of States

<sup>252</sup> See, in this connexion, the ideas developed by Münch, *op. cit.*, pp. 186 *et seq.*

directly, in the different sectors of the law of nations, they study these rights and duties from the point of view of their breach—an approach which can ultimately reduce the whole of international law to the notion of responsibility. This is what produces the tangle of rules of responsibility and “primary” rules of international law which, as has been noted on several occasions,<sup>253</sup> makes it extremely difficult to isolate and define the rules relating to international responsibility proper.

144. To revert, after this preliminary clarification, to the only task we have to undertake at the present stage, it may be affirmed that there is no need to resort to ideas of progressive development of international law in order to conclude that the acts or omissions of all State organs—whether of the constituent or legislative power, the executive or the judiciary—can be attributed to the State as internationally wrongful acts. No-one now supports the old theories which purported to establish an exception in the case of legislative organs on the basis of the “sovereign” character of parliament, or in the case of jurisdictional organs by virtue of the principle of independence of the courts or the *res judicata* authority of their decisions. The cases in which certain States have resorted to arguments based on principles of this kind, and have found arbitral tribunals willing to accept them, belong to the distant past.<sup>254</sup> Today, the belief that the respective positions of the different powers of the State have significance only for constitutional law and none for international law (which sees the State only in its entity) is firmly rooted in international jurisprudence, the practice of States and the doctrine of international law.

145. In fact, for nearly a century there has not been a single international judicial or arbitral decision which has stated, or even implicitly accepted, the principle of the non-responsibility of the State for the acts of its legislative or judicial organs. On the other hand, the opposite principle has been expressly confirmed in more than one decision and adopted implicitly in many others. We may mention in detail here some examples from different periods. In the award of 8 May 1902 in the *Salvador Commercial Company Case*, the United States of Amer-

ica/San Salvador arbitration tribunal, established under the Protocol of 19 December 1901, endorsed the opinion of Halleck that:

[. . .] a State is responsible for the acts of its rulers, whether they belong to the legislative, executive or judicial department of the Government, so far as the acts are done in their official capacity.<sup>255</sup>

Twenty-four years later, in its Judgment No. 7 of 25 May 1926 in the *Case concerning certain German interests in Polish Upper Silesia* (Merits), the Permanent Court of International Justice affirmed the responsibility of Poland for the act of adopting and applying a law and, in so doing, stated the principle which has now become classical, that:

From the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.<sup>256</sup>

At about the same time, in the award of 23 July 1927 in the *Chattin Case*, the United States of America/Mexico General Claims Commission, set up under the Convention of 8 September 1923, affirmed the direct responsibility of the State for acts of its “officials”, and in this context completely identified wrongful acts committed by the courts with those committed by executive organs.<sup>257</sup> More recently, the Franco-Italian Conciliation Commission, set up under article 83 of the Peace Treaty of 10 February 1947, expressed the following opinion in its decision of 7 December 1955:

Although in some arbitral awards of the XIXth century the opinion is expressed that the independence of the courts, in accordance with the principle of the separation of powers generally recognized in civilized countries, excludes the international responsibility of the State for acts of the judiciary contrary to law, this theory now seems to be universally and rightly rejected by international doctrine and jurisprudence. The judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive. The non-observance of an international rule by a court generates international responsibility of the community of which the court is an organ [. . .]. Either the French courts ordered the liquidations in accordance with French internal law but in breach of the Treaty, and France is responsible for the legislative act violating its international obligations; or the French courts ordered the liquidations contrary to French internal Law and to the Treaty, and France is responsible for the judicial act violating its international obligations.<sup>258</sup> [Translation from French by the Secretariat.]

It must also be said, in support of the observations made here, that there have been very many international awards in which the examination of the case included examination of the question whether a State should be held responsible for acts committed by its legislative<sup>259</sup> or

<sup>253</sup> This aspect was stressed in paragraphs 55 and 89 of the first report by the present Special Rapporteur (*Yearbook of the International Law Commission*, 1969, vol. II, pp. 134 and 138, document A/CN.4/217 and Add.1) and in paragraph 7 of the second report (*ibid.*, 1970, vol. II, p. 178, document A/CN.4/233).

<sup>254</sup> The theory of the independence of the judiciary was advanced by Portugal to avoid recognizing its international responsibility in the Croft (1856) and Yuille, Shortridge and Co. (1861) cases. The Senate of Hamburg appointed as arbitrator between Great Britain and Portugal by virtue of the Agreements of 14 May 1855 and 8 March 1861, decided that the Portuguese Government could not be held responsible for the act of its courts, because they were independent (A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Pédone, 1923), t. II, 22, 23 *et seq.*, 101 *et seq.*, and 103). For an analysis of these cases, see A. Otken, “De la responsabilité internationale des Etats en raison de décisions de leurs autorités judiciaires”, *Revue de droit international, de sciences diplomatiques, politiques et sociales* (Geneva, 4th tome, January-March 1926), pp. 33 *et seq.* The theory of the *res judicata* authority of an internal judgment was advanced, for the same purpose, by Nicaragua in the *Lighthouse Case* (1880) (H. La Fontaine, *Pasicrisie internationale — Histoire documentaire des arbitrages internationaux* (Bern, Stämpfli, 1902), pp. 225-227).

<sup>255</sup> United Nations, *Reports of International Arbitral Awards*, vol. XV (United Nations publication, Sales No. 66.V.3), p. 477.

<sup>256</sup> P.C.I.J., series A, No. 7, p. 19.

<sup>257</sup> United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No. 1951.V.1), p. 286.

<sup>258</sup> *Ibid.*, vol. XIII (Sales No. 64.V.3), p. 438.

<sup>259</sup> See, in this connexion, the judgments and advisory opinions of the Permanent Court of International Justice in the cases concerning settlers of German origin in the territory ceded by Germany to Poland (P.C.I.J., series B, No. 6, 1923), particularly pp. 35 *et seq.*, the treatment of Polish nationals in the Danzig Territory (*idem.*, series A/B, No. 44, 1932, particularly pp. 24-25), and Phosphates in Morocco (*idem.*, series A/B, No. 74, 1938, particularly pp. 25-26);

judicial<sup>260</sup> organs. And in all these awards, whether it was held that the State was responsible or not, the possibility of attributing the acts in question to the State was accepted.

146. With regard to the practice of States, it certainly seems that the doctrine of the impossibility of invoking international responsibility for the acts of legislative or judicial organs has not been advanced for a long time. On the other hand, the possibility of invoking international responsibility for such acts has been directly or indirectly recognized on many occasions.<sup>261</sup> A detailed examination

and those of the International Court of Justice in the Case concerning the rights of nationals of the United States of America in Morocco (*I.C.J. Reports 1952*, pp. 176 *et seq.*), the Case of the monetary gold removed from Rome in 1943 (*ibid.*, 1954, pp. 19 *et seq.*, and particularly p. 32), and the Case concerning the application of the Convention of 1902 on the Guardianship of Infants (*ibid.*, 1958, pp. 55 *et seq.*). Reference may also be made to the awards of the United States/Norway Arbitral Tribunal (1922) in the Case of the Norwegian Shipowners' Claims (United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No. 1948.V.2), pp. 309 *et seq.*, and particularly p. 331), of the Arbitrator between Great Britain and Costa Rica (1923) in the Aguilar-Amory and Royal Bank of Canada Claims (Tinoco Case) (*ibid.*, pp. 375 *et seq.*), of the Arbitrator between the United States of America and Guatemala (1930) in the Shufeldt Case (*ibid.*, vol. II (Sales No. 1949.V.1), pp. 1083 *et seq.*, and particularly p. 1095), and the United States of America/Panama General Claims Commission (1933) in the Mariposa Development Company and Others Case (*ibid.*, vol. VI (Sales No. 1955.V.3), pp. 338 *et seq.*, and particularly p. 340).

<sup>260</sup> In this connexion, see the judgments and advisory opinions of the Permanent Court of International Justice in the "*Lotus*" case (P.C.I.J., series A, No. 10, 1927, p. 24), the case concerning the jurisdiction of the Court of Danzig (*id.*, series B, No. 15, 1928, p. 24) and the Phosphates in Morocco case (*id.*, series A/B, No. 74, 1938, particularly p. 28); and the judgment of the International Court of Justice in the Ambatielos Case (*I.C.J. Reports 1953*, pp. 10 *et seq.*, and particularly pp. 21 *et seq.*). Mention may also be made of the decisions by the Arbitrator between Great Britain and Spain (1925) in the Case of British property in Spanish Morocco (United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), pp. 615 *et seq.*, and particularly p. 646); by the United States of America/Mexico General Claims Commission in the cases of Garcia and Garza (1926) (*ibid.*, vol. IV (Sales No. 1951.V.1), pp. 119 *et seq.*), Kennedy (1927) (*ibid.*, pp. 194 *et seq.*), De Galvan (1927) (*ibid.*, pp. 273 *et seq.*), Richards (1927) (*ibid.*, pp. 275 *et seq.*), Parrish (1927) (*ibid.*, pp. 314 *et seq.*), Chase (1928) (*ibid.*, pp. 337 *et seq.*), Way (1928) (*ibid.*, pp. 391 *et seq.*, and particularly p. 400) and Chazen (1930) (*ibid.*, pp. 564 *et seq.*); by the Italy/Venezuela Arbitral Tribunal in the Martini case (1930) (*ibid.*, vol. II (Sales No. 1949.V.1), pp. 975 *et seq.*, and particularly p. 986); by the Arbitrators between Germany and Portugal in the case concerning the Responsibility of Germany for acts committed after 31 July 1914, etc. . . . (1930) (*ibid.*, pp. 1036 *et seq.*, and particularly pp. 1050 and 1058); by the British/Mexican General Claims Commission in the El Oro Mining and Railway Company Case (1931) (*ibid.*, vol. V (Sales No. 1952.V.3), pp. 191 *et seq.*); and by the United States of America/Egypt Arbitral Tribunal in the Salem case (1932) (*ibid.*, vol. II (Sales No. 1949.V.1), pp. 1165 *et seq.* and particularly p. 1202).

<sup>261</sup> By way of example, with regard to the acts of legislative organs we may quote two opinions, expressed by the British and French Governments, respectively. In a note sent to the United States Secretary of State on 28 February 1913, the British Ambassador at Washington wrote:

"International law or usage does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right, and that a nation which holds that its treaty rights have been so infringed or brought into question by a denial that they exist must, before protesting and seeking a means of determining the point at issue,

of all the positions taken to this effect would obviously take up a disproportionate amount of space. In this report, we shall therefore merely draw attention to the fact that countries which have been parties to disputes, either as claimants or as respondents, have always explicitly or implicitly recognized the possibility of attributing to the State an internationally wrongful act due to the conduct of legislative or judicial organs, as well as one due to the conduct of executive or administrative organs.<sup>262</sup> The most conclusive expression of the belief of States on

wait until some further action violating those rights in a conclusive instance has been taken" (A. D. McNair, *The Law of Treaties* (Oxford, Clarendon, 1961), p. 548).

In a note dated 23 January 1937, the Legal Department of the Quai d'Orsay expressed the following opinion:

"In theory, it is not impossible for a law to be in conflict with an international obligation of the French State constitutionally assumed, which does not necessarily mean that the obligation has been approved by Parliament.

"In such a case the international responsibility of the French State is involved, and it is for the Government either to secure amendment of the law in question by Parliament, or to indemnify the aliens whose interests are held to be prejudiced by the law or, if that is possible, to denounce the conventions which Parliament refuses to apply". [Translation by the United Nations Secretariat.] (Kiss, *Répertoire . . . (op. cit.)*, No. 903, p. 526.)

The opinions stated, particularly in the first of these notes, are not contradicted by the fact that, in certain specific cases, States have maintained that the internationally wrongful act in question was not due to the enactment of a law or failure to enact it, but to specific measures taken in application of the law, so that the violation, if any, resulted from an act of administrative or judicial organs, not of legislative organs. We have already had occasion to point out (see para. 141 above) that these attitudes are justified, in specific cases, by reference to the content of the obligation alleged to have been violated. There are, indeed, international obligations which do not specifically require, for their fulfilment, the formal enactment of a law, but only the achievement of a certain result, regardless of whether it is attained by legislation or by some other means. On the other hand, where the international obligation specifically requires action by legislative organs, no doubt has been expressed about the possibility of attributing to the State, as a breach of an obligation, the fact that its organs have not enacted the law required or have enacted a law having a different content.

With regard to the acts of judicial organs, reference may be made to the report sent on 26 February 1887 by Secretary of State Bayard to the President of the United States of America, in which it was said that:

"This Department has contested and denied the doctrine that a government may set up the judgment of one of its own courts as a bar to an international claim, when such judgment is shown to have been unjust or in violation of the principles of international law [ . . . ]" (J. B. Moore, *A Digest of International Law* (Washington, U.S. Government Printing Office, 1906), vol. VI, p. 667).

See Also Mr. Bayard's instructions to Mr. Jackson, the United States Minister to Mexico, dated 7 September 1886 (*ibid.*, p. 680).

<sup>262</sup> In his case for Poland, when an advisory opinion was requested from the Permanent Court of International Justice in the case concerning the treatment of Polish nationals in the Danzig territory, Mr. Ch. de Visscher said:

"When a State has assumed an international obligation which imposes on it a specific line of conduct, a breach of this international obligation may result from any kind of activity, even if such activity, considered from the point of view of internal law, is a purely constitutional, legislative, administrative or judicial activity. The nature of the act which constitutes departure from an internationally obligatory line of conduct or attitude is of no importance in international law." [Translation by the United Nations Secretariat.] (*Répertoire des décisions et des documents de la procédure écrite et orale de la Cour permanente de justice internationale et de la Cour internationale de justice*, vol. I, *Droit international et droit interne*, by K. Marek, Geneva, 1961, p. 29).

this point is to be found in the opinions they advanced on the occasion of the 1930 Conference for the Codification of International Law. The request for information submitted to governments by the Preparatory Committee contained three relevant points, in the first of which (point III), concerning "Acts of the legislative organ", the following question was asked:

Does the State become responsible in the following circumstances:

Enactment of legislation incompatible with the treaty rights of other States or with its other international obligations? Failure to enact legislation necessary for the purpose of implementing the treaty obligations of the State or its other international obligations?

In the second point (point IV), concerning "Acts relating to the operation of the tribunals", Governments were asked whether the State became responsible for a series of hypothetical acts or omissions relating to the exercise of judicial functions, which are incompatible with the treaty obligations or other international duties of the State. In the third point (point V), concerning "Acts of the executive organ", the same question was asked in regard to acts or omissions of organs of the executive power. In their replies, four Governments (these of Austria, Finland, Germany and Sweden) expressly stated that in their opinion the State was responsible, in principle, for the non-fulfilment of its international obligations, whether this resulted from an act of its legislative, executive or judicial organs, and that no distinction should be made in this connexion between the different categories of organ.<sup>263</sup> The other twenty States took what was, in fact, the same view by also replying in the affirmative to each of the three main questions asked in the points referred to above.<sup>264</sup> Equally concordant opinions were expressed later by the representatives who took part in the discussions in the Third Committee of the Conference.<sup>265</sup> When the discussions had ended, three of the ten articles adopted in first reading by the Committee established the responsibility of the State for acts or omissions of its legislative (article 6), executive (article 7) and judicial (article 9) organs incompatible with its international obligations.<sup>266</sup>

147. As to the doctrine of international law, a few words will suffice to complete the examination of the subject already made in the preceding paragraphs. It may be said that, regardless of the way in which the different writers choose to treat the question and the complications that sometimes result, they nevertheless agree that the conduct of all State organs, whatever branch of the State "power" they may belong to, can be regarded as an "act of the State" for the purposes of qualifying such an act as internationally wrongful.<sup>267</sup> It is characteristic of this

subject that a classical formula such as that put forward in his day by Anzilotti, to the effect that, from the point of view of foreign States, the State is seen only in its unity and not divided into its different powers, has found continued acceptance by international jurists right up to the most recent expressions of opinion, such as Soviet doctrine.

148. The codification drafts—both those from official sources and those produced by private institutions—follow the same basic principles. Nevertheless, they differ from one another as regards the criteria for drafting the formulations proposed. One method is to set out in general terms, in a single formulation, the idea of attribution to the State of the acts or omissions of its organs, without it being considered necessary to mention that they belong to one or other of the "powers" of the State. Such formulations are found, for example, in article 1 of the draft prepared by the International Law Association of Japan (Kokusaiho Gakkwai) in 1926,<sup>268</sup> in article 1 of the draft prepared by Professor Strupp in 1927,<sup>269</sup> in article 1 of the draft prepared by Professor Roth in 1932,<sup>270</sup> and in the general rule as to attribution section 169 of the *Restatement of the Law* prepared by the American Law Institute.<sup>271</sup> A second method, on the other hand, is once again to adopt a single formulation, but to state expressly that the fact that the organs belong to different branches of the State power has no relevance for purposes of attributing their acts or omissions to the State as sources of international responsibility. For instance, the first paragraph of rule I of the 1927 draft of the Institute of International Law establishes the responsibility of the State for

any action or omission contrary to its international obligations, whatever be the authority of the State whence it proceeds: constitutional, legislative, governmental, administrative or judicial.<sup>272</sup>

Schroeder, *Die Grenzen der staatlichen Verantwortlichkeit für Handlungen von Staatsorganen im völkerrechtlichen Verkehr* (Zurich, 1939); Oppenheim, *op. cit.*, pp. 357 *et seq.*; Accioly, *Tratado . . . (op. cit.)*, pp. 280 *et seq.*, and "Principes généraux . . .", *Recueil des cours* . . . (op. cit.), pp. 371 *et seq.*; Verdross, *Völkerrecht (op. cit.)*, pp. 304 *et seq.*; Rousseau, *Droit international public (op. cit.)*, pp. 370 *et seq.*; Guggenheim, *Traité . . . (op. cit.)*, pp. 7 *et seq.*; H. H. Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (Bonn, Röhrscheid, 1952); Colombo, "Responsabilidad del Estado por los actos de los poderes legislativo, ejecutivo y judicial", *Revista de ciencias jurídicas y sociales*, (Santa Fe, 1954, pp. 5 *et seq.*; Monaco, *op. cit.*, pp. 363 *et seq.*; Schüle, *op. cit.*, pp. 332-333; Dahm, *op. cit.*, pp. 185 *et seq.*; Cavaré, *op. cit.*, 1962, t. II, pp. 410 *et seq.*; O'Connell, *op. cit.*, pp. 1042 *et seq.*; Amerasinghe, "Imputability . . .", *Revue égyptienne* . . . (op. cit.), pp. 96 *et seq.*; Levin, *Otvetsvennost gosudarstv . . . (op. cit.)*, pp. 69 *et seq.*; Jiménez de Aréchaga, *op. cit.*, pp. 544 *et seq.*; Institute of the State and Law of the Academy of Sciences of the Soviet Union, *op. cit.*, pp. 427-428.

<sup>268</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 141, Document A/CN.4/217 and Add.1, annex II.

<sup>269</sup> *Ibid.*, p. 151, document A/CN.4/217 and Add.1, annex IX.

<sup>270</sup> *Ibid.*, p. 152, document A/CN.4/217 and Add.1, annex X.

<sup>271</sup> See above, p. 193, document A/CN.4/217/Add.2. However, the commentary to section 169 indicates that the term "agency", used in the text of the rule, includes the head of State as well as any legislative, executive, administrative or judicial organ, or any other State authority (American Law Institute, *op. cit.*, p. 152).

<sup>272</sup> *Yearbook of the International Law Commission, 1956*, vol. II, pp. 227-228, document A/CN.4/96, annex 8 (Italics supplied by the Special Rapporteur).

<sup>263</sup> See League of Nations, *Bases of discussion . . . (op. cit.)*, pp. 25, 26, 29 *et seq.*

<sup>264</sup> *Ibid.*, pp. 25 *et seq.*, 41 *et seq.*, 52 *et seq.*, and *Supplement to Volume III (op. cit.)*, pp. 2-3 and 6 *et seq.*

<sup>265</sup> See League of Nations, *Acts of the Conference . . . (op. cit.)*, pp. 32 *et seq.*, 59 *et seq.*, 103 *et seq.*, and 152 *et seq.*

<sup>266</sup> For the texts of these three articles, see *Yearbook of the International Law Commission, 1956*, vol. II, p. 225 and 226, document A/CN.4/96, annex 3.

<sup>267</sup> In addition to the writers already quoted in foot-notes 249, 250 and 251 above, see Anzilotti, *Corso . . . (op. cit.)*, pp. 388 *et seq.*; Eagleton, *The Responsibility of States . . . (op. cit.)*, pp. 59 *et seq.*;



paragraph 3 of article 1 of the draft prepared by the Deutsche Gesellschaft für Völkerrecht in 1930 specifies that

It is immaterial whether the violation results from acts or omissions of the constituent or legislative power, of the Government, of the administrative authorities, of the courts [. . . ]<sup>273</sup>

and paragraph 1 of article 16 of the draft convention prepared in 1961 by the Harvard Law School likewise specifies that

The terms "organ of a State" and "agency of a State", as used in this Convention, include the Head of State and any legislative, deliberative, executive, administrative, or judicial organ or agency of a State.<sup>274</sup>

A third method, finally, is to adopt separate articles for the acts or omissions of the three principal powers of the State. This method, adopted in 1929 by the Preparatory Committee of the Conference for the Codification of International Law (The Hague) in drawing up its Bases of Discussion Nos. 2, 5, 6 and 7, was also followed, as we have seen, in the articles adopted in first reading in 1930 by the Third Committee of the Conference.<sup>275</sup> It was subsequently applied in 1965 by the Inter-American Juridical Committee, in drafting its "Principles of international law that govern the responsibility of the State in the opinion of the United States of America".<sup>276</sup> Mr. Garcia Amador followed the same lines in presenting articles 2, 3 and 4 of his 1957 draft on international responsibility of the State,<sup>277</sup> and articles 3, 12 and 13 of the revised draft he prepared in 1961.<sup>278</sup>

149. As to the formulation to be proposed for the present draft, we think the comments made above regarding the drawbacks of separate treatment of the acts or omissions of organs belonging to the different powers of the State show that it would be inadvisable to follow the method of drafting separate articles. We believe it to be essential that the principle of the basic unity of the State, as it appears in international relations, should be clearly brought out by the wording adopted. On the other hand, we think it may nevertheless be useful to point out that the fact of organs of the State belonging to one or other of its "powers" does not affect the possibility of treating an act or omission of one of those organs as constituting an internationally wrongful act of the State. It must not be thought that it is unnecessary, for the clarity of the rule to be adopted, to emphasize that the constituent, legislative and judicial organs may enter into consideration for this purpose, in exactly the same way as the executive and administrative organs. Consequently, while deciding in favour of a single formulation, the Special Rapporteur expresses his preference for one close to the very clear wording adopted in 1927 by the Institute of International Law.

<sup>273</sup> *Ibid.*, 1969, vol. II, p. 149, document A/CN.4/217 and Add.1, annex VIII (Italics supplied by the Special Rapporteur).

<sup>274</sup> *Ibid.*, p. 145, document A/CN.4/217 and Add.1, annex VII (Italics supplied by the Special Rapporteur).

<sup>275</sup> *Ibid.*, 1956, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>276</sup> *Ibid.*, 1969, vol. II, pp. 153-154, document A/CN.4/217 and Add.1, annex XV, articles II, III and IV.

<sup>277</sup> *Ibid.*, 1957, vol. II, pp. 128-129, document A/CN.4/106, annex.

<sup>278</sup> *Ibid.*, 1961, vol. II, pp. 46 *et seq.*, document A/CN.4/134 and Add.1, addendum.

150. It now remains to examine the last of the three points mentioned at the beginning of this section. This is the question whether a further distinction should be made between State organs to determine those whose acts or omissions can be attributed to the State as an internationally wrongful act of the State—a distinction based on the superior or subordinate rank of the organ in the State hierarchy.

151. This question has been debated for a long time. As we shall see, the view that the acts or omissions of "minor" ("subordinate" or "lower") organs can be attributed to the State as a possible source of international responsibility just as well as the acts or omissions of higher organs, is now very largely predominant. But this has not always been so. One school of thought, of which Professor Borchard<sup>279</sup> was the principal spokesman—and which has continued, even very recently, to find some support<sup>280</sup>—has vigorously maintained the view that in international law only the conduct of higher organs is attributable to the State. It maintains that the State cannot be held responsible for an act by a minor organ unless its conduct appears to be explicitly or implicitly endorsed by superior organs; and that this is the case if the superior organs have omitted to take the necessary preventive measures or refused to punish the guilty party, or if they have refused to allow the injured party access to the courts. Thus in all these cases, the State would really be responsible only for the acts of its higher organs. In support of his thesis, the learned American international lawyer cited a number of cases from American diplomatic practice and the international jurisprudence of the time. The opinion summarized here is reflected in the draft convention prepared in 1929 by the Harvard Law School, for the Hague Codification Conference (this draft was prepared under Borchard's personal supervision). Article 7 (b) provides that:

A State is responsible if an injury to an alien results from the wrongful act or omission of one of its subordinate officers or employees within the scope of his office or function, if justice is denied to the injured alien, or if, without having given adequate redress to the injured alien, the State has failed to discipline the officer or employee.<sup>281</sup>

152. Borchard's thesis met with some reservations, however, and also with firm opposition in the legal literature of his time—even in that of the United States.<sup>282</sup> In

<sup>279</sup> E. M. Borchard, *op. cit.*, pp. 189 *et seq.*

<sup>280</sup> See, in particular, C. Fenwick, *International Law*, 3rd ed. (rev. and enl.) (New York, Appleton-Century-Crofts, 1948), pp. 280-281 and 282-283. See also G. Von Glahn, *Law among Nations: An Introduction to Public International Law*, 2nd ed., (London, Macmillan, 1970), p. 227.

<sup>281</sup> See the text of the draft article and the accompanying commentary, in Harvard Law School, *Research in International Law* (Cambridge, Mass., 1929), pp. 157 *et seq.* and 165 *et seq.*

<sup>282</sup> For the clearest and best documented opposition, see Eagleton, *The Responsibility of States . . .* (*op. cit.*), pp. 45 *et seq.* See also Strupp, "Das völkerrechtliche Delikt", *Handbuch . . .* (*op. cit.*), pp. 37 and 38 (note 5); Hyde, *op. cit.*, pp. 935-936; Hoijer, "Responsabilité internationale des Etats en matière d'actes judiciaires", *Revue de droit international* (*op. cit.*), pp. 115 *et seq.* (the position of this author is, however, very undecided); F. S. Dunn, *The Protection of Nationals: A Study in the Application of International Law* (London, Oxford University Press, 1932), pp. 125 *et seq.*



particular, he was criticized for having wrongly interpreted the affirmation that there exist other conditions for attributing to the State an act giving rise to international responsibility as a confirmation of the alleged impossibility of attributing to the State, as a source of responsibility, the conduct of its subordinate organs. In some cases it does indeed appear to have escaped Borchard that the circumstance invoked in concluding that it was impossible to attribute the conduct of a particular organ to the State was not the "minor" nature of that organ, but the fact that it had acted in complete disregard of the law and of the limits even of its apparent authority.<sup>283</sup> Of course, the competence of a minor organ, such as a policeman, a soldier, or a judge of low rank, is much narrower than that of a higher organ, so that acts manifestly exceeding such competence can occur much more easily. But it is mainly in regard to the requirement of exhaustion of local remedies and its effect on responsibility that Borchard seems to have fallen into error in developing his theory of the non-responsibility of the State for the acts of its lower organs.<sup>284</sup> The essence of the "local redress rule" consists, precisely, in laying down that, at least as a general rule, the breach of an international obligation cannot be deemed to have finally taken place so long as a single one of the organs capable of fulfilling that obligation has not yet acted in the matter. In other words, international responsibility is not incurred if there remains any other internal means by which the obligation can still be fulfilled. Now it is obvious that such a situation will occur more frequently when the organ which acted first is of inferior rank. Nevertheless, the situation in law does not change because of a mere increase in probability. Even in the case of an act or omission by a higher organ, if remedies are available against its injurious conduct there will normally be no State responsibility involved until those remedies have been exhausted. In connexion with these remarks, it must also be pointed out that a major element of confusion is introduced by the current practice of stating the problem in regard to the acts or omissions of State organs not, as would be correct, in terms of attribution of such acts or omissions to the State, but directly in terms of responsibility. The conduct of any organ is attributable to the State as a subject of international law, even when such conduct is not sufficient in itself to generate international responsibility, but must be accompanied by the conduct of other organs for their combined conduct to be regarded as an internationally wrongful act and give rise to responsibility. This basic misunderstanding is certainly one of the sources of the idea of excluding the conduct of subordinate organs from the "acts of the State".

<sup>283</sup> For example, in a letter of 14 August 1900 from Mr. Adee, the United States Secretary of State, to Baron de Fava, the Italian ambassador in Washington (Moore, *A Digest* . . . (op. cit.), p. 743) it is stated that the general rule of international law observed by the United States is that sovereigns are not liable in diplomatic procedure for damages occasioned by the "misconduct of petty officials and agents acting out of the range not only of their real but of their apparent authority".

<sup>284</sup> On this point Eagleton refers, for example, to the Lewis Case (Moore, *History and Digest* . . . (op. cit.), vol. III, pp. 3019 et seq.), in which the United States contended that it was "not responsible for the error of judgment of such subordinate officers till proper resort was had to some responsible and chief officer of the government".

153. In addition, it must be recognized that, on this point, the diplomatic practice and arbitral awards of 1850-1914, on which Borchard relied, were far from clear and uniform. The American international lawyer himself noted that there was much confusion there.<sup>285</sup> There were, no doubt, opinions and decisions which appeared to favour the thesis that the acts or omissions of "minor officials" could not be attributed to the State and, especially, that the State could not be held responsible for their conduct; but there was also much in support of the opposite view.<sup>286</sup> A close examination of the formulations used shows that one element stood out especially in a series of cases: an element calculated to justify, to some extent, the conclusion reached by Borchard and the other advocates of his thesis. The American legal system—unlike, for example, the systems of continental Europe—often provides, against injurious acts by State officials, especially those of lower rank, the possibility of personal recourse against the individual organ, not of recourse against the administration of the State as such. Hence diplomatic notes from the United States Government, or arbitral awards concerning disputes to which it was a party, sometimes pointed out that such personal recourse was available to the plaintiff, and that he should not claim against the State.<sup>287</sup> Now an opinion of this kind could be interpreted as indicating a failure to exhaust local remedies, noted in the case in question, but it could also be interpreted as an expression of the belief that the acts of lower organs, precisely because they only generate their own personal responsibility, could not be regarded as acts capable of being attributed to the State.<sup>288</sup> The confusion, then current, between the attribution of an act to the State at the internal level and the attribution of the same act to the State at the international level, clearly encouraged such a belief. This helps to explain the differences of opinion sometimes pointed out, in this connexion, in the diplomatic correspondence exchanged before the First

<sup>285</sup> *The Diplomatic Protection* . . . (op. cit.), p. 185.

<sup>286</sup> See the cases cited by Eagleton in *The Responsibility* . . . (op. cit.), pp. 46 et seq.

<sup>287</sup> In the decision in the Bensley Case, taken on 20 February 1850 by the Claims Commission established under the Act of Congress of 3 March 1849, it was stated that for injuries committed by subordinate municipal officers, the party must find his redress by a prosecution against the individual by whom the wrong was done, and while the tribunals of justice are kept open to afford this redress, an indemnity can not be demanded from the government (Moore, *History and Digest* . . . (op. cit.), vol. III, p. 3017). In the Leichardt Case, the United States member of the United States of America/Mexico Mixed Commission established under the Convention of 4 July 1868, justified his concurrence in the decision, which dismissed the claim for compensation made by the Government of the United States against the Government of Mexico, by saying that in case of injuries inflicted by "paltry petty officers drest in a little brief authority", like the governor's secretary, for instance, they [foreigners] must resort to the courts of the country, and in such cases only appeal to their sovereign when the courts of the country refuse to do their duty" (*ibid.*, p. 3134). A similar position was taken by the umpire Thornton in the cases of Slocum (*ibid.*, pp. 3140-3141), Blumhardt (*ibid.*, p. 3146), Smith (*ibid.*, p. 3146), Jennings, Laughland and Co. (*ibid.*, pp. 3135-3136), and Burn (*ibid.*, p. 3140).

<sup>288</sup> It should be noted, however, that Borchard ("Theoretical Aspects of the International Responsibility of States", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Berlin, vol. I, part 1, 1929), pp. 231-232) himself admitted that he saw no difference of principle between the category of higher officials and that of lower officials.

World War between the United States Government and European Governments.<sup>289</sup> Above all, it explains why the theory which seeks to exclude attribution of the conduct of subordinate organs to the State flourished at one time in the American literature, whereas it never found any supporters in the literature of European countries.

154. The position of the European governments amounted to regarding the acts and omissions of its subordinate organs as emanating from the State, for the purposes of generating international responsibility of the State. An expression of this view can be found in the instructions sent on 8 March 1882 by the Italian Minister for Foreign Affairs, the learned international lawyer Mancini, to the Italian Minister to Peru, regarding injuries caused to Italian subjects by troops which had taken part in the sack of Chincha:

As a general rule such responsibility is presumed, even when the injuries are not a direct consequence of the action of the Government, but of the action of subordinate authorities [ . . . ]<sup>290</sup> (In regola generale questa responsabilità si presume, anche quando i danni non sono conseguenza diretta dell'azione del Governo, ma di autorità inferiori [ . . . ].)

It should also be noted, as we have said, that the arbitral awards of the period preceding the First World War, besides some that can be interpreted in an opposite sense, provide many examples of recognition of the principle of attribution to the State, as a subject of international law, of the acts or omissions of subordinate organs; and this applies also to decisions on disputes involving countries of the American continent. In the *Moses Case*, for example, the umpire, Mr. Lieber, rejected the Mexican plea based on the subordinate character of the officer who had seized the goods of the American citizen Moses, and this rejection gave him occasion to enunciate the formula already quoted in this report,<sup>291</sup> according to which the Government, in an international sense, "is the aggregate of all officers and men in authority". In the *Maal Case*, adjudicated by the Netherlands/Venezuela Mixed Commission established under the protocol of 28 February 1903, the Commission, referring to maltreatment of a Venezuelan citizen by police officers, ruled that:

[ . . . ] the acts of their [the Government's] subordinates [ . . . ] however odious their acts may be, the Government must stand sponsor for.<sup>292</sup>

Without dwelling on further cases, we think we can conclude, in regard to the earliest period referred to thus far, that the practice of States and international jurisprudence were even then based mainly on the principle that, for purposes of international responsibility, the conduct of its subordinate organs can be attributed to the State; the contrary opinions appear, against the general background, rather as exceptions due to the special features of

certain legal systems and to systematic concepts that were still uncertain.

155. In any case, the uncertainty that may have existed in earlier times seems to have disappeared subsequently, particularly during the years preceding 1930. Governments were given an opportunity of showing what was their prevailing view on our problem, first during the preparatory work, and then during the actual proceedings, of the 1930 Codification Conference. The international jurisprudence of the last four decades does not appear to furnish any examples of dissenting decisions. The views of the authors of learned works are also almost unanimous.

156. Point IV of the request for information addressed to governments by the Preparatory Committee for the 1930 Conference, concerning acts relating to the operation of the tribunals, made no distinction between higher and lower courts; and, in the replies, no government expressed any reservations on that point.<sup>293</sup> Point V of the request for information referred separately to acts of the higher authorities of the State (No. 1, *a*) and to acts or omissions of officials (No. 2, *a*).<sup>294</sup> In its reply, the German Government (which answered all the questions in point V together), expressly stated that "[ . . . ] a minor civil servant [ . . . ] involves the responsibility of the State in exactly the same way as if an act contrary to international law had been committed by the Government itself".<sup>295</sup> The Czechoslovak Government said that "it makes no difference whether the executive organs in question are higher or subordinate bodies".<sup>296</sup> The great majority of the other replies implicitly showed adherence to the same view.<sup>297</sup> Only in the replies of the United States,<sup>298</sup> Hungary,<sup>299</sup> and Poland<sup>300</sup> are there some traces of the position taken by Mr. Borchard. Consequently, in preparing the bases of discussion for the Conference, the Preparatory Committee did not provide for any difference in treatment, for the purposes of attribution of responsibility to the State, between the conduct of higher organs and that of minor organs. At the Conference itself, the question of organs of lower rank was considered only occasionally during the discussions, and no trace of it was left in the conclusions.<sup>301</sup> Article 7 of the articles adopted in first reading by the Third Committee, concerning international responsibility of the State for acts or omissions of the executive power, and article 8, concerning the

<sup>289</sup> League of Nations, *Bases of Discussion . . .* (op. cit.), pp. 41 et seq.; and *Supplement to volume III* (op. cit.), pp. 2, 9 et seq.

<sup>294</sup> *Id.*, *Bases of Discussion . . .* (op. cit.), pp. 56 and 70.

<sup>295</sup> *Ibid.*, p. 52.

<sup>296</sup> *Ibid.*, p. 58.

<sup>297</sup> *Ibid.*, pp. 53 et seq., 56 et seq., 70 et seq.; and the *Supplement to volume III* (op. cit.), pp. 2-3.

<sup>298</sup> League of Nations, *Supplement to volume III* (op. cit.), pp. 15-16.

<sup>299</sup> League of Nations, *Bases of Discussion . . .* (op. cit.), p. 72.

<sup>300</sup> *Ibid.*, p. 73.

<sup>301</sup> The Mexican delegate proposed an amendment to basis of discussion No. 12 (which later became article 8), to provide that in the case of acts or omissions by subordinate officials, the State would not incur any international responsibility if it disavowed the act and punished the guilty official. No State supported the Mexican delegate's amendment, and he withdrew it. See League of Nations, *Acts of the Conference . . .* (op. cit.), pp. 82 et seq.

<sup>289</sup> See, for example, the position taken by Cushing, Attorney-General of the United States, on a claim made against the United States Government for the loss of a vessel through the negligence of a pilot in San Francisco (Moore, *A Digest . . .* (op. cit.), pp. 740-741.

<sup>290</sup> S.I.O.I. (Società Italiana per l'Organizzazione Internazionale) - C.N.R. (Consiglio Nazionale delle Ricerche), *La prassi italiana di diritto internazionale* (Rome, 1970), 1st series (1861-1887), vol. II, p. 862.

<sup>291</sup> See para. 124 above.

<sup>292</sup> United Nations, *Reports of International Arbitral Awards*, vol. X (United Nations publication, Sales No. 60.V.4), p. 732.

acts or omissions of officials,<sup>302</sup> used the same language for the two cases; they contained no reference to any distinction according to the rank of the organ.

157. At about the same time, the position of arbitral tribunals was established in a series of cases. The possibility of attributing, in principle, to the State, as a subject of international law, the conduct of all its organs regardless of their rank was thereby clearly confirmed. The problem of "minor" organs was discussed, in particular, in a number of cases brought before the Mexico/United States of America General Claims Commission established, as previously noted, by the convention of 8 September 1923. It is worth noting that article V of that convention excluded the application, in the bilateral relations between the parties, of the general principle of exhaustion of local remedies. Thus one cause of confusion concerning our problem was eliminated, and its solution accordingly simplified. In the *Roper Case*, decided on 4 April 1927,<sup>303</sup> the Commission paid particular attention to the possibility of attributing an act or omission by a subordinate organ to the State as a source of international responsibility. On this occasion, the Mexican agent pleaded that his Government was not responsible for the acts of a policeman; he relied on the general thesis that in international law the State is not responsible for the conduct of its "lower" organs. However, the Commission, referring to the decision in a previous case,<sup>304</sup> in which Mexico had been the claimant, and in which that thesis had not been accepted, rejected the arguments of the Mexican agent and declared Mexico responsible. The same issue was dealt with again in the *Massey Case*, decided on 15 April 1927, in which the argument based on the subordinate character of the organ (in this instance an assistant jail-keeper) was again put forward by the Mexican agent.<sup>305</sup> The Commission pointed out the uncertainty that had attended that issue in the jurisprudence of international tribunals. Nevertheless, after examining the precedents at length, it expressed the view that the conclusion of non-responsibility reached in some cases was not really based on the subordinate character of the organ committing the act or omission, but on the fact that that act or omission did not really constitute a breach of an international obligation of the State.<sup>306</sup> In this case the Commission therefore rejected the Mexican argument. Its conclusion, formulated by the United States Commissioner Nielsen, was as follows:

It is undoubtedly a sound general principle that, whenever misconduct on the part of any [...] persons [in the service of a nation], whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants.<sup>307</sup>

Following this decision, the international responsibility of

the State was recognized in a number of other cases by the Commission which, in its decision of 18 October 1928 in the *Way Case*,<sup>308</sup> reaffirmed the principle by which it had been guided. After this the parties ceased to invoke, in their pleadings before the Commission, the argument based on the subordinate rank of the official concerned. A few years later the Government of Panama tried to use this argument before the United States of America/Panama General Claims Commission, constituted under the agreement of 28 July 1926, in the *Baldwin Case*.<sup>309</sup> But the Commission, in its decision of 26 June 1933, affirmed that Panama was responsible for the acts of its police organs. The following year, according to Nielsen, a decision in the *Malamatinis Case* also stated the principle of the responsibility of the State for the acts or omissions of its officials, regardless of their rank, and in doing so followed the wording previously used in the decisions of the Mexico/United States of America Commission.<sup>310</sup> This was apparently the last time that a respondent Government tried to invoke in its defence, before an international tribunal, the argument that the conduct of minor organs should not constitute an act of the State, and consequently should not give rise to international responsibility of the State.

158. The problem posed by the subordinate nature of some State organs does not appear to have been the subject of any express statement of opinion by other international tribunals recently. But this does not mean that their principles actually followed by these bodies in certain instances were different from those so clearly and consistently affirmed by the claims commissions referred to in the preceding paragraph. They, too, had to deal in several cases with the acts or omissions of lower organs, and automatically regarded them as acts or omissions which must be attributed to the State, and to which international responsibility could therefore be attached. To cite only one example, the Italian/United States of America, Franco/Italian and Anglo/Italian Conciliation Commissions, established under article 83 of the Treaty of Peace of 10 February 1947, have often had to consider the conduct of persons regarded as minor organs of the State, such as receivers,<sup>311</sup> administrators<sup>312</sup> and policemen.<sup>313</sup>

<sup>302</sup> *Ibid.*, p. 400. The wording used is almost the same as that used by the Commission in the *Massey Case*.

<sup>303</sup> *Ibid.*, vol. VI (Sales No. 1955.V.3) pp. 328 *et seq.* On the agreement of 1926, see B. L. Hunt, *American and Panamanian General Claims Arbitration* (Washington, U.S. Government Printing Office, 1934), p. 324.

<sup>304</sup> See F. K. Nielsen, *American-Turkish Claims Settlement under Agreement of December 24, 1923 . . . Opinions and Report* (Washington, U.S. Government Printing Office, 1937) pp. 608 *et seq.*

<sup>305</sup> For the Franco-Italian Commission, see *Différend Société anonyme de filatures de Schappe* (1954) (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), pp. 605-606); *Différend concernant l'interprétation de l'article 79* (1955) (*ibid.*, pp. 431-432); *Différend patrimoine Tagliarino Filippo* (1959) (*ibid.*, pp. 481-482); *Différend patrimoine Bonomo Francesco* (1959) (*ibid.*, pp. 468-469); For the Anglo-Italian Commission, see the *Currie Case* (1954) (*ibid.*, vol. XIV (Sales No. 65.V.4), p. 24).

<sup>306</sup> See the cases concerning *Société Verdol* (1949) (*ibid.*, vol. XIII (Sales No. 64.V.3), pp. 95-96 and *Joseph Ousset* (1954) (*ibid.*, p. 262) decided by the Franco-Italian Commission.

<sup>307</sup> See the cases concerning *Dame Mossé* (1953) (*ibid.*, pp. 492 *et seq.*) and *Dame Menghi née Gibey* (1958) (*ibid.*, pp. 802-803) decided by the Franco-Italian Commission.

<sup>302</sup> See *Yearbook of the International Law Commission*, 1956, vol. II, pp. 225-226, document A/CN.4/96, annex 3.

<sup>303</sup> United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No. 1951.V.1), pp. 145 *et seq.*

<sup>304</sup> *Ibid.*, p. 147. This was in the *Quintanilla Case*.

<sup>305</sup> *Ibid.*, pp. 155 *et seq.*

<sup>306</sup> *Ibid.*, p. 159.

<sup>307</sup> *Ibid.*, p. 159.

Both the Commission and the parties to the dispute have always agreed to treat the acts of such persons as acts attributable to the State.

159. As regards the most recent doctrine, it can be said that, with one or two exceptions, international lawyers trained in the most widely different systems of law all support the view that even the conduct of minor organs can be regarded as an act of the State.<sup>314</sup> Some of them are notable for the emphasis they place on the disadvantages of adopting the old contrary view. It should also be noted that none of the codification drafts, official or private—with the exception, of course, of the Harvard draft of 1929—distinguishes, for the purposes we are concerned with, between higher and subordinate organs.<sup>315</sup>

160. The conclusion which must be reached on the third point considered in the present section is, therefore, that there is no place today for the idea, which emerged at one time, of making a distinction between officials and employees of the State according to their rank in the hierarchy. There is no reason to assume that only the conduct of high-ranking officials can be regarded as conduct of the State for purposes of international responsibility. That restriction was accepted only temporarily and to a limited extent in the practice of States, the jurisprudence and the literature, all of which now reject it almost unanimously. Even if that were not so, however, such a view would have to be opposed from the standpoint of expediency and of the progressive development of international law. To accept such a distinction would be to introduce a serious element of uncertainty; the line of demarcation between the two categories of official could only be an arbitrary one, and States would find it an all too convenient means of escaping the consequences of their own acts. The State must recognize itself in all those it has charged with acting on its behalf, from the lowest to the highest. This is a requirement which satisfies both logic and the need for clarity and security in international legal relations.

161. We can now regard as concluded the examination of the many questions that had to be dealt with in connexion with the various categories of State organs and the possibility of attributing their acts and omissions to

the State. We have reached clear and consistent conclusions on the main points, and in our view there is no need to refer separately to other problems which can be said to solve themselves. It is self-evident, for example, that for our purposes there is no reason to distinguish between officials according to the place where they perform their functions, or according to whether their employment is permanent or temporary, remunerated or honorary. The unity of the State as a subject of international law, which we have seen to follow as a firm principle from an examination of inter-State relations as they really exist, requires that the acts or omissions of every individual or collective member of the State machinery be treated in the same way as acts or omissions of the State at the international level, and that, should the occasion arise, they be capable of incurring its international responsibility. It would, moreover, be absurd to believe that there is a category of organs specially set apart for the commission of internationally wrongful acts, like the category of organs designated to perform international legal acts.<sup>316</sup> Any organ of the State, if it is materially able to act in a manner that conflicts with an international obligation of the State, can give rise to an internationally wrongful act of the State. Of course, there are organs which, by the nature of their functions, will in practice have more opportunity of doing so than others; but the great variety of international obligations precludes any prior distinction between organs which can commit internationally wrongful acts and those which can not. The sole criterion in this matter is that the organ must be engaged, through its functions, in an activity in which it can enter the field of an international obligation of the State, and possibly violate that obligation by its conduct.

162. It remains to consider what formula can best express, in the present draft, the sense of the conclusions we have successively reached. It may be emphasized, once more, that such a formula will be all the more effective if it can take the form of a single, comprehensive principle. At the same time, as we have already indicated above, it seems essential that the conclusions reached on each of the main aspects of the general problem considered here should appear with the necessary clarity. In the light of these requirements, we propose the following wording:

**Article 6. Irrelevance of the position of an organ of the State in the distribution of powers and in the internal hierarchy**

For the purposes of determining whether the conduct of an organ of the State is an act of the State in international law, the questions whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the hierarchy of the State, are irrelevant.

**4. ATTRIBUTION TO THE STATE, AS A SUBJECT OF INTERNATIONAL LAW, OF THE ACTS OF ORGANS OF PUBLIC INSTITUTIONS SEPARATE FROM THE STATE**

163. When stating the basic principle of the subject-matter of this chapter—namely, the principle of the

<sup>314</sup> See Freeman, "Responsibility of States . . .", *Recueil des cours* . . . (op. cit.), pp. 284 et seq., and earlier, by the same author, *The International Responsibility of States* . . . (op. cit.), pp. 447 et seq.; Briggs, *The Law of Nations* (op. cit.), p. 697; Verdross, *Völkerrecht* (op. cit.), pp. 380-381; Cheng, *op. cit.*, pp. 195-196; Reuter, *La responsabilité internationale* (op. cit.), p. 92; Meron, *op. cit.*, pp. 97-98; Accioly, "Principes généraux . . .", *Recueil des cours* . . . (op. cit.), pp. 392-393; Dahm, *op. cit.*, pp. 186-187; Cavaré, *op. cit.*, t. II, pp. 411 et seq. (although with some concessions, as regards the past, to the opposite view); Schüle, *op. cit.*, p. 332; Münch, *op. cit.*, pp. 202-203; Levin, *Orvetstvennost gosudarstv* . . . (op. cit.), pp. 71-72; Quéneudec, *op. cit.*, pp. 55 et seq.; Amerasinghe, "Imputability . . .", *Revue égyptienne* . . . (op. cit.), p. 106; Jiménez de Aréchaga, *op. cit.*, pp. 546-547; Institute of the State and Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 427; Greig, *International Law* (London, 1970), pp. 436-437.

<sup>315</sup> This also applies to the new Harvard draft of 1961 and to the *Restatement of the Law* by the American Law Institute, in which the commentary on the rule, already quoted, in section 169 (American Law Institute, *op. cit.*, p. 513), speaks in critical terms of the idea that the conduct of a minor official does not give rise to international responsibility.

<sup>316</sup> On this point see Ago, "Le délit international", *Recueil des cours* . . . (op. cit.), pp. 468-469.

attribution to the State, as a subject of international law, of the conduct of persons or groups of persons who are its "organs" under its internal legal system, we took care to make two reservations.<sup>317</sup> We stated, first, that there was nothing to suggest that this principle was necessarily absolute; only further detailed analysis of what really happens in international life, we said, might possibly enable us to conclude that the conduct of *all* organs of the State could be considered as an act of the State as a subject of international law. This analysis was made in the preceding section. Secondly, we stressed that there was no indication at all that this same basic principle should be exclusive. On the contrary, we suggested that an examination of the facts would probably show that the list of acts attributable to the State as a possible source of international responsibility also included the conduct of other persons or groups of persons who, according to the internal legal order, could not properly be described as organs of the State. Consequently, in order to obtain a complete picture of the acts which can be attributed to the State at the international level, we must now proceed to examine a series of different situations. The first task, which we shall undertake in this section, will be to investigate, from this standpoint, the treatment accorded to the acts and omissions of organs of public institutions separate from the State. These institutions may be roughly grouped in two main categories, which will be dealt with separately and successively: (a) public corporations and other public institutions which have their own legal personality and autonomy of administration and management, and are intended to provide a particular service or to perform specific functions; (b) territorial public entities engaged in public activities of a general nature, but carried on at the local or regional level.

164. The emergence and proliferation of public institutions is a phenomenon of our time, which is marked today by a tendency towards progressive differentiation and a wider separation between the organization of these institutions and the administration, structures and methods of the State. The diversity of the tasks of common interest which the community itself has to perform in a modern society, the ever-increasing number of services which only the community is able to provide, the gradual extension of these services to the most widely different sectors of economic, social and cultural life, the fact that they are often of a technical nature and thus require autonomy of decision and action and the possession of special qualifications, the need to make procedures more flexible and simplify controls in order to increase the efficiency of the service—these, in short, are the main causes of the phenomenon. Thus, side by side with the State, there have been and are being established a number of institutions which, though their functions give them a distinctly public character, have a separate legal personality under the internal legal system, possess their own organization distinct from that of the State and are subject, in their activities, to a legal régime *sui generis*, which may partake sometimes of public law and sometimes of private law, according to requirements. By a neologism which may be questionable from the standpoint of linguistic purity, but

is effective for describing the facts, a large group of these bodies are sometimes described as "para-State" institutions, i.e., institutions which possess an organization of their own and which, side by side with the State but separate from it, provide services and perform tasks of a public character.

165. In addition to the phenomenon described above, there are others which may be mentioned for the purposes we are concerned with here. There is one, in particular, which arises not in a specialized and usually technical sphere, but in a distinctly general and political context. Some national systems do not follow the principle of entrusting certain higher functions of organization, direction and political supervision only to organs of the State. Such functions are assigned primarily to a separate institution, a political entity organized outside the machinery of the State, though closely and indissolubly linked to it. Moreover, this institution is required to perform the above-mentioned functions not only for the community as such, but above all for the machinery of the State itself and its organs. The political entity concerned is thus certainly a public institution, and one at the highest level. This is the system applied in the socialist countries. Article 126 of the Constitution of the USSR states expressly that the Communist Party is the "leading core of all organizations of the working people, both government and non-government". According to the preamble to its Rules, the Communist Party of the USSR is "the highest form of political and social organization, the force which directs and guides soviet society", while rule 35 entrusts to the supreme organs of the Communist Party the task of directing "the work of the central organs of the State". Other systems too now have a "single" party, although its role may vary. In some recently constituted countries, in particular, the single party is a public institution charged with the functions of organizing, developing and modernizing society and maintaining permanent contact between society and the organs of the State. Lastly, political entities also calling themselves single parties, although their foundations and purposes were entirely different, existed in the recent past in countries which were under a totalitarian régime. Under the system then in force in those countries, the character of the single party as a public institution separate from the State, but integrated with it at all levels, was stressed in several legal texts.

166. The examples given in the foregoing paragraphs certainly do not exhaust the wide range—which varies considerably from system to system and may include other possible types in the future—of institutions separate from the State but also responsible for meeting public needs. Their functions vary widely and may be at the highest or lowest level and of a general or special character; but they are, nevertheless, always public functions which serve the interests of the community. At the same time, in the context of the internal legal order, we find that each of these institutions has its own machinery, which is not part of the machinery of the State, and its own organs which—usually, at least—are not organs of the State. The question thus arises whether the acts or omissions of the organs of such institutions can or cannot be considered as "acts of the State" at the international level.

<sup>317</sup> See paras. 107 and 122 above.

167. The question of the attribution to the State, as a subject of international law, of an act or omission of an organ of a public institution was raised before the International Court of Justice in the *Case of Certain Norwegian Loans*. In this dispute between France and Norway, the Government of Norway argued that the Norwegian banks which had contracted some of the loans in question had a personality distinct from that of the State, so that the international responsibility of the State could not be incurred by an act or omission of the management of these banks.<sup>318</sup> The French Government contested the validity of this argument.<sup>319</sup> During the oral proceedings, Professor Gros, the Agent of the French Government, stated its position as follows:

In internal law [...] a public institution is created to meet a need for decentralization: it may be necessary to grant some degree of independence to certain institutions or agencies, either for budgetary reasons or because of the purposes they serve, for example, welfare or cultural purposes. This independence is achieved by granting them legal personality under internal law.

But although, in internal law, the legal personality of public institutions, distinct from that of the State, has the consequence that actions relating to these institutions must be brought against them and not against the State [...], this consequence need not be transferred to international law [...]. From the standpoint of international law, these public persons merge with the State.<sup>320</sup> [Translation by the United Nations Secretariat.]

It is true that the Court did not have occasion to express an opinion on this important point, for after accepting a further preliminary objection raised by the Norwegian Government, it declared that it was without jurisdiction to adjudicate upon the dispute. However, it may well be thought that, if matters had taken a different course, the Court would have found it difficult to accept the Norwegian argument, based on the fact that the French Government had "not been able to cite any authority [...] either in doctrine or in jurisprudence" in support of the existence of a "rule of international law making a State internationally responsible for arrangements made by State agencies constituted as independent legal persons".<sup>321</sup> Indeed, two judges (Sir Hersch Lauterpacht and Mr. Read) did express opinions on this point and stressed the validity of the French argument;<sup>322</sup> Mr. Read also drew attention to the inconsistency shown by the Norwegian Government which, when an action was brought against one of the banks concerned before the *Tribunal de la Seine*, had invoked immunity from jurisdiction—the immunity internationally accorded to organs of foreign States. Thus the Norwegian Government had itself argued, in that earlier case, that the acts of the public institution concerned should be treated as "acts of the State" at the international level.

168. With regard to the practice of States, none of the points in the request for information addressed to Governments by the Preparatory Committee of the 1930 Codification Conference contained any express mention

of public institutions. However, in their replies to point VI (Acts or omissions of bodies exercising public functions of a legislative or administrative character [communes, provinces, etc.]), some Governments, including those of Germany and Great Britain, observed that the State was responsible also for acts or omissions of bodies other than those of a local character, in so far as such bodies were also required to exercise public functions.<sup>323</sup> The Preparatory Committee accordingly came to the conclusion that it should refer not only to territorial entities such as communes and provinces, but also to "autonomous institutions" in general. It therefore prepared the following basis of discussion:

A State is responsible for damage suffered by a foreigner as a result of acts or omissions of such corporate entities (communes, provinces, etc.) or autonomous institutions as exercise public functions of a legislative or administrative character [...].<sup>324</sup>

Unfortunately, the Third Committee of the Conference did not have time to consider and adopt this basis of discussion. It is, however, significant that, after receiving the replies of governments, the Preparatory Committee decided to deal in a single clause with the attribution to the State of the conduct of organs of territorial entities—which, as we shall see, is generally accepted—and with the problem of the acts or omissions of organs of "autonomous institutions" exercising public functions.

169. With regard to the other institutions we have mentioned, and in particular agencies separate from the State but closely linked to it and charged with functions of administration and political guidance, some writers cite the decision—already mentioned in this report—of the Franco-Italian Conciliation Commission in the *Dame Mossé case*. In this decision, given on 17 January 1953, the Commission stated that:

It is impossible to consider [...] the armed forces of the reconstituted Fascist Party as being unconnected with these organs [those of the so-called Saló Republic], because of the status accorded to the party in fact and in law by the aforesaid Republic [...].<sup>325</sup> [Translation by the United Nations Secretariat.]

Some writers also cite similar precedents from the practice of States. They refer, for example, to the observations contained in a study annexed to the 1932 report of the Commission of Enquiry (Lytton Commission) appointed by the League of Nations to investigate the Chinese boycott and the responsibilities relating thereto. That study indicated that the boycott had been ordered, controlled and co-ordinated not by the Nationalist Government, but by the Kuomintang. But it also stated that this movement was the maker and the master of the Government, that it directed and controlled the Government and that it could be considered as the real source of power.<sup>326</sup> Writers refer also, more particularly, to an

<sup>318</sup> League of Nations, *Bases of Discussion* . . . (op. cit.), pp. 90-91.

<sup>319</sup> *Ibid.*, p. 92.

<sup>320</sup> United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3) p. 492. On this subject see Reuter, *La responsabilité internationale* (op. cit.), pp. 91-92; Quéneudec, op. cit., pp. 52-53.

<sup>321</sup> League of Nations, *Appeal by the Chinese Government, Documents annexed to the Report of the Commission of Enquiry* (doc.C.663.M.320.1932.VII Annexes), pp. 244-245. In this connexion, see H. Lauterpacht, "Boycott in International Relations"

(Continued on next page.)

<sup>318</sup> *I. C. J. Pleadings*, vol. I, pp. 136-137, 237 et seq., and 445 et seq.

<sup>319</sup> *Ibid.*, pp. 181-182 and 405 et seq.

<sup>320</sup> Public hearing of 15 May 1957 (*ibid.*, vol. II, p. 72).

<sup>321</sup> Hearing of 23 May 1957 (*ibid.*, p. 175).

<sup>322</sup> See *I. C. J. Reports 1957*, pp. 36 and 96.



agreement concluded on 10 May 1935 between Germany and Belgium, following certain frontier incidents caused by organs of the National Socialist Party. In this agreement, Germany was obliged to recognize the principle of the international responsibility of the German State for the acts of persons described as "having an official status" and "directly or indirectly in the service" of the State.<sup>327</sup>

170. As these are special and relatively recent situations, the precedents provided by jurisprudence and the practice of States are naturally not very numerous. On the other hand, many writers have discussed the various points that arise quite fully and have explained the logical reasons for attributing to the State, at the level of international relations, the acts or omissions of organs of various institutions which have a personality separate from that of the State under the internal legal system, but are nevertheless responsible for providing public services or performing public functions—in a word, for an activity on behalf of the community.<sup>328</sup> Moreover, the principle of this attribution is to be found in certain codification drafts.<sup>329</sup>

(Foot-note 326 continued)

*The British Year Book of International Law*, 1933 (London) pp. 133-134; C. L. Bouvé, "The National Boycott as an International Delinquency", *American Journal of International Law*, Washington, vol. 28, No. 1 (January 1934), pp. 36-37; L. Preuss, "International Responsibility for Hostile Propaganda against Foreign States", *ibid.*, No. 4 (October 1934), pp. 667-668.

<sup>327</sup> League of Nations, *Treaty Series*, vol. CLXV, p. 174. See Reuter, *La Responsabilité internationale*, (*op. cit.*), p. 91; Quéneudec, *op. cit.*, p. 52.

On the problem of State responsibility for acts of single parties see also Ch. de Visscher, *Théories et réalités . . .* (*op. cit.*), pp. 340-341; E. Zellweger, *Die völkerrechtliche Verantwortlichkeit des Staates für die Presse* (Zürich, Polygraphischer, 1949), pp. 21 *et seq.*

<sup>328</sup> In addition to the authors of articles already mentioned concerning special questions, see W. Friedmann, "The Growth of State Control over the Individual and its Effects upon the Rules of International State Responsibility", *The British Year Book of International Law*, 1938 (London), p. 144, and "Some Impacts of Social Organization on International Law", *American Journal of International Law* (Washington), vol. 50, No. 3 (July 1956), pp. 492-493; Romano, *Corso di diritto internazionale*, 4th ed. (Padua, 1939), pp. 212-213; Balladore Pallieri, *Diritto internazionale pubblico* (*op. cit.*), pp. 129 *et seq.*; Reuter, *La responsabilité internationale* (*op. cit.*), p. 91; Sørensen, *op. cit.*, p. 225; Dahm, *op. cit.*, pp. 193 *et seq.*; L. Delbez, *Les principes généraux du contentieux international* (Paris, Librairie générale de droit et de jurisprudence, 1962), pp. 173-174; Sereni, *op. cit.*, t. II, pp. 304-305, and t. III, p. 1508; Münch, *op. cit.*, pp. 200-201 (gives many concrete examples); Quéneudec, *op. cit.*, pp. 44, 50 *et seq.*; Amerasinghe, "Imputability . . .", *Revue égyptienne . . .* (*op. cit.*), p. 103.

<sup>329</sup> Professor Roth's draft (*Yearbook of the International Law Commission*, 1969, vol. II, p. 152, document A/CN.4/217 and Add.1, annex X) used a very wide formulation in article 1, attributing to the State, as a source of responsibility, the acts "of any individuals whom or corporations which it entrusts with the performance of public functions". The corporations and institutions to which we have referred are certainly covered by this formulation.

Even more explicitly, the draft prepared in 1930 by the *Deutsche Gesellschaft für Völkerrecht* (*ibid.*, p. 149, document A/CN.4/217 and Add.1, annex VIII) mentioned in article 1, paragraph 3, together with the various State powers, "corporations and agencies which perform public functions" in the territory of the State.

Article 17 of the draft convention prepared in 1961 by the Harvard Law School (*ibid.*, p. 146, document A/CN.4/217 and Add.1, annex VII) excluded attribution to the State of the acts of "any organ, agency, official or employee" of a commercial enterprise "which is owned in whole or in part by a State [ . . . ] if such enterprise is [ . . . ] a separate juristic person" and does not enjoy immunity from

It seems logical that the decisive criterion here should be the nature of the functions performed and not whether they are performed by an organ of the State machinery proper or by an organ of a separate institution which is merely co-ordinated with the State. The distribution of public functions between the State itself and other institutions depends on methods of organization which vary from system to system; and it would be absurd to conclude, on the basis of this distribution, that an act or omission in the performance of one and the same public function should, from the international standpoint, be considered as an act of the State in one case and not in another. The principle—already mentioned and universally recognized—of the unity of the State from the international point of view cannot be limited in its effects to excluding from consideration, for the purposes of attributing acts to the State as a subject of international law, any difference between the acts or omissions of one or another of the State powers. This principle must also lead us to disregard, for the same purposes, the distinction between all the different institutions which, also in a public capacity, provide specific services for the community or perform functions considered to concern the community. In other words, it seems necessary to recognize clearly that the conduct of officials of these corporations or institutions must be regarded, at the international level, as "acts of the State"—i.e. acts which can generate international responsibility should the occasion arise. With the increasing complexity and differentiation of the machinery of the State, the importance of this principle cannot fail to become more and more evident. Consequently, even though we should hesitate to conclude that there is a rule on the matter already firmly established in practice, the need for clarity in international relations and the very logic of the principles governing these relations would have us affirm such a rule as progressive development of international law.

171. The validity of this conclusion concerning the attribution to the State, as a subject of international law, of the acts of organs of public corporations or other public institutions separate from the State, finds further confirmation, by analogy, in the principle that the acts of organs of local or territorial entities are attributable to the State. The existence of such entities may reflect the application of a principle of distribution of functions *ratione loci*, whereas the existence of the corporations and institutions mentioned above reflects, rather, a principle of distribution *ratione materiae*, but for our purposes the phenomenon is basically the same. Territorial entities, too, have a legal personality separate from that of the State and possess their own machinery and organs. Nevertheless, as we shall now see, the attribution to the State, as a subject of international law, of the acts and omissions of organs of these entities is generally accepted.

jurisdiction. The formulation used is very involved, but the conclusion may be drawn from it *a contrario* that, in the opinion of the authors of the draft, the acts of organs of non-commercial or even commercial institutions for which the State would invoke immunity are attributable to the State. This conclusion is confirmed in the comment on the "General rule as to attribution" in the American Law Institute's *Restatement of the Law* (American Law Institute, *op. cit.*, p. 512).



172. We may begin by considering the territorial entities characteristic of a unitary State: communes, provinces and regions. An early affirmation of the responsibility of the State for the acts or omissions of municipal officials is to be found in the opinion of the umpire expressed in connexion with the award made on 14 August 1905 by the French-Venezuelan Mixed Claims Commission, established by the protocol of 19 February 1902, in the *Pieri Dominique and Co. Case*.<sup>330</sup> But a much more explicit and conclusive reaffirmation of this principle is contained in the award made on 15 September 1951 by the Franco-Italian Conciliation Commission established under article 83 of the Peace Treaty of 10 February 1947, in the case concerning the *Heirs of the Duc de Guise*. This award seems to be especially significant because it is of recent date and refers to a territorial entity enjoying the highest degree of autonomy. The Commission expressed the following opinion:

For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic.<sup>331</sup> [Translation by the United Nations Secretariat]

173. We have already mentioned above<sup>332</sup> that point VI of the request for information addressed to Governments by the Preparatory Committee of the Hague Codification Conference of 1930 expressly asked the question whether the State became responsible as a result of "acts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.)". Twenty-four States expressed their views on this question in their replies. They all accepted the principle that a State did incur responsibility for such acts or omissions.<sup>333</sup> Since then, there has not been much occasion for reaffirmation of this principle in the practice of States, the main reason being that it has not been questioned, but has been applied spontaneously by States.

174. On turning to the codification drafts from official and private sources, we note that rule II of the draft prepared in 1927 by the Institute of International Law provides that:

The State is responsible for the act of corporate bodies exercising public functions on its territory.<sup>334</sup>

The same conclusion may be drawn from article 3 of the draft convention prepared by the Harvard Law School in 1929,<sup>335</sup> from article 17, paragraph 1 *d*, of the draft prepared by the same School in 1961,<sup>336</sup> from article 1, paragraph 3, of the draft prepared in 1930 by the

Deutsche Gesellschaft für Völkerrecht,<sup>337</sup> from article VII of the principles of international law that govern the responsibility of the State in the opinion of the United States of America, prepared by the Inter-American Juridical Committee in 1965,<sup>338</sup> and from section 170 of the American Law Institute's *Restatement of the Law*.<sup>339</sup> These drafts from the United States generally use the term "political subdivisions". Mr. García Amador adopted the same term in article 14, paragraph 1, of the revised preliminary draft he prepared in 1961 as Special Rapporteur:

The acts and omissions of political subdivisions, whatever their internal organization may be and whatever degree of [ . . . ] autonomy they enjoy, shall be imputable to the State.<sup>340</sup>

In commenting on this provision, Mr. García Amador noted that "It states a principle which, at least in modern times, is not in dispute".<sup>341</sup> All writers on international law who have dealt with the question, from the earliest to the most modern, have indeed concurred in affirming the same principle.<sup>342</sup>

175. The attribution to a federal State of the acts of organs of its component states, in cases where such acts enter into consideration at the international level as a source of responsibility, is also a firmly established principle. Since 1875, at least, a consistent series of legal decisions has affirmed this principle, even in regard to situations in which internal law does not provide the federal State with means of compelling the organs of component states to fulfil international obligations. In the award in the *Case of the "Montijo"*, which was made on 26 July 1875 by the arbitrators between the United States of America and Colombia, and which is the starting point for this consistent series of decisions, Mr. Bunch, the umpire, stated that in the case of violation of an international obligation by one of the component states of the Colombian federal State, the foreign State could have recourse only to the central government. He continued as follows:

If this rule, which the undersigned believe to be beyond dispute, be correctly laid down, it follows that in every case of international wrong [ . . . ] it (the general Government of the Republic), and it alone, is responsible to foreign nations [ . . . ].

But it will probably be said that by the Constitution of Colombia the federal power is prohibited from interfering in the domestic disturbances of the [federal] States, and that it can not in justice be made accountable for acts which it has not the power, under the fundamental charter of the Republic, to prevent or to punish. To this the undersigned will remark that in such a case a treaty is superior to the constitution, which latter must give way. The legislation of the

<sup>330</sup> United Nations, *Reports of International Arbitral Awards* vol. X (United Nations publication, Sales No.: 60.V.4), p. 156.

<sup>331</sup> *Ibid.*, vol. XIII (Sales No.: 64.V.3), p. 161.

<sup>332</sup> See para. 168 above.

<sup>333</sup> League of Nations, *Bases of discussion . . .* (*op. cit.*), pp. 90 *et seq.*; *Supplement to volume III* (*op. cit.*), pp. 3 and 18.

<sup>334</sup> *Yearbook of the International Law Commission*, 1956, vol. II, p. 228, document A/CN.4/96, annex 8.

<sup>335</sup> *Ibid.*, p. 229, document A/CN.4/96, annex 9.

<sup>336</sup> *Ibid.*, 1969, vol. II, p. 146, document A/CN.4/217 and Add.1 annex VII.

<sup>337</sup> *Ibid.*, p. 149, document A/CN.4/217 and Add.1, annex VIII.

<sup>338</sup> *Ibid.*, p. 154, document A/CN.4/217 and Add.1, annex XV.

<sup>339</sup> See above, p. 193, document A/CN.4/217/Add.2.

<sup>340</sup> *Yearbook of the International Law Commission*, 1961, vol. II, p. 48, document A/CN.4/134 and Add.1, addendum.

<sup>341</sup> *Ibid.*, p. 52.

<sup>342</sup> See Triepel, *op. cit.*, pp. 356 *et seq.*; Anzilotti, *Corso . . .* (*op. cit.*), p. 391; Ross, *op. cit.*, p. 253; Fenwick, *op. cit.*, p. 297; Rousseau, *op. cit.*, p. 373; Schwarzenberger, *International Law* (*op. cit.*), pp. 625-626; Dahm, *op. cit.*, p. 193; Sereni, *op. cit.*, t. II, pp. 311 and 463, and t. III, p. 1508; Münch, *op. cit.*, pp. 199-200; Levin, *Otvetstvennost gosudarstv . . .* (*op. cit.*), p. 69; Brownlie, *op. cit.*, pp. 369-370.

Republic must be adapted to the treaty, not the treaty to the laws [ . . . ]

[ . . . ] It may seem at first sight unfair to make the federal power, and through it the taxpayers of the country, responsible, morally and pecuniarily, for events over which they have no control, and which they probably disapprove or disavow, but the injustice disappears when this inconvenience is found to be inseparable from the federal system. If a nation deliberately adopts that form of administering its public affairs, it does so with the full knowledge of the consequences it entails. It calculates the advantages and the drawbacks, and can not complain if the latter now and then make themselves felt.<sup>343</sup>

Among the many arbitral awards which later expressly reaffirmed this principle, reference may be made to those of the United States of America/Venezuela Mixed Commission in 1890 in the *De Brissot Case*,<sup>344</sup> the British-Venezuelan Mixed Claims Commission in 1903 in the *Davy Case*,<sup>345</sup> the French-Venezuelan Mixed Commission on 14 August 1905 in the *Pieri Dominique and Co. Case*,<sup>346</sup> already cited above with reference to State responsibility for the acts of municipal organs; the Mexico/United States of America General Claims Commission in the *Janes*,<sup>347</sup> *Swinney*,<sup>348</sup> *Quintanilla*,<sup>349</sup> *Youmans*,<sup>350</sup> *Mallén*,<sup>351</sup> *Venable*<sup>352</sup> and *Tribolet*<sup>353</sup> cases; and finally the France/Mexico Claims Commission on 7 June 1929 in the *Pellat* case. In the latter award, the Commission reaffirmed "the principle of the international responsibility, often called indirect, of a federal State for all the acts of its separate States which give rise to claims by foreign States" and noted specially that such responsibility

[ . . . ] cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law.<sup>344</sup> [Translation by the United Nations Secretariat]

It should be noted that in many of the awards cited here, the arbitrator expressly noted that the respondent party itself recognized the principle that, for the purposes of establishing international responsibility, the acts of a component state are attributable to the federal State.

176. Of course, some States with a federal structure have sometimes tried to resist claims for compensation in respect of acts of organs of a component state. But such attempts, after being unsuccessful for a long time, have become increasingly rare in this century. A typical example is to be found in the practice of the United States of

America and its development. This practice cannot be better illustrated than by the words of the United States authorities themselves. The United States agent before the Mexico/United States of America General Claims Commission had inquired of his Government whether or not he should argue that the Federal Government was not responsible in international law for the acts or omissions of organs of the federated states. The Department of State replied on 25 July 1925 in the following terms:

It must be remembered that foreign Governments cannot make representations to the [federated] States and demand reparation from them. Foreign Governments can only deal with the Government of the United States, and as under treaties and the law of nations this Government owes a duty properly to protect foreigners within its territorial jurisdiction, the question arises whether, when the lack of protection is due to an act or omission of a State authority, this fact may properly be pleaded as a defense by the Federal Government [ . . . ]. There is a long list of cases [ . . . ] in which the Federal Government has taken the position of non-liability; on the other hand some cases have been settled without raising this question. President Harrison [ . . . ] sent a message to Congress on December 9, 1891,<sup>355</sup> in which he laid down the following principle:

"It seems to me [ . . . ] that the officers of the State charged with police and judicial powers in such cases must, in the consideration of international questions [ . . . ], be regarded in such sense as Federal agents to make this Government answerable for their acts."

[ . . . ] It is also true that, in our dealings with foreign Governments having a federal system similar to our own, we have invariably insisted on the liability of the Federal Government, although the failure to protect American citizens or properly to prosecute for offences against them was chargeable to the officials of one of the constituent states or provinces [ . . . ].

Moreover, the United States Government has frequently paid indemnity in settlement of claims based on such grounds notwithstanding the fact that the acts or omissions were those of officials of the states or municipalities [ . . . ]. The Department is of the opinion that you should not specially plead immunity from liability on the ground that the acts or omissions were those of [federated] State officials.<sup>356</sup>

177. Four years later, in its reply of 22 May 1929 to point X of the request for information received from the Preparatory Committee for the Hague Codification Conference, the Government of the United States of America wrote:

In the United States, the protection of the rights of aliens is assumed by the Federal Government under treaty and international law, yet the punishment of offences against these rights is to a certain extent within the control of the [federated] states. The Federal Government has frequently paid indemnities for the delinquencies of the states where the states have failed to furnish protection and redress [ . . . ]. In claims against foreign States, the United States has refused to recognise the plea that the federal organization of the respondent State was not internationally responsible for the maintenance of order and the provision of effective redress in its constituent political subdivisions.<sup>357</sup>

<sup>355</sup> Following the refusal of the judicial and police authorities of the State of Louisiana to prosecute those responsible for the killing of Italians in New Orleans.

<sup>356</sup> Hackworth, *op. cit.*, vol. V (Washington, U.S. Government Printing Office, 1943), pp. 594-595.

<sup>357</sup> League of Nations, *Bases of Discussion . . . Supplement to volume III* (*op. cit.*), p. 21.

<sup>343</sup> Moore, *History and Digest . . .* (*op. cit.*), pp. 1440-1441; Lapradelle et Politis, *op. cit.*, 1954, t. III, pp. 674-675.

<sup>344</sup> Moore, *History and Digest . . .* (*op. cit.*), pp. 2967, 2970 and 2971.

<sup>345</sup> United Nations, *Reports of International Arbitral Awards*, vol. IX (United Nations publication, Sales No. 59.V.5), p. 468.

<sup>346</sup> *Ibid.*, vol. X (Sales No. 60.V.4), p. 156.

<sup>347</sup> Award of 16 November 1925. *Ibid.*, vol. IV (Sales No. 1951.V.1), p. 86.

<sup>348</sup> Award of 16 November 1926. *Ibid.*, p. 101.

<sup>349</sup> Award of 16 November 1926. *Ibid.*, p. 103.

<sup>350</sup> Award of 23 November 1926. *Ibid.*, p. 116.

<sup>351</sup> Award of 27 April 1927. *Ibid.*, p. 177.

<sup>352</sup> Award of 8 July 1927. *Ibid.*, p. 230.

<sup>353</sup> Award of 8 October 1930. *Ibid.*, p. 601.

<sup>354</sup> *Ibid.*, vol. V (Sales No. 1952.V.3), p. 536.

178. As regards the question under consideration, the request for information by the Preparatory Committee for the 1930 Conference was formulated in a manner liable to cause misunderstanding and complicate both the wording of the replies and their interpretation. As we have seen, point VI referred to "bodies exercising public functions"; and the examples given (communes, provinces, etc.) did not make it clear whether the component states of a federal State were supposed to be included in this category or not. The existence of point X in addition to point VI seemed to support a negative conclusion; nevertheless there were governments (including that of the United States of America) which, in their reply to point VI, referred to a case concerning a component state of a federal State (Venezuela), in which the decision had stressed the fact that from the international point of view, the existence of the federated state was completely veiled in that of the federal State.<sup>358</sup> Point X, in turn, asked one single question about the "Responsibility of the State in the case of a subordinate or a protected State, a federal State or other unions of States." Some of the situations mentioned were of a kind in which the relationship in question creates a bond between political units, all having international personality. Such is the case of a protectorate and other forms of international dependence, of unions of states of the confederation type and others—i.e. cases in which the responsibility of the superior State for the dependent state, or of the union for a member state can only be seen as the responsibility of one subject of international law for the acts of another. Along with these situations was mentioned the case of the federal State, in which the possession of international personality by a federated state is normally entirely ruled out or is exceptionally recognized only for an extremely limited international capacity—so limited that to envisage the violation by a federated state of an international obligation directly incumbent on itself is practically an academic exercise. This joint reference to very different situations might therefore have distorted the replies of governments. That of Germany, for example, took into account mainly cases of the "co-existence of several subjects of international law" and mentioned certain criteria (questionable, incidentally) for the assignment of responsibility among these different subjects in various circumstances. Bulgaria and Canada confined their replies even more closely to the same type of situation, Bulgaria propounding the principle of the responsibility of the State which caused the damage, and Canada that of the identity of the subject of the violated obligation with the bearer of the responsibility. Poland practically confined itself to the case of a protectorate. Hungary, on the other hand, dealing only with the case of a federal State whose component states are not "competent at international law", affirmed the responsibility of the federal State on that basis. Italy and Norway also tried to separate the case of the federal State and recognized its responsibility for the acts of its federated states. Australia, Austria, Belgium, Denmark, Great Britain, Japan, the Netherlands, New Zealand and South Africa affirmed in general terms the responsibility of the State which has assumed representation of, or responsibility for conducting foreign relations for, another

political unit, in some cases (Belgium) specifying that such responsibility is "indirect".<sup>359</sup> The reply of the United States has already been mentioned in the preceding paragraph. Finally, the reply of the Swiss Government was outstanding for its clear presentation of ideas:

[ . . . ] The international responsibility of a federal State is of the same nature and extent as that of a unified State.

Swiss constitutional law [ . . . ] allows the Confederation to assume international responsibility for any acts contrary to international law proved against the Cantons.<sup>360</sup>

A more recent confirmation of the position of the Swiss Government on this question was given by Mr. Petitpierre, Head of the Political Department, in a statement made to the National Council in 1955 concerning the *Case of the Legation of Romania at Berne*:

The Confederation would have to intervene only if an act contrary to international law had been committed by a person engaging its responsibility, that is to say, a person acting on its behalf. That person could be either a federal authority such as the Federal Council, or the police authorities of Berne. For although the latter are not employed by the Confederation, it must be recognized that in their surveillance of embassies and legations and in their action on the incident of the Romanian Legation, they were acting on behalf of the Confederation. Hence, *vis-à-vis* foreign countries, the Confederation could be held responsible for an injury caused by a fault of the Berne police.<sup>361</sup>

179. In spite of the relative confusion discernible in the replies of governments to an ambiguously drafted questionnaire, the conclusion to be drawn from the practice of States seems clear enough. The principle that a federal State must answer for acts or omissions involving a breach of its international obligations, irrespective of whether they emanate from organs of the federated states or from federal organs, is firmly rooted in the conviction of States. It is rather the very numerous opinions expressed by writers which make the picture less clear, owing to the differences, often more apparent than real, between the various schools of thought—differences which are sometimes reflected in the codification drafts.

180. A large group of jurists has realistically taken as a subject for study the phenomenon of the federal State, as it has developed in modern times in many parts of the world and in particular on the American Continent, in other words, as a phenomenon of constitutional law, not of international law.<sup>362</sup> They see the federal structure as an

<sup>359</sup> For these various replies, see League of Nations, *Bases of discussion . . .* (op. cit.), pp. 121 et seq.; and *Supplement to volume III* (op. cit.), p. 4.

<sup>360</sup> League of Nations, *Bases of discussion . . .* (op. cit.), pp. 123-124. After receiving the replies, the Preparatory Committee understood the need at least to have separate paragraphs for different cases and drew up Basis of discussion No. 23 accordingly. The second paragraph read as follows:

"Where one Government is entrusted with the conduct of the foreign relations of several States, the responsibility [ . . . ] belongs to such common or central Government." (*Yearbook of the International Law Commission, 1956*, vol. II, p. 223, document A/CN.4/96, annex 2.)

The 1930 Conference did not have time to examine this text, however.

<sup>361</sup> Société suisse de droit international, *Annuaire suisse de droit international, 1956* (Zürich, vol. XIII, 1957), p. 175.

<sup>362</sup> Article 2 of the Convention on Rights and Duties of States, adopted at Montevideo in 1933 by the seventh International

<sup>358</sup> *Ibid.*, p. 18.

(Continued on next page)

advanced form of decentralization. Hence, they logically regard the principle of responsibility of a federal State, in the cases considered here, as being the consequence of the attribution to that State, from the international point of view, of acts and omissions of organs of the component states<sup>363</sup>—an attribution which is made on the same basis as that of the conduct of organs of any other type of territorial entity: a province, a region, etc.<sup>364</sup> The influence of this view is to be seen in the formulation of article 3 of the draft prepared by the Harvard Law School in 1929;<sup>365</sup> in article 14 of the revised preliminary draft prepared in 1961 by Mr. García Amador for the International Law Commission;<sup>366</sup> in article VII of the Principles of international law that govern the responsibility of the State in the opinion of the United States of America, prepared in 1965 by the Inter-American Juridical Committee;<sup>367</sup> and in section 170 of the *Restatement of the Law* by the American Law Institute.<sup>368</sup> In all of these provisions the single term “subdivision”, “political subdivision” or “political unit” is intended also to cover the case of a territorial entity in a unitary State and in a federal State. Article 17 of the draft prepared in 1961 by the Harvard Law School falls into the same group, for while providing both for the case of a “political subdivision” and for the specific case of a component state or province of a federal State, it indicates that any organ of such a subdivision or component state, as these terms are used in the draft convention, is to be regarded as an “organ of a State”.<sup>369</sup>

(Foot-note 362 continued)

Conference of American States, provides that the federal State “shall constitute a sole person in the eyes of international law”. Eagleton (*The Responsibility of States* . . . (op. cit.), p. 32) cites a note published by E. Clunet in the *Journal du droit international privé*, in which the French jurist already noted that “Everyone recognizes that, in international relations, the federal State constitutes an indivisible whole, into which each of the component States has merged by complete renunciation of its external sovereignty, retaining only its internal autonomy, the evaluation of which does not concern other States [ . . . ] in the federal State, unity is absolute from the international point of view.” (*Journal du droit international privé et de la jurisprudence comparée*, Paris, t. 18, 1891, p. 1156).

<sup>363</sup> As we have seen, President Harrison’s message of 9 December 1891 was based on this idea.

<sup>364</sup> In this connexion, though the clarity of expression varies from writer to writer, see Donot, *De la responsabilité de l’Etat fédéral à raison des actes des Etats particuliers* (Paris, 1912) pp. 7 et seq.; Borchard, *The Diplomatic Protection* . . . (op. cit.), pp. 201-202, 226; Schoen, op. cit., pp. 28 et seq.; Eagleton, *The Responsibility of States* . . . (op. cit.), loc. cit.; Hyde, op. cit., p. 949; Fenwick, op. cit., p. 297; Anzilotti, *Corso* . . . (op. cit.), pp. 391 and 432; Cavaglieri, op. cit., p. 510; Ago, “La responsabilità indiretta . . .”, *Archivio di diritto pubblico* (op. cit.), pp. 18 et seq.; Cheng, op. cit., pp. 194, 195 and 197; Balladore Pallieri, *Diritto internazionale pubblico* (op. cit.), p. 349; Schwarzenberger, *International Law* (op. cit.), pp. 625-626; Monaco, op. cit., p. 376; Accioly, “Principes généraux . . .”, *Recueil des cours* . . . (op. cit.), pp. 390-391; Sørensen, op. cit., p. 224; Quéneudec, op. cit., p. 70; Brownlie, op. cit., pp. 369-370; Amerasinghe, “Imputability . . .”, *Revue égyptienne* . . . (op. cit.), pp. 119 et seq.; Jiménez de Aréchaga, op. cit., pp. 557-558.

<sup>365</sup> *Yearbook of the International Law Commission*, 1956, vol. II, p. 229, document A/CN.4/96, annex 9.

<sup>366</sup> *Ibid.*, 1961, vol. II, p. 48, document A/CN.4/134 and Add.1, addendum.

<sup>367</sup> *Ibid.*, 1969, vol. II, p. 154, document A/CN.4/217 and Add.1, annex XV.

<sup>368</sup> See above, p. 193, document A/CN.4/217/Add.2.

<sup>369</sup> *Yearbook of the International Law Commission*, 1969, vol. II, p. 146, document A/CN.4/217 and Add.1, annex VII.

181. As against this view there is another, whose supporters seem originally to have had in mind certain concrete situations, as they existed at the time, which were closer to them. These writers, especially the older ones, regard the federal State much less as a unit which has adopted a decentralized structure than as a “union” of States—an association created by an agreement between countries formerly sovereign, whose desire was not to be completely absorbed into the union, but to keep at least some vestiges of their original international sovereignty. In the opinion of these writers, therefore, it was particularly necessary to take account of the possibility that a component state of a federal State might, as part of the latter, have an international personality of its own, even though a limited one. Two possible cases would then have to be considered. The first would be that of an act or omission of an organ of a component state, relating to a sphere in which that state had no international obligation directly incumbent on it; the act or omission in question can then appear only as the conduct of a decentralized organ of the federal State, in the same way as the conduct of organs of a municipality. On this point, the conclusion of this second school of writers is the same as that of the first. The second possible case would be that of the acts or omissions of an organ of a component state in the limited sphere in which it appears as an independent subject of international rights and duties. In this case, the federal State cannot be held responsible for an act attributable to itself; its international responsibility can be invoked additionally, but as the responsibility of one subject of international law for the act of another, hence as “indirect” responsibility. In this second case, the position of a federal State with respect to a component state would be similar to that of a protecting State with respect to a protected State, or to that which may exist in other similar forms of inter-State relations.<sup>370</sup> Opinions in this group differ only as regards the justification of the indirect responsibility, some of the writers seeking it in a relationship of international representation established between the federal State and the component state and others in reasons of a different kind (criterion of control, “Ein-

<sup>370</sup> The thesis summarized here has been particularly developed by Triepel (op. cit., pp. 359 et seq., 366 et seq.) with references to the situation then obtaining in the German Empire. With minor variations of emphasis from one writer to another, this view is also supported by Strupp (“Das völkerrechtliche Delikt”, *Handbuch* . . . [op. cit.], pp. 109 et seq.), Ch. de Visscher (“La responsabilité des Etats”, *Bibliotheca Visseriana* [op. cit.], pp. 105-106), Klein (op. cit., pp. 173 et seq., 194 et seq.), M. V. Polak (“Die Haftung des Bundesstaates für seine Gliedstaaten”, *Oesterreichische Zeitschrift für öffentliches Recht* (Vienna, vol. I [new series], 1948), pp. 382 et seq., Verdross (“Theorie der mittelbaren Staatenhaftung”, *ibid.*, pp. 395 et seq., and *Völkerrecht* [op. cit.], pp. 381 and 389), G. Barile (“Note a teoria sulla responsabilità indiretta degli Stati”, *Annuario di diritto comparato e di studi legislativi*, (Rome, vol. XXII, fasc. 3, 1948), pp. 444-445), Schüle (op. cit., p. 331), Levin (*Otvetsvennost gosudarstv* . . . [op. cit.], pp. 41 et seq.). Münch (op. cit., pp. 240 et seq., 243 et seq.). The latter writer also advances the possibility of a direct responsibility of the component state in certain cases in which its acts take place within its own sphere of international competence.

To complete the picture, mention may also be made of a few writers who present the responsibility of the federal State for the component state as being, with respect to every possible situation, an indirect responsibility or a responsibility for the acts of others. See Ross, op. cit., p. 262; Rousseau, op. cit., p. 358; and Cavaré, op. cit., vol. II, p. 433.

griffstheorie", etc.). The influence of the approach just outlined is to be seen in the first paragraph of rule IX of the draft prepared in 1927 by the Institute of International Law, which expressly distinguishes between these two situations by stating that:

A federal State is responsible for the conduct of the individual States, not only if it is contrary to its own international obligations, but also if it is contrary to the international obligations incumbent upon those States.<sup>371</sup>

The same can be said of article 4 of the draft prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht.<sup>372</sup>

182. After carefully considering these differences of opinion, however, one realizes that they are not such as to affect the solution of the problem we are concerned with here. It may, if desired, be admitted that the distinctions deemed necessary by the second school of thought, as regards the nature of the responsibility incurred by a federal State for a component state in the various situations mentioned above, may be justified at the level of legal theory. It may also be observed that the case of conduct by an organ of a component state involving a breach of an international obligation directly incumbent on that state as an independent subject of international law is one very unlikely to arise in practice. The most sagacious and the most modern of the writers who maintain the need to make this distinction themselves recognize the difficulty of presenting a concrete case of an internationally wrongful act occurring within the tiny sphere of international capacity some federal systems still leave to their component states; these writers also point out that not a single example of such an act can be cited from recent practice and that federalism does not seem to be developing towards a widening of that sphere.<sup>373</sup> All that can be said is that this hypothesis cannot be dismissed *a priori*, for it must be remembered that there is not just one single type of federal State, whose physiognomy is definitively fixed: historical reality has only specific situations, each with its own characteristics,<sup>374</sup> and no one can say what future situations will be like. As we have said, however, all this has no relevance to what we are trying to do now. The question under examination is that of the possibility of

attributing to the State, from the international point of view, the acts or omissions of organs of public institutions separate from the State. More specifically, we have to determine whether, at the international level, the conduct of organs of component states which prove to be in conflict with an international obligation of the *federal State* are to be regarded as acts of the federal State as a subject of international law. In other words, can a federal State violate its own international obligations through acts or omissions of persons who are not its own organs, but organs of its component states? That is the question we have to answer; and as we have seen, the answer is not in doubt. This is all we are concerned with at the moment. The Commission will certainly be able, when it comes to consider cases of responsibility of one subject of international law for the acts of another, also to take into consideration the possible cases of responsibility of a federal State for a breach by a component state of an international obligation directly incumbent on that state. It will then be able to choose a formula which can cover this situation, however theoretical it may appear. As to our present problem it remains exclusively within the limits we have just defined and does not arise for a federal State in terms other than those applicable to a decentralized unitary State following different criteria.

183. A few brief considerations will suffice to show that what has been said about the possibility of attributing to a State, as a subject to international law, the conduct of organs of separate public institutions, whether special or territorial, necessarily applies also to the organs of an autonomous administration of a colony or, more generally, of a territory outside that of the State but under its sovereignty.<sup>375</sup> Nowadays, this question has lost much of its significance, since colonialism is fortunately disappearing. Nevertheless, there are still some examples and there is certainly no reason to relieve a metropolitan State of the responsibility attached to wrongful acts of the organs of its colonial administration. For the purposes of the present study, of course, there is no need to take account either of the case in which the colonial administration is entrusted direct to organs belonging to the machinery of the metropolitan State, or of the case in which the dependent country nevertheless remains a separate State possessing its own international personality (a protectorate or similar situations). In the first case, the attribution to the State of acts of the colonial administration is merely an application of the attribution to the State of acts of its own organs properly so called; in the second case, on the other hand, international responsibility of the so-called "superior" State for the acts of organs of the dependent State can only be regarded, it has been said, as indirect responsibility. The remaining case to which we must refer is that of a country which does not constitute, in international law, a subject separate from the metropolitan country, but which is under a separate and autonomous administration. Although few cases can be cited, the practice of States leaves no doubt about the possibility of considering the acts of such a separate administration as acts of the metropolitan State and of drawing the conclu-

<sup>371</sup> *Yearbook of the International Law Commission, 1956*, vol. II, p. 228, document A/CN.4/96, annex 8.

<sup>372</sup> "A federal State is responsible for its component states, irrespective of whether a case concerns its own obligations under international law or the like obligations of such component states." (*Ibid.*, 1969, vol. II, p. 150, document A/CN.4/217 and Add.1, annex VIII). It is interesting to note the difference, in this respect, between the individual drafts of Professor Strupp and Professor Roth. Article 5 of the draft treaty prepared in 1927 by Professor Strupp (*ibid.*, p. 151, document A/CN.4/217 and Add.1, annex IX) mentions the responsibility of the superior State (*Oberstaat*) for the acts of the inferior or protected State (*Unterstaat*) in the three cases of a federation, a confederation and a protectorate, which are presented together as "composite States". Article 5 of the draft convention prepared in 1932 by Professor Roth (*ibid.*, p. 152, annex X) does not expressly refer to the responsibility of the federal State for the acts of organs of a component state, which it clearly assimilates to the acts of federal organs, though it recognizes the responsibility of the superior State for the acts of the inferior State "in the case of confederations and of dependencies under international law".

<sup>373</sup> See Münch, *op. cit.*, pp. 240-241.

<sup>374</sup> In this connexion, see the pertinent observations of Reuter in *La responsabilité internationale (op. cit.)*, p. 100.

<sup>375</sup> For example, the B and C Mandates of the League of Nations and perhaps some of the remaining Trust Territories.

sion that international responsibility for them is incurred by the metropolitan State. On 11 May 1891, Mr. Ribot, the French Minister for Foreign Affairs, speaking in the Senate about the difficulties which the colony of Newfoundland was putting in the way of implementation of the Franco-British arrangement of 11 March 1891 concerning the Newfoundland fisheries, said:

It has been pointed out that the colony of Newfoundland has on various occasions been less than eager [...] to assist in implementing the arrangements agreed to by England [...]. We, for our part, are not concerned with the colony of Newfoundland; we are not concerned with its public authorities; we are only concerned with England; it is England which we consider to be our guarantor for the conduct of its colony [...]

[...] and if [...] the colony of Newfoundland should subsequently come to evade the obligations which England has contracted, we would consider, and I am sure England considers, that it would be its duty and a matter of honour for it to take all the legislative steps necessary to overcome the resistance of the colony and to ensure the full and integral execution of the award.<sup>376</sup>

In any case, the general principle we have been able to identify as underlying the whole of the subject-matter of this section dictates the solution to be adopted for this particular problem.

184. The general principle referred to is, finally, only a corollary of that unity of the State, from the international point of view, which we have pointed to several times as the most notable aspect revealed by an examination of the facts of inter State relations. As a subject of international law, the State appears as a community equipped with a whole complex of organisms working on its behalf. The action of the community is, to be sure, carried out first and foremost through the action of the members of the State organization proper; but to this action must be added that of the machinery of all the other institutions belonging to the same complex, whether the basis for their separate existence is the special nature of their functions or the local or territorial context in which they act. This shows that the prediction made at the beginning of this section was well founded. A study of the realities of international life has proved to us that the acts and omissions of organs of the State do not exhaust the list of acts which can be attributed to the State as a subject of international law. The acts and omissions of the organs of all public institutions separate from the State must also be regarded as acts of the State at the international level and as possible sources of international responsibility of the State.

185. In the light of the successive analyses made in this section, it seems to us that, once again, the formula used to express the general principle deduced will be all the more effective if it can be both broad and concise at the same time. The wording we propose is as follows:

<sup>376</sup> See Kiss, *Répertoire* . . . (op. cit.), No. 935, p. 568. The replies of Australia, Great Britain and the United States of America to point X of the request for information by the Preparatory Committee for the Hague Conference expressly confirmed their position concerning the responsibility of the State for the conduct of a colony (see League of Nations, *Bases of Discussion* . . . (op. cit.), pp. 121-122; and *Supplement to volume III* (op. cit.), p. 21). The United States thereby modified the different position it had occasionally taken in 1881-1885 in the Tunstall Case with Great Britain (see Moore, *A. Digest* . . . (op. cit.), pp. 663-664).

**Article 7. Attribution to the State, as a subject of international law, of the acts of organs of public institutions separate from the State**

The conduct of a person or group of persons having, under the internal legal order of a State, the status of an organ of a public corporation or other autonomous public institution or of a territorial public entity (municipality, province, region, canton, member state of a federal State, autonomous administration of a dependent territory, etc.), and acting in that capacity in the case in question, is also considered to be an act of the State in international law.

**5. ATTRIBUTION TO THE STATE, AS A SUBJECT OF INTERNATIONAL LAW, OF ACTS OF PRIVATE PERSONS IN FACT PERFORMING PUBLIC FUNCTIONS OR IN FACT ACTING ON BEHALF OF THE STATE**

186. Up to now we have been considering attribution to the State, as a subject of international law, of acts or omissions by persons who in internal law are regarded as organs of the State administration or organs of specialized or territorial public institutions, and whose own functions supplement the functions of public interest provided for directly by the State itself. Let us now turn our attention to situations involving acts or omissions by persons who have no such status, but which nevertheless, in view of the circumstances in which these acts or omissions were committed and of the objects in view, can also be considered as "acts of the State" capable of generating international responsibility if they constitute a breach of an international obligation.

187. There are, indeed, a number of different situations in which an individual or even a group of individuals having no official status under the internal legal order does in fact have occasion to perform a function which should normally be performed by an organ of the State administration or of one of the other public institutions or entities, or is called upon to provide a service or perform a specific task on behalf of the State, without thereby acquiring the status of a State official. It is in connexion with situations of this kind that the theory of administrative law in certain countries has developed the concept of the "de facto official" and has sought to justify this definition, sometimes by the idea of appearance, sometimes by that of necessity and sometimes by the *negotiorum gestio*. Let us say at once that these different explanations of the validity of acts performed under such conditions, and of the responsibility under internal law which the State or other public institutions may incur as a result of them, are of significance only in the national context and have no bearing on the problem of international law with which we are concerned. The consideration of these acts as "acts of the State" at the international level is independent of their attribution to the State in internal law, even though the two may often coincide.

188. An example of a "de facto official" sometimes given is a person who has assumed public office without having been appointed, or after being appointed irregularly, or one who has been regularly appointed but has subsequently been suspended from office for the duration of proceedings taken against him. In such cases, it is said, the



person concerned has only the appearance of being an official: although he may, in good faith or in bad faith, behave as though he were occupying his post in a regular manner, his acts are not the acts of an official and cannot even be assimilated to those of an official who has exceeded his authority or acted against the law, for at the time such a person acts he is not an official at all. According to this view, he is a private person who is in fact performing public functions. Nevertheless, his acts and decisions are normally regarded, in internal law, as being valid with respect to third persons who may reasonably have been unaware of the true situation.<sup>377</sup> Hence it is only natural that these acts and decisions should be considered as acts of the State from the viewpoint of international law. This conclusion, as such, is no doubt correct, but it may be doubted whether—at least in certain situations—it is correct to describe an irregularly appointed official as a mere private person who is in fact performing public functions. Until his irregular appointment is cancelled, his position would seem to be closer to that of a genuine official properly so called.

189. In any case, this is certainly not the most typical of the whole group of situations we have to consider here. There are circumstances in which, for one reason or another, the regular administrative authorities have disappeared. During the last war, for example, in belligerent countries and any other country invaded, local administrations fled before the invaded or, later, before the armies of liberation. It then sometimes happened that persons acting on their own initiative provisionally took over the management of certain commercial concerns in order to render a service to the community, or that committees of private persons provisionally took charge of public affairs, issued ordinances, performed legal acts, administered property, pronounced judgments, etc.<sup>378</sup> In such circumstances, it also happens that private persons acting on their own initiative assume functions of a military nature: for example, when the civilian population of a threatened city takes up arms and organizes its defence.<sup>379</sup>

<sup>377</sup> For an analysis of these situations from the viewpoint of internal law, see Jèze, *Principes de droit administratif*, 3rd ed. (Paris, 1930), t. II, p. 288; Zanobini, *Corso di diritto amministrativo*, 8th ed. (Milan, 1958), vol. I, pp. 306-307; Sayagués Laso, *Tratado de derecho administrativo* (Montevideo, 1953), vol. I, pp. 300 *et seq.*; A. de Laubadère, *Traité élémentaire de droit administratif*, 3rd ed. (Paris, Librairie générale de droit et de jurisprudence, 1963), t. I, p. 239; Alessi, *Principi di diritto amministrativo* (Milan, 1966), vol. I, pp. 96 *et seq.*; E. Forsthoff, *Traité de droit administratif allemand*, translated by M. Fromont (Bruxelles, Bruylant, 1969), p. 361; Giannini, *Diritto amministrativo* (Milan, 1970), vol. I, pp. 272 *et seq.*; for an examination of the same situations from the viewpoint of international law, see Reuter, *La responsabilité internationale* (*op. cit.*), p. 90; Quéneudec, *op. cit.*, pp. 45-46.

<sup>378</sup> For examples, see M. Waline, *Droit administratif*, 8th ed. (Paris, Sirey, 1959), p. 401; Sayagués Laso, *op. cit.*, p. 301; Sandulli, *Manuale di diritto amministrativo*, 10th ed. (Naples, 1969), p. 147; de Laubadère, *op. cit.*, vol. I, p. 240.

<sup>379</sup> Verdross ("Règles générales...", *Recueil des cours...* (*op. cit.*), pp. 466-467, and *Völkerrecht* (*op. cit.*), p. 350) refers to article 2 of the Regulations respecting the Laws and Customs of War on Land,<sup>a</sup> annexed to the IVth Hague Convention of 18 October 1907, which extends consideration as "belligerents" to the inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves.

There are other situations in which the organs of administration are unfortunately lacking as a result of natural events such as an earthquake, a flood or some other major disaster. Here, again, private persons who do not hold any public office may come to assume public functions in order to carry on services which cannot be interrupted, or which must be provided precisely because of the exceptional situation.<sup>380</sup> The law of some countries makes such performance of public functions by private persons obligatory in cases of public danger, riot or disaster, and even punishes failure to fulfil such obligations.<sup>381</sup>

190. In the same context and for the same purposes, mention should be made of the many different situations in which private natural or legal persons—while definitely remaining such—are entrusted by the public authorities with the provision of a service or the performance of a specific task. The range of these possibilities is very wide. A private undertaking may, for instance, be engaged to provide public transport, postal communications or some other public service; non-official associations or groups of private persons may be used as auxiliaries in official health units, the police or the armed forces; drivers of private vehicles may be used to carry troops to the front, etc.<sup>382</sup> In other cases, private persons may be secretly appointed to carry out particular missions or tasks to which the organs of the State prefer not to assign regular State officials; people may be sent as so-called "volunteers" to help an insurrectional movement in a neighbouring country—and many more examples could be given.<sup>383</sup>

Verdross indicates that the acts of these inhabitants are attributed to the State and that the State is responsible for them. (A different opinion is held by Morelli (*op. cit.*, p. 210) and Sereni (*op. cit.*, t. II, p. 513), although the justification for it is not clear). Similar reflections may be made on article 4, para. A(6), of the Geneva Convention of 12 August 1949 on the Treatment of Prisoners of War.<sup>b</sup>

<sup>a</sup> Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907*, 3rd. ed. [J. B. Scott ed.] (New York, Oxford University Press, 1918), pp. 107-108.

<sup>b</sup> United Nations, *Treaty Series*, vol. 75, p. 140.

<sup>380</sup> See Mortati, *Istituzioni di diritto pubblico*, 8th ed. (Padua, 1969), vol. I, p. 219; A. Grisel, *Droit administratif suisse* (Neuchâtel, Ides et Calendes, 1970), pp. 236-237.

<sup>381</sup> Mortati, *op. cit.*, pp. 215-216.

<sup>382</sup> In times which are now past, it also frequently happened that governments granted charters to private companies authorizing them to carry out exploration and colonization missions in specified areas. It is open to question, however, whether the charter companies remained private companies or whether the terms of the concession charter did not transform them into public institutions under the authority of the government. In any case, their acts were considered as acts which could generate international responsibility of the State. See, for examples drawn from the practice at the end of the last century (Anglo-French incidents arising out of the activities of the Royal Niger Company in Niger and the East Africa Company in Uganda), Kiss, *Répertoire...* (*op. cit.*), No. 940, pp. 571-572, and No. 893, pp. 518 *et seq.*

<sup>383</sup> Dahm (*op. cit.*, p. 193) mentions the case of an entrepreneur engaged to recruit foreign labour in an occupied country in violation of international law, and the case of a doctor instructed to carry out experiments on prisoners. Other writers, such as Sereni (*op. cit.*, t. III, p. 1512), refer mainly to cases of private persons secretly recruited to carry out espionage, sabotage, terrorism, abduction and other such assignments, the completion of which is certainly an act of the State, even if it is disguised as a private act.



191. At the internal level, the State often assumes responsibility for offences committed by private persons exceptionally performing public functions in the place of *de jure* officials who omit to perform them or are unable to do so. Similarly, the State is often considered responsible for the acts of private natural or legal persons commissioned to provide a particular public service, or of individuals or groups carrying out any kind of mission for the State. The State, as a subject of international law, should, *a fortiori* it seems, bear responsibility for the acts of these various classes of person where they relate to one of the functions, tasks or missions mentioned above and have resulted in a breach of an international obligation of the State. The underlying principle in international law, which is becoming increasingly clear as our analysis progresses, requires that the criterion should be the public character of the function or mission in the performance of which the act or omission contrary to international law was committed, rather than the formal link between the State organization and the person whose conduct is in question. An act by the person most certainly invested with the legal status an organ of the State is still not an "act of the State" if the person-organ was acting only a private capacity. Similarly, it is logical that the act of a private person who, in one way or another, is performing a function or task of an obviously public character should be considered as an act attributable to the community and should engage the responsibility of the State at the international level. Moreover, the validity of this conclusion is confirmed by international jurisprudence and practice, even though the former, especially, has only occasionally had to deal with the acts of persons or groups who, despite the different nature of the situations we are referring to, may be brought together under the common denomination of "*de facto* organs". The cases which have actually occurred in international life relate mainly to situations in which the activities of the persons concerned were especially liable to bring them into contact with foreign countries. The conduct which has been taken into consideration for attribution to the State as acts generating international responsibility is, first, that of private persons or groups used as auxiliaries in the police or armed forces, or sent as "volunteers" to neighbouring countries; and, secondly, that of persons employed to carry out certain assignments in foreign territory, which may or may not be acknowledged.

192. With regard to the first group of situations, reference is often made to a case which dates back to the Spanish-American war, but was not settled until 30 November 1925, by a Great Britain/United States arbitral tribunal—namely, the *D. Earnshaw and Others (Zafiro)* Case. The question which arose in this case was whether the conduct of the crew of a United States merchant vessel could be considered as an act of the State. The United States argued that "the *Zafiro*, registered as a merchant ship, must be so regarded, and can not be held to be a public ship for whose conduct the United States may be held liable." The arbitral tribunal rejected that argument and affirmed, as a principle, "that the liability of the State [...] must depend on the nature of the service in which [...] [the vessel] is engaged and the purpose for which she is employed..." It concluded that the conduct

of the crew of the *Zafiro* must be attributed to the United States and engage its responsibility since, whatever the legal régime of the vessel, it was being used as a supply ship for United States naval operations and its captain and crew were, for this purpose, in fact under the command of a naval officer who had come on board to control and direct the movements of the ship.<sup>384</sup>

Another application of the same principle is to be found in the decision in the *Stephens Case*, given on 15 July 1927 by the Mexico/United States of America General Claims Commission. Stephens, a United States national, had been killed by a person named Valenzuela, who was a member of a group of auxiliaries of the Mexican armed forces. With reference to these auxiliaries, the Commission observed:

It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were 'acting for' Mexico.

On this basis the Commission concluded that Valenzuela must be assimilated to a soldier and that Mexico must be held liable for his act.<sup>385</sup> We can finally quote the case of the pseudo-volunteers sent to Spain by some foreign States during the civil war of 1936-1939. Referring to these "volunteers", the Mexican delegate at the League of Nations, Mr Fabela, declared:

In order to maintain that the foreign soldiers fighting in Spain are volunteers, it would be necessary to consider that they left their country against the law, i.e. as criminals. And everyone knows that these soldiers have never been thus considered, but as heroes who deserved the warm congratulations of their Government. Consequently their acts are acts of the Government and engage its responsibility.<sup>386</sup>

193. With regard to the second group of situations, reference is made to the *Black Tom* and *Kingsland* cases, concerning acts of sabotage committed in the United States of America during the period of its neutrality in the First World War. These acts were attributed to German saboteurs. In its decision of 16 October 1930, the United States and Germany Mixed Claims Commission, established under the agreement of 10 August 1922, did not hold Germany responsible, but only because it had not been proved that the fires which caused the damage were in fact due to the acts of the persons suspected of sabotage; otherwise, these acts would undoubtedly have been attributed to the German State.<sup>387</sup> In the same context, reference is also made to the notorious cases in

<sup>384</sup> *United Nations, Reports of International Arbitral Awards*, vol. VI (United Nations publication, Sales No. 1955.V.3), pp. 160 *et seq.* See the comments on this case by T. Meron, *op. cit.*, p. 106.

<sup>385</sup> *United Nations, Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No. 1951.V.1), p. 267.

<sup>386</sup> League of Nations, 18th Assembly, Sixth Committee, Records of the eighteenth ordinary session of the Assembly, Minutes of the Sixth Committee, 1937 (*Official Journal, Special Supplement No. 175*), p. 61.

<sup>387</sup> Germany itself, in the agreement of 10 August 1922, had declared itself willing to make reparation for the damage caused by German saboteurs if it were proven that such damage had really been caused by the persons concerned. For an account of the two cases mentioned here and for the text of the decision of the Mixed Commission, see *American Journal of International Law*, Washington, vol. 25, No. 1 (January 1931), pp. 147 *et seq.*

which persons have been abducted from the territory of another State Cesare Rossi, resident at Lugano, was abducted on 28 August 1928, by persons probably acting by agreement with the Italian police. These persons took Rossi to Campione, in Italian territory, where the police arrested him. On 27 September Mr. Motta, Head of the Swiss Federal Political Department, speaking on this matter in the Federal Council, said:

... it is evident that acts have been committed on Swiss territory by agents of the Italian police or by persons acting in concert with them, with a view to bringing about and securing the arrest, on Italian territory, of persons wanted in Italy. The Swiss Federal Council regards these doings as acts violating the territorial security of Switzerland and hence contrary to international law.<sup>388</sup>

In its reply, dated 1 October, the Italian Government denied the charge that there had been co-operation by the Italian police and declared that it had never intended to violate the territorial sovereignty of Switzerland. The two Governments maintained their positions in further notes dated 11 October and 1 November, respectively. Leaving aside this difference of opinion concerning the facts, the principle of law on which the Swiss Government relied, and which the Italian Government did not dispute, was that Italy would have been responsible if it had been proved that the persons committing the acts on Swiss territory had acted by agreement with, and on behalf of, the Italian police.<sup>389</sup> A similar situation arose seven years later when Berthold Jacob, a German journalist who had taken refuge in Switzerland, was abducted, on 9 March 1935, by persons manifestly employed for this work by the Gestapo, and taken to Germany. Following protests by the Swiss Government, the German Government agreed, on 25 July 1935, to sign an arbitration agreement.<sup>390</sup> After the Second World War, in 1960, Adolf Eichmann, a German national actively sought for war crimes, was found during the night of 11-12 May by a group of Israeli nationals in a suburb of Buenos Aires, where he had taken refuge after staying successively in various countries. Eichmann was abducted by these persons, and on 25 May he was taken by air to Israel to stand trial there. The Government of Israel, both in its diplomatic correspondence with the Argentine Government and later before the Security Council, to which Argentina referred the matter, maintained that the abduction was the work of a "group of volunteers" who had acted on their own initiative and without the knowledge of the Government

of Israel. It nevertheless expressed its regret for any infringement of Argentine laws or Argentine sovereignty which might have been committed by the group of volunteers. The Argentine Government regarded this expression of regret as an admission of responsibility by the Government of Israel. It maintained that the operation had in fact been carried out by secret emissaries of that Government; and that even if the volunteers had acted without the knowledge of the Government of Israel, the fact remained that that Government had subsequently approved the act committed in violation of Argentine sovereignty and had supported those responsible for it.<sup>391</sup> On 23 June 1960 the Security Council adopted resolution 138 (1960) drawing attention to the dangers involved in any repetition of such acts and requesting the Government of Israel to make appropriate reparation to the Argentine Government in accordance with the Charter of the United Nations and the rules of international law.<sup>392</sup> A few years later ex-Colonel Argoud, one of the leaders of the OAS, was abducted from a Munich hotel and taken to Paris, where the police, informed by an anonymous telephone call, found him, bound, in a small van in a street in the centre of the city. They arrested him and he was tried for acts against the security of the State. The affair gave rise to long discussions, both in German political circles and at the international level. Some members of the Bundestag raised the question of the international responsibility of France for the abduction, called for an enquiry and pressed the German Government to demand the return of Colonel Argoud. In December 1963, the German Government decided to apply to the French authorities for his return. The French Government denied any participation in the abduction. There was a further exchange of notes between the two Governments, after which an exchange of personal letters between the two Heads of State seems to have closed the incident.<sup>393</sup>

<sup>391</sup> The Argentine Government also adopted, as a secondary argument, the old theory that the State sometimes becomes responsible for the act of a private person when by subsequent approval it endorses the act and adopts it as its own. See, on this subject, Eagleton, *The Responsibility of States*... (*op. cit.*), p. 79. We shall revert to this point later, when we come to deal with the acts or private persons proper.

<sup>392</sup> The dispute concerning interpretation, on the question whether reparation should take the form of the return of Eichmann or of apologies by Israel, was finally closed by a joint communiqué issued by the two Governments on 3 August 1960. The text of the Security Council resolution and that of the joint communiqué are reproduced in *International Law Reports* (London, vol. 36, 1968), pp. 58 *et seq.* For a detailed analysis of this case, see the account given in *Revue générale de droit international public* (Paris, 3rd series, t. XXXI, No. 4 (Oct.-Dec. 1960), pp. 772 *et seq.*, and, on its international law aspects, the articles by P. O'Higgins: "Unlawful Seizure and Irregular Extradition", *The British Year Book of International Law*, 1960 (London, 1961), pp. 279 *et seq.*; by H. Silving: "In Re Eichmann: A Dilemma of Law and Morality", *American Journal of International Law* (Washington, vol. 55, No. 2, April 1961), pp. 307 *et seq.*; J.E.S. Fawcett: "The Eichmann Case", *The British Year Book of International Law*, 1962 (London, 1964), pp. 181 *et seq.*; and by L. Green: "Legal Issues of the Eichmann Trial", *Tulane Law Review*, 1963, pp. 641 *et seq.* For a complete bibliography on the Eichmann case, see *International Law Reports* (London, vol. 36, 1968), pp. 342 *et seq.*

<sup>393</sup> The two letters were dated 18 February and 8 April 1964, respectively. On the Argoud case, see the information given in

(Continued on next page)

<sup>388</sup> Quoted by Scheuner: "Der Notenwechsel zwischen der Schweiz und Italien in der Angelegenheit Cesare Rossi", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Berlin, t. I, part 2, 1929), p. 283.

<sup>389</sup> After this exchange of notes, the dispute was considered as settled *de facto*. See, with reference to this case, Ch. Rousseau, "L'aménagement de compétences en droit international", *Revue générale de droit international public* (Paris, 3rd series, t. IV, 1930), p. 445, foot-note 71; and Scheuner, *op. cit.*, pp. 280 *et seq.*

<sup>390</sup> The arbitration did not take place, however, and the dispute between Switzerland and Germany concerning the Jacob Case was settled on 17 September 1935 by an extra-judicial agreement between the two Governments, under which Jacob was returned to the Swiss authorities and arrested by them. See the text of the arbitration agreement in "Die deutsch-schweizerische Schiedsordnung im Falle Jacob", *die Friedens-Warte* (Geneva, vol. 35, No. 4, 1935), pp. 157-158; and in *Revue générale de droit international public* (Paris, 3rd series, t. X, No. 5 [Sept.-Oct. 1936]), p. 638.

194. For each of the two groups of situations described at the end of paragraph 191, we have confined ourselves to cases which have been the subject of an international arbitral award or of statements of position in terms of law in diplomatic correspondence between the States concerned. It need hardly be said that, in view of the number and variety of the situations that may arise, it would be easy to mention other specific cases, even recent ones, especially in the very varied field of action on foreign territory by persons or groups connected with the State in fact, if not formally. Mention could also be made of certain statements of position made on the occasion of incidents caused by the conduct of the press, radio, television, etc. It has happened that the country claiming to be injured has alleged international responsibility for such conduct, arguing that, in the country where the conduct occurred, the press and other mass information media were not free, but were really controlled by the Government,<sup>394</sup> so that the acts complained of should not be considered as acts of mere private persons, but of persons acting, in fact, at the instigation and on behalf of the Government. It does not seem necessary, however, to take up any more time in giving further concrete examples of the application of the principle which is the subject of this section, since this principle is practically undisputed. The attribution to the State, as a subject of international law, of the conduct of persons who are in fact acting on its behalf or at its instigation (though without having acquired the status of organs, either of the State itself or of a separate official institution providing a public service or performing a public function) is unanimously upheld by the writers on international law who have dealt with this question.<sup>395</sup>

195. Attempts are sometimes made to assimilate to the situations we have been examining here the case of certain

institutions considered in section 4 of this report, such as the single parties which, in various countries, perform particularly important public functions. In the countries where they exist, however, institutions of this kind are genuine public institutions, though they are separate from the State; the public functions they perform are statutorily their own functions and not functions of the State which they perform on its behalf. Hence these institutions cannot be assimilated to private persons or private groups acting more or less occasionally on behalf of the State or in place of its organs.

196. We do not believe, either, that the case of "*de facto* officials" can be assimilated to the case of what are often called "*de facto* governments". The notion of the *de facto* official presupposes the existence of a government in office and of State machinery serving it; he takes the place of organs of that machinery or supplements their action in certain circumstances, while himself remaining outside it, but acting in fact as though he formed part of it. The *de facto* government, on the other hand, is itself a State apparatus which has replaced, for reasons that may vary from situation to situation, the State machinery that existed previously. The term "*de facto* government", or "general *de facto* government", is sometimes used to designate a government which, though it has not been invested with power in accordance with the previously established constitutional forms, has fully and finally taken power, the previous government having disappeared. The term in question then merely reflects the existence of a problem of legitimacy concerning the origin of the new government—a problem which, moreover, subsists only from the point of view of a constitutional rule that will probably cease to exist itself, being replaced by a new written or unwritten rule.<sup>396</sup> But all this is without relevance to the problems of international responsibility, in which no distinction may be made between a State ruled by a *de facto* government and one ruled by a *de jure* government. A State whose government has been established in full compliance with the prescribed constitutional forms and a State whose government was born of a revolutionary change incur international responsibility under exactly the same conditions and for the same reasons.<sup>397</sup> The State organization exists in the one case as in the other; and the persons who are part of it are no less "organs"—and true organs—because the government has a *de facto* rather than a *de jure*

(Foot-note 393 continued)

*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart, vol. 25, No. 2, May 1965), pp. 295 *et seq.*; *ibid.* (1967), pp. 188-189; and A. Cocatre-Zilgien, *L'Affaire Argoud* (Paris, 1965).

On the problems of international responsibility for abductions alleged to have been carried out by private persons, see B. de Schutter, "Competence of the national judiciary power in case the accused has been unlawfully brought within the national frontiers", *Revue belge de droit international* (Brussels, vol. 1965-I, 1965), pp. 97 *et seq.*; N. Ronzitti, "La cattura di un individuo all'estero: In margine al caso Argoud", *Rivista di diritto internazionale* (Milan, vol. XLVIII, fasc. 1, 1965), pp. 64 *et seq.*

<sup>394</sup> For examples drawn from practice, see also Friedmann, "The Growth of State Control . . .", *The British Year Book . . .* (op. cit.), pp. 145 *et seq.*; Zellweger, op. cit., pp. 40 *et seq.*; Münch, op. cit., pp. 233-234; Quéneudec, op. cit., p. 54. One of the most recent cases cited is that of an article published in 1964 in *Izvestia*, which gave rise to a protest by the Government of the Federal Republic of Germany, the article being regarded as an insult to the President, Mr. Luebke. The apologies made at the German Embassy in Moscow by an editor of the newspaper were accepted by the Federal Government. See *Revue générale de droit international public* (Paris, 3rd series, t. XXXV, No. 4 [Oct.-Dec. 1964]), pp. 922-923.

<sup>395</sup> On this subject see Anzilotti, *Corso . . .* (op. cit.), p. 387; Verdross, *Völkerrecht* (op. cit.), p. 380; Reuter, *La responsabilité internationale* (op. cit.), pp. 90 *et seq.*; Cheng, op. cit., pp. 196-197; Morelli, op. cit., p. 191; Sereni, op. cit., t. III, p. 1512; Dahm, op. cit., p. 193; Münch, op. cit., p. 199; Quéneudec, op. cit., pp. 47 *et seq.*; Ténékidès, "Responsabilité internationale", *Répertoire de droit international* (op. cit.), p. 787; Vitta, "Responsabilità degli Stati", *Novissimo Digesto Italiano* (op. cit.), p. 735.

<sup>396</sup> This aspect has long been brought out in international jurisprudence. See, for example, the award of 17 October 1923 by the Arbitrator, Mr. Taft, in the Aguilar-Amory and Royal Bank of Canada Claims (Tinoco Case), in United Nations, *Report of International Arbitral Awards*, vol. I (United Nations publication, Sales No. 1948.V.2), pp. 375 *et seq.*, in particular pp. 381-382. See also the other cases quoted by Cheng, op. cit., pp. 188-189.

<sup>397</sup> See, in this connexion, Borchard, *The Diplomatic Protection . . .* (op. cit.), pp. 205 *et seq.*; Strupp, "Das völkerrechtliche Delikt", *Handbuch . . .* (op. cit.), pp. 89 *et seq.*; J. Spiropoulos, *Die de facto-Regierung im Völkerrecht* (Beiträge zur Reform und Kodifikation des Völkerrechts, No. 2) (Kiel, Verlag des Instituts für Internationales Recht an der Universität Kiel, 1926), pp. 172 *et seq.*; Anzilotti, *Corso . . .* (op. cit.), p. 167; Verdross, "Règles générales . . .", *Recueil des cours . . .* (op. cit.), pp. 336-337, *et Völkerrecht* (op. cit.), p. 322; Cheng, op. cit., loc. cit.; Schwarzenberger, *International Law* (op. cit.), p. 135; Sereni, op. cit., t. III, p. 1508; Quéneudec, op. cit., p. 46.

origin.<sup>398</sup> Hence, their case has nothing to do with that of private persons in fact performing a public function or in fact carrying out a mission on behalf of the State. The question may have some more complicated aspects in cases where the term "*de facto* government" is applied retroactively by a regular government, which has been re-established, to a government previously set up in its territory as a result of a revolution or a *coup d'état*, or at the instigation of a foreign State which occupied the territory and wished to make use of it as a *longa manus* for its own purposes. Complicated problems of direct or indirect responsibility and of succession of governments may then arise, but these are problems of a special nature which will have to be considered in a context other than that of the questions falling within the scope of this section.

197. Having clarified these points, it seems that we can now proceed to formulate the draft article which is to express the principle brought out in the preceding paragraphs. In the light of the observations made and of the need for a comprehensive formula that can cover a wide variety of situations, we propose the following text:

**Article 8. Attribution to the State, as a subject of international law, of acts of private persons in fact performing public functions or in fact acting on behalf of the State**

The conduct of a person or group of persons who, under the internal legal order of a State, do not formally possess the status of organs of that State or of a public institution separate from the State, but in fact perform public functions or in fact act on behalf of the State, is also considered to be an act of the State in international law.

**6. ATTRIBUTION TO THE STATE, AS A SUBJECT OF INTERNATIONAL LAW, OF THE ACTS OF ORGANS PLACED AT ITS DISPOSAL BY ANOTHER STATE OR BY AN INTERNATIONAL ORGANIZATION**

198. The successive identification of acts which must be considered as "acts of the State" from the standpoint of international law, and may involve the international responsibility of the State, has led us to establish a number of points. One essential fact must be emphasized from the start: the acts or omissions of persons who, according to the internal legal order, possess the status of organs of the State concerned and are acting in that capacity in the case in question, are acts of the State from the standpoint of international law. We have seen also that this conclusion is inescapable irrespective of the branch of government to which the persons committing these acts or omissions belong, of whether they are superiors or subordinates, of the nature of their functions or of the place where they perform them. Next, we established that the acts and omissions of persons who, again according to the internal legal order, possess the status of organs of public institutions separate from the

State—such as public corporations, autonomous public institutions, territorial entities, and so forth—must also be considered as acts of the State from the standpoint of international law. We have seen, too, that the acts and omissions of private persons who, in special circumstances, are in fact performing public functions or in fact acting on behalf of the State must likewise be added. In order to exhaust the list, we must now consider another specific group of acts, namely acts committed by organs placed at the disposal of one State by another State or by an international organization.

199. There is one point which must first be elucidated in order to make it quite clear what we are discussing. The situations we have in mind are those in which a State or an international organization places one of its organs, whether individual or collective, at the disposal of another State in order that that other State may use it within its own system to perform, in conjunction with its own machinery, a specific public task or function or to provide a public service for which its own organization is not suitably or sufficiently equipped. There is therefore a clear distinction between situations of this kind and situations in which organs of a State are performing some of their own functions which, either in the ordinary course of events or exceptionally, have to be exercised in foreign territory. Functions of that kind are, and continue to be, functions of the State to which the organs belong, and there is therefore no connexion between these organs and the machinery of the State in whose territory they are acting.

200. Once this has been made clear, it is easy to envisage possible instances of organs being "lent" by one State to another State or by an international organization to a State. A State may place at the disposal of another State a contingent of its police or armed forces so that, together with the forces of the beneficiary State, it may assist that State in putting down an insurrection or resisting foreign aggression. It may send to the other State a detachment of its health, hospital or other services to provide assistance when there is an epidemic or other natural disaster. It may authorize some of its officials to administer in the territory of a third State a service of another State, in cases where the officials of that other State are unable for one reason or another to do so. It may second specialists from its administration to help another State to organize or reorganize a service, to instal plant, to plan and put into operation a structural reform, and so forth. Obviously, assistance of this nature may be provided not by another State but by an international organization or institution; and it goes without saying that situations of this kind are likely to become increasingly frequent in the widening framework of bilateral or multilateral assistance programmes.

201. The question arises whether the activities of these organs which are "lent" to or "placed at the disposal" of another State<sup>399</sup>—these "transferred servants" as English-

<sup>398</sup> De Laubadère (*op. cit.*, p. 240) mentions as examples the National Defence Government formed in France in 1870 and the Provisional Government also formed in France, in 1944. He rightly stresses the point that State officials under these governments were *de jure* and not *de facto* officials.

<sup>399</sup> The expression "organes mis à la disposition" (of another subject of international law) is found for example in the judgment of the Civil Court of Tunis on the Trochel Case (*Recueil Dalloz de doctrine, de jurisprudence et de législation*, Paris, 1953, p. 564) and in

speaking writers call them<sup>400</sup>—should be attributed at the international level to the State within whose system they are to perform specific functions. There would appear to be no doubt about the answer. If they are organs which, though belonging to a particular State (or international organization), have in fact been *placed at the disposal* of another State, and have genuinely been placed under the authority and orders of that other State to be used for some time, then the acts or omissions which they may commit are attributable only to that other State. This principle can, of course, be applied in different ways. It may happen that the organ of one State is placed temporarily at the exclusive disposal of another State and ceases, in that case, to perform any activity on behalf of the State to which it belongs. On the other hand, it may be that if another State is given an opportunity to use the services of such an organ, its demands may not be so exacting as to prevent the organ from continuing to act simultaneously, though independently, as an organ of its own State. In such cases it will be necessary to ascertain in each particular instance on whose behalf and by whose authority a specific act or omission has been committed. It may be that a State at whose disposal a foreign State has placed a person belonging to its administration will appoint this person to a post in its service, so that at a given moment he will formally be an organ of two different States at the same time.<sup>401</sup> If that were so, the acts or omissions committed by the person in question in performing a function of the recipient State would be acts of the recipient State just as if they were acts or omissions of its own organs. If, on the other hand, the person in question is not formally an organ of the recipient State, his actions will still be considered as acts of the recipient State but will be regarded rather as of the same nature as the acts or omissions of private persons in fact performing State functions, since the status of organ accorded under the legal order of the State of origin is not valid under the legal order of the recipient State. In any case, the basic conclusion is still the same: the acts or omissions of organs placed at the disposal of a State by other subjects

of international law are attributable to that State if in fact these acts and omissions have been committed in the performance of functions of that State and under its genuine and exclusive authority. The reply to the question raised at the beginning of this paragraph is therefore in the affirmative in all the different situations envisaged here.

202. It is no accident that in considering the case of organs "lent" by one State to another, we have constantly insisted that there is one essential requirement which must be fulfilled before the acts of these organs can be attributed to the beneficiary State and before any consequences arising from these acts in terms of international responsibility can be justified. In performing the functions assigned to it within the system of another State, the organ that has been "lent", so long as it continues to be lent and to act in that capacity, must be genuinely and exclusively under the authority of the other State. Indeed, it is only when this requirement has been fulfilled, that it is really possible to speak of an organ of one State "placed at the disposal" of another State. It is clear, for example, that this requirement has not been met in cases where a State agrees that an organ of a foreign State—for example, the troops of a State with which it has concluded a defensive alliance—should be stationed in its territory and engage in activities there while retaining its status as an organ of that foreign State.<sup>402</sup> Furthermore, it is essential to stress that the situations we have in mind are not analogous to cases in which a State, because it is a dependency, a protectorate, under mandate, under military occupation, in an inequitable union and so forth, is obliged to accept that the acts of its own apparatus are set aside and replaced to a greater or lesser extent by those of the apparatus of another State. In situations of this kind, whatever the language sometimes used to save appearances, the superior, protecting, occupying, etc., State is in no sense placing its own organs at the disposal of the subordinate, protected or occupied State. What it is in fact doing is to replace, in specific sectors, the activities of the organs of the subordinate State by those of its own organs, which will go on acting under its own instructions. There is, therefore, no "loan" and no persons belonging to the apparatus of one State are really being "placed at the disposal" of another State. It is rather a case of a transfer of functions in reverse: certain functions normally carried out by the organs of the territorial State are taken away from those organs and transferred to the organs of another State, which perform them under that State's authority and control. From the international point of view, therefore, the acts and omissions of the organs concerned are obviously acts and omissions of the State to which the organs belong—the so-called "superior" State—and will consequently involve the international responsibility of that State should the occasion arise. A basic distinction must accordingly be made between the differ-

(Foot-note 399 continued)

a report dated 18 July 1960 by the Secretary-General of the United Nations concerning the United Nations Force in the Congo (*Official Records of the Security Council, Fifteenth Year, Supplement for July, August and September 1960*, document S/4389). J.-P. Ritter ("La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de droit international*, 1962 (Paris, 1963), vol. VIII, p. 444) uses this expression as well as "organes prêtés".

We are referring here solely to cases in which the beneficiary of a "loan" of an organ from another State or from an international organization is itself a State, since this draft is exclusively concerned with State responsibility. But it is clear that cases may occur in which conversely, an international organization is the beneficiary of a loan of organs by a State. In such cases, a problem of international responsibility may arise for the organization. It would be useful to see how some of these cases have been settled in practice, since this may lead to an indirect confirmation of the principle we are affirming here.

<sup>400</sup> See Brownlie, *op. cit.*, p. 376.

<sup>401</sup> In spite of this formal situation, the person in question will in fact be acting only for one of the two States or at all events in different conditions for each of them. His situation should not be confused with that of a "joint" organ, defined as such by an agreement between two States. The actions of a joint organ are acts of each of the two States at the same time and may consequently involve the international responsibility of both of them.

<sup>402</sup> Ritter states that "a State remains responsible for the acts of its armed forces as long as it retains command and control over them, even if under the terms of an alliance or in response to a request for intervention it has placed them in the service of the interests of a friendly power." [Translation by the United Nations Secretariat] (*op. cit.*, p. 445).

ent situations in which organs of one State perform functions in another State; and this distinction necessarily affects the solution to be given to the problem of determining to which State the acts of such organs are attributable. The criterion for attributing the acts or omissions of the persons in question to one State rather than another is not the specific State apparatus to which they originally belonged, and not—or rather not only—the system within which their activities are performed. The decisive element is the authority actually responsible for their acts at the time when they performed them. If at that time they are genuinely at the disposal of another State and operating under its authority, then their acts and omissions are attributable to that State and can cause it to incur international responsibility. If they are still acting under the authority and in accordance with the instructions of their own State, then their own State must be regarded as the author of their acts and must answer for them internationally.<sup>403</sup>

203. The principle which has just been stated seems to be confirmed by international jurisprudence and practice. It is true that there have only been a very few legal pronouncements on the problem we are discussing here. Reference may, however, be made to the arbitral award made on 9 June 1931 in the *Chevreau Case* by Judge Beichmann, who was appointed arbitrator under the *compromis* signed in London on 4 March 1930 by France and the United Kingdom.<sup>404</sup> Julien Chevreau, a French national resident in Persia, had been arrested in 1918 by the British Expeditionary Force under General Dunster-ville which was operating near the Caspian Sea. He was subsequently detained on suspicion of intelligence with the enemy and deported. The arbitrator, who was requested to establish first whether the measures taken against Chevreau had been taken in such circumstances as to give rise to a claim in international law, had to decide, in particular, whether the United Kingdom was required to compensate Chevreau for the loss of certain property, books and documents which, according to Chevreau, had been in his rooms at the time of his arrest and had subsequently been stolen or lost owing to the negligence of the British consular authorities. In fact, Chevreau's books and documents had been sent at the request of the French Consul at Resht—who was away from Persia at the time—to the British Consul who, in the absence of the French Consul, was in charge of the French Consulate. In

his award the arbitrator rejected the French claim, stating that:

The British Government cannot be held responsible for negligence by its Consul when in charge of the Consulate of another Power.<sup>405</sup> The situation in question was therefore precisely one of those described above; <sup>406</sup> it was a case where the organ of one State was required to administer in a foreign State an office belonging to another State, replacing an organ of the last-mentioned State which was unable to perform its functions itself. And the conclusion reached by the arbitrator, ruling out the possibility of attributing to the United Kingdom responsibility for negligence by an organ of the British State at a time when it was performing a function for the French State, was obviously based on recognition of the principle which, in our view, governs the matter—namely, that an act or omission committed by the organ of one State in the performance of functions on behalf of another State, in whose interests it has been requested to act, must be considered at the international level as an act of that other State.

204. The criteria to be applied in the matter now under discussion emerge equally clearly from an examination of State practice. The principle of the responsibility of the State for the acts of organs placed at its disposal by another State, for use as auxiliaries of its own organs, was clearly upheld by the Government of El Salvador in the *Gattorno Case*, which gave rise to an exchange of notes between the Governments of Italy and El Salvador in 1872-73. Gattorno, an Italian national residing at Amapala (Honduras) had suffered injury at the hands of the troops of a Honduran general, General Streber, commanding a body of troops which the Government of El Salvador had placed at the disposal of Honduras as an "auxiliary force". The Italian Chargé d'affaires in Guatemala, Mr. Anfora, applied in the first instance to the Government of El Salvador for compensation for the damage suffered by Mr. Gattorno. In support of his application, he said:

At the time when Amapala was occupied and these regrettable acts of violence took place, General Streber was Commander-in-Chief of the Salvadorian Oriente vanguard and was responsible to the Ministry of War at San Salvador, as is clear from a report sent by him on 8 May and published in the Official Gazette of 16 May.<sup>407</sup>

The Government of El Salvador replied to Mr. Anfora, however, that the acts of the corps commanded by General Streber were committed by Honduras and that Honduras must therefore bear responsibility for them. In support of its argument, the Government of El Salvador said:

The documents published in the Official Gazettes of this Republic and of Honduras show that during the months of May and June, the operations of the Salvadorian forces ceased to have an international character as soon as those forces entered the territory of Honduras, since they then placed themselves at the disposal of the Provisional Government of Mr. Arias as "auxiliary forces". Accordingly, General Streber occupied the port of Amapala on 8 May as Commander-in-Chief of the vanguard of the Salvadorian army

<sup>403</sup> It should be noted that, in spite of the distinction between them, the two cases mentioned here are both cases of direct responsibility—that is to say, responsibility of the author of the act. Consequently they should not be confused with cases of indirect responsibility, or responsibility for the acts of other persons, which, as we shall see later, arise when members of the apparatus of one State continue to perform their own functions themselves though they are under the control and subject to the orders of a foreign State.

<sup>404</sup> We should also mention here that the conclusion stated above regarding the international responsibility assumed by a State in the situations we have just described cannot be affected by the decision—possibly a different one—which may be adopted or imposed at the national level regarding civil or administrative responsibility.

<sup>405</sup> United Nations *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), pp. 1115-1116.

<sup>406</sup> *Ibid.*, p. 1141.

<sup>407</sup> See para. 200 above.

<sup>408</sup> Mr. Anfora to Mr. Arbiju, 14 November 1872 (*Archivio del Ministero degli Affari Esteri italiano*, serie Politica A, No. 1244).



assisting the Provisional Government of Honduras. This is stated textually in the instrument of surrender concluded on the same day with Colonel Clotter, commanding at Amapala, and published in Official Gazette No. 53 of that Republic, on 16 May of this year. As the Salvadorian forces were auxiliaries, even if General Streber was not a Honduran national, I believe that you will agree with me that responsibility rests with the Government *under whose orders* these forces were operating and not with the Government of El Salvador.<sup>408</sup>

Mr. Anfora then transmitted the reply of the Government of El Salvador to the Italian Minister for Foreign Affairs and proposed that he (Mr. Anfora) should press the Government of El Salvador to meet Mr. Gattorno's claim and then itself seek reimbursement from the Government of Honduras. But the Secretary-General of the Ministry, Mr. Artom, did not accept this proposal and, in his reply to Mr. Anfora, he pointed out that the rule applicable in determining responsibility for the acts of troops sent by one Government to another as auxiliaries depended primarily on the agreements actually concluded between the two Governments at the time when one of them sent troops to the other. The Italian Government seemed therefore to agree with the views of the Government of El Salvador, since it was precisely the agreements in question which should have established whether General Streber's troops were genuinely operating on behalf of the Government of Honduras and under its orders, as the Government of El Salvador asserted. Mr. Anfora was therefore instructed to submit his claim to the Government of Honduras, in order to ascertain whether that Government accepted responsibility for the acts of General Streber.<sup>409</sup>

205. A similar position was adopted in a letter addressed by Mr. Geoffray, the French Ambassador at Madrid, to Mr. Cruppi, the French Minister for Foreign Affairs, on 16 June 1911. Mr. Geoffray stated in the letter that he had replied in the following terms to a note from the Spanish Minister of State, Mr. García Prieto, complaining about the conduct of a French officer named Moreaux who had been placed by France at the disposal of the Moroccan Government:

With regard to the presence of Captain Moreaux in the vicinity of El Ksar, to which reference is made at the end of your letter, I would however venture to point out to you that this is a Moroccan outpost commanded by an officer in the regular service of the Sultan. Accordingly, his movements are of no concern to us, and they were doubtless carried out under orders from the Moroccan Government itself.<sup>410</sup>

206. It therefore seems clear from these statements of position by Governments that the act or omission of an organ placed by one State at the disposal of another State and acting in the particular case on behalf of that other State must be attributed to that State. Here again, however, the idea is subject to the fundamental criterion of effectiveness which is constantly found at the root of the principles of international law and is the basis of their

interpretation. The "placing at the disposal" must be genuine and not a mere semblance. In other words, if the act is to be attributed to the "beneficiary" State, the organ "lent" by another State must *genuinely* have been placed under the authority of the beneficiary State and must be acting in accordance with instructions from that State. In cases where, on the contrary, the organ concerned, though acting on the territory of a foreign State and in its name, is not in fact acting under the authority of that State or in accordance with its instructions, the principle upheld is that the acts of that organ are attributable to the State to which it belongs and under whose authority it is continuing to act. In international law, the State on whose behalf it is operating in a purely formal sense is not considered to be the author of its acts and is not responsible for them.

207. It is interesting to consider in this connexion the position taken by the Italian Government on the occasion of the dispute concerning damage caused by French troops during the bombardment and capture of the town of Sfax, in Tunisia. In July 1881 this town revolted against the Bey. The French Government, which under the Treaty of Kasr Said had undertaken to support the Bey of Tunis "against any danger threatening the tranquillity of his domains", sent troops to put down the insurrection. During the events which followed, a number of Italian nationals residing at Sfax suffered injury; the consulate itself was occupied and the archives seized. Mr. P. S. Mancini, the Italian Minister for Foreign Affairs, instructed the Italian Consul-General at Tunis and, through him, the Italian Consular Agent at Sfax, to determine the amount of damage suffered and to ascertain whether the damage was due to the bombardment or to the looting and theft which had occurred when houses had been left empty. In particular, he wished to know, whether the authors of the various injurious acts were Tunisian insurgents or French soldiers, and he went on to say:

the latter eventuality [...] would be particularly serious and important in settling questions of responsibility for the damage caused.<sup>411</sup>

Mr. Mancini's intention was therefore to await the results of the inquiry for which he had asked before making official representations to the French Government. As a joint committee of inquiry into the events at Sfax had meanwhile been established on the initiative of the French Government, the Italian representative was instructed to emphasize that the committee's task was to establish who had caused the damage, and to determine

[...] the share of responsibility which, in the light of the findings of the inquiry, is to be borne by France and Tunisia respectively, the latter on the ground of its inability to prevent the rebellion and the former on the ground that it had used excessive force in its measures of repression.<sup>412</sup>

In his correspondence Mr. Mancini laid particular stress on this second aspect and said:

[...] the serious responsibility incurred in the circumstances by France, as a result of the acts of its troops, seems to be beyond doubt.<sup>413</sup>

<sup>408</sup> Mr. Caseres to Mr. Anfora, 23 November 1872 (*ibid.*). Italics supplied by the Special Rapporteur.

<sup>409</sup> Mr. Artom to Mr. Anfora, 9 July 1873 (S.I.O.I.-C.N.R., *op. cit.*, p. 854). Unfortunately, the outcome of this case is not known.

<sup>410</sup> Kiss, *Repertoire* . . . (*op. cit.*), No. 926, p. 558.

<sup>411</sup> S.I.O.I.-C.N.R., *op. cit.*, p. 855.

<sup>412</sup> *Ibid.*, p. 856.

<sup>413</sup> *Ibid.*, p. 855.



The French Government maintained in the first place that the damage suffered by Italian nationals was due to acts of war for which, in its view, no responsibility was involved; nevertheless, it declared that it was ready to pay compensation *ex gratia*. The French Government argued further that, if it had been a question of responsibility, it would have rested with Tunisia and not with France.<sup>414</sup> But the Italian Government maintained its position and protested against the unilateral dissolution of the Committee of inquiry by its French chairman before it had been able to establish the extent of the responsibility attributable to Tunisia and France respectively.<sup>415</sup> The dispute lasted for two years. The Italian Government maintained that there were only two ways of solving it. Either the French Government should order the resumption of inquiry into the origin of the damage, or it should undertake to pay compensation for the whole of the injury caused and then settle with the Bey which of them should be charged. In 1883 the French Government informed the Italian Government that the Bey had promulgated a decree granting Italian nationals *ex gratia* a lump sum corresponding to the total amount of compensation claimed by Italy. Mr. Mancini accepted, but observed at the same time that the question whether the compensation paid should be charged to the Tunisian Treasury or the

French Treasury was a matter which concerned only France and Tunisia. For Italy, the payment was merely the "fulfilment of an obligation which the French Government had accepted towards us".<sup>416</sup>

208. In the same context, certain statements in the House of Lords on the *Nissan Case* also seem to be instructive. Mr. Nissan, a British subject, claimed compensation from the authorities of his country for damage to his hotel in Cyprus, which had been requisitioned by United Kingdom forces in the island between 29 December 1963 and 27 March 1964. The United Kingdom Government refused to pay any compensation, on the ground that its forces had been placed at the disposal of the Government of Cyprus to help it to restore peace in the island. The United Kingdom Government therefore maintained—and this is the aspect which is of interest to us—that the forces in question should be regarded as organs of the State of Cyprus. In its view, the Nissan case was one in which Cyprus was responsible for damage caused to a foreign national and not a purely internal case in which the United Kingdom Government was responsible for damage caused by its agents to one of its nationals. But the English courts of first<sup>417</sup> and second<sup>418</sup> instance, and the judges of the House of Lords<sup>419</sup> in their opinions, agreed that the acts of the United Kingdom forces in taking possession of the plaintiff's hotel could not be attributed to the Government of Cyprus, since the United Kingdom forces had not been acting in that particular case as "agents" of that Government. They were acting under United Kingdom command, were not subject to any control by the Government of Cyprus and were not receiving any instructions from it.<sup>420</sup>

<sup>416</sup> *Ibid.*, pp. 857-858.

<sup>417</sup> See the judgment by the Queen's Bench Division of 17 February 1967 (*The All England Law Reports*, 1967, London, vol. 2, pp. 200 *et seq.*).

<sup>418</sup> See the judgment by the Court of Appeal of 29 June 1967 (*ibid.*, pp. 1238 *et seq.*).

<sup>419</sup> See the judgment by the House of Lords of 11 February 1969 (*ibid.*, 1969, vol. 1, pp. 629 *et seq.*). For the case as a whole, see I. Brownlie "Decisions of British Courts during 1968 involving Questions of Public or Private International Law", *The British Year Book of International Law*, 1968-1969 (London, 1970), pp. 217 *et seq.*

<sup>420</sup> Lord Reid, in his statement, observed that:

"The British forces were to act under British command, and there is no suggestion that the Cyprus Government had any control over them."

Lord Morris pointed out that the United Kingdom forces "never became the agents" of the Cyprus Government. There had never been, he said, any "relationship of principal and agent" between those forces and the Government of Cyprus. The absence of any relationship of "agency" was also stressed by Lord Pearce, Lord Wilberforce and Lord Pearson. The last-mentioned based his opinion in part on the fact that the United Kingdom forces were not carrying out instructions from the Government of Cyprus.

It should be noted that the highest judicial authority of the United Kingdom maintained the principle that the United Kingdom Government was responsible for the damage suffered by Mr. Nissan as a result of the occupation of his hotel by United Kingdom troops, even during the period 27 March to 5 May 1964—that is to say, at a time when the United Kingdom forces had become an integral part of the United Nations Force in Cyprus. Contrary to the arguments of the United Kingdom Government, which refused to accept responsibility for the conduct of a contingent which had in the meantime become part of the United Nations Force, and contrary also to the

(Continued on next page)

<sup>414</sup> The French courts have often attributed to the protected State financial responsibility for damage caused to private persons by the negligence of French police officials maintaining public order on behalf of the local sovereign. In support of their decisions, these courts have argued that the officials in question were acting on behalf of the protected State and not the protecting State. Reference is frequently made in this connexion to the awards of the Civil Court of Tunis in the Trochel Case (*Recueil Dalloz de doctrine, de jurisprudence et de législation* (Paris, 1953), pp. 564 *et seq.*, with the note by Ladhari), and to those of the Administrative Tribunal of the Seine (*ibid.*, 1959, pp. 357-358, with the note by Silvera) and of the French Conseil d'Etat (*Revue générale de droit international public*, Paris, 3rd series, t. XXXIV, No. 1 (Jan.-March 1963), pp. 220-221, with the note by Rousseau) in the Prince Sliman Bey Case. In both cases, the argument that the French security forces were carrying out their duties in Tunisia as agents of the Bey, and on his behalf, was deemed to have greater weight than the contrary argument that the forces concerned were subordinate to the Resident-General and were carrying out the orders of that French official. (See also the cases quoted by R. Drago, "La réparation des dommages causés par les attroupements et les attentats en Tunisie", *Revue tunisienne de droit*, Tunis, vol. I, No. 2, April-June 1953, in particular pp. 125 *et seq.*). However, if the question of responsibility had been raised at the international rather than at the internal level, it is extremely doubtful whether the purely formal fact of the sovereignty on whose behalf the police powers of the Resident-General and his subordinates were exercised would have prevailed over the actual fact that the forces concerned were in reality controlled by the protecting State and were acting under its authority and instructions. Moreover, even from the standpoint of internal law, the French Government seems in more recent times to have adopted an attitude similar to that required by international law. After the protectorate over Morocco had come to an end, the Moroccan Government refused to compensate French nationals who had been the victims of attack during the protectorate on the ground that France had at that time been responsible for security; and the French Government, after first opposing it, seems to have accepted the Moroccan point of view. See, in this connexion, the debates in the Assemblée Nationale on a bill granting a pension to French nationals who had been victims of attack in Morocco, in: France, *Journal officiel de la République française, Débats parlementaires: Assemblée nationale*, Paris, 28 July 1959, year 1958-1959, No. 52 A.N., pp. 1509-1510; and *Annuaire français de droit international*, 1959 (Paris, vol. V, 1960), pp. 895-896.

<sup>415</sup> S.I.O.I.-C.N.R., *op. cit.*, pp. 856-857.

209. It would appear therefore that the basic principle emerging from all the practice we have considered here can be summarized in the following terms: the conduct of an organ lent by one State to another State is attributable in international law to the second State if the organ is actually placed at the disposal of that State, that is to say, if it is acting under the authority and in accordance with the instructions of the "beneficiary" State. It is, on the contrary, attributable to the first State if the loan is merely apparent or if the organ has not really been placed at the disposal of the second State, because in that case the organ will in fact still be acting under the control and in accordance with the instructions of the State to which it belongs.

210. In this report we are concerned solely with the subject of State responsibility, and the only question which can be considered here, therefore, is the possible responsibility of a State for the acts of organs placed at its disposal by another State or by an international organization. It may, however, be useful to point out that a confirmation of the validity of the principle stated in the preceding paragraph is undoubtedly provided by the practice concerning acts or omissions of organs placed at the disposal of international organizations by States. Here, too, the decisive criterion for determining responsibility in such cases is the actual circumstances in which the acts or omissions concerned have been committed. In cases where State organs have been placed at the disposal of an organization on a purely formal basis and they have continued in fact to act under the sole control and in accordance with the instructions of the State to which they belong, it is that State and not the organization which has been held responsible for their acts. On the other hand, in cases where the organs have really been placed under the sole authority of an organization by the State to which they belong and have acted in accordance with instructions genuinely emanating from the organization, the organization itself has accepted its responsibility and borne the financial consequences; and—this is an interesting point—none of the member States has ever raised any objections. The situations which arose in Korea and in the Congo are particularly instructive in this connexion.

211. During the operations undertaken in Korea in 1950 on behalf of the United Nations by armed forces of the United States of America and other countries, the forces in question were placed under a unified command set up by the United States Government, and their operational orders were issued solely by this command.<sup>421</sup> Accord-

ingly, irrespective of whether the decision taken on this occasion by the Security Council was legal or illegal (as the Soviet Union maintained), the important point to note is that in this particular case the armed forces sent to Korea had not actually been placed under the authority and the orders of the organization in whose name they were acting. The Governments of the Soviet Union, the People's Republic of China and the Democratic People's Republic of Korea maintained that responsibility for the internationally wrongful acts which, they alleged, had been perpetrated by members of the United States forces rested solely with the Government of the United States. And although the United States Government asserted that the protests in question should be addressed not to it but to the United Nations, it did however state on a number of occasions that if the facts alleged in these protests were established by an impartial inquiry, it would provide the Organization with the funds necessary to pay compensation for the damage caused.<sup>422</sup> But the fact

<sup>422</sup> The Government of the USSR sent two notes of protest to the United States Government, in September and October 1950 respectively (Bowett, *op. cit.*, p. 57; Seyersted, *op. cit.*, pp. 110-111; M. Bothe *Streitkräfte internationaler Organisationen* (Cologne, Heymanns, 1968, p. 68). The United States Government refused to receive these notes, stating that they should have been addressed to the Security Council. However, after the second note, protesting against the bombing of an airfield in Soviet territory, the United States representative to the United Nations, Mr. Austin, sent the Secretary-General a letter (*Official Records of the Security Council, Fifth Year, Supplement for September to December 1950*, document S/1856) in which he admitted the bombing, the result of an error, gave an assurance that disciplinary action would be taken against the pilots involved, expressed his regret for the violation of the Soviet frontier and said that his Government was prepared to provide funds for payment of any damages determined by a United Nations commission or other appropriate procedure to have been inflicted upon Soviet property. The Minister for Foreign Affairs of the People's Republic of China, in addition to addressing protests and complaints to the United States Secretary of State, sent a number of cables to the Secretary-General of the United Nations denouncing the bombing of Chinese territory by aircraft of the United States forces in Korea (*ibid.*, *Supplement for June, July and August 1950*, documents S/1722, S/1743; *ibid.*, *Supplement for September to December 1950*, documents S/1808, S/1857, S/1870, S/1876; A/1410). He was not thereby claiming that any responsibility rested with the Organization, however; he was demanding rather that the United Nations should condemn the United States. Once again the United States representative to the United Nations declared that his Government was ready to pay compensation to the Secretary-General and to take disciplinary action against those responsible if a commission of inquiry appointed by the Security Council found that an aerial attack on Chinese territory had actually taken place (*Official Records of the Security Council, Fifth Year, No. 35*, 493rd meeting, pp. 25-26; *ibid.*, No. 41, 499th meeting, p. 11; *ibid.*, No. 43, 501st meeting, p. 4; *ibid.*, *Fifth Year, Supplement for June, July and August 1950*, document S/1727; *ibid.*, *Supplement for September to December 1950*, documents S/1832, S/1813; *Official Records of the General Assembly, Fifth Session, First Committee*, 439th meeting, p. 607). In connexion with these incidents, the USSR submitted draft resolutions to the Security Council and the General Assembly condemning the Government of the United States for the acts committed and declaring it responsible for the damage caused to the People's Republic of China (S/1745/Rev.1, A/C.1/660 and A/1777). These proposals were rejected by the Security Council and the General Assembly, not because the United States Government was held responsible in them for acts committed by the armed forces acting in Korea under the United Nations flag, but because the facts alleged had not been proved (*Official Records of the Security Council, Fifth Year, No. 43*, 501st meeting; *Official Records of the General Assembly, Fifth Session, First Committee*, 439th to 441st meetings; *ibid.*, *Plenary Meetings*, 328th meeting).

(Foot-note 420 continued)

decisions of the courts of first and second instance (*The All England Law Reports*, 1967, London, vol. 2, pp. 200 *et seq.*, 1238 *et seq.*), the House of Lords said that the United Kingdom Government was responsible. It held that the agreements concluded with the United Nations did not contain any clause relieving the Crown of its responsibility for the continuation of a wrongful act committed by forces which had not ceased to be British soldiers (*ibid.*, 1969, vol. 1, pp. 629 *et seq.*, especially pp. 646 *et seq.*).

<sup>421</sup> On the independence of the "unified command" from the United Nations, see D. W. Bowett, *United Nations Forces: A Legal Study of United Nations Practice* (London, Stevens, 1964), pp. 40 *et seq.*; F. Seyersted, *United Nations Forces in the Law of Peace and War* (Leyden, Sijthoff, 1966), pp. 41 and 98-99.

remains that the Organization as such never envisaged assuming any responsibility for the acts of the armed forces operating in Korea under the United Nations flag.

212. The situation during the United Nations intervention in the Congo in 1961 was quite different. Although the United Nations Force in the Congo consisted of national contingents, it was placed under a commanding officer appointed directly by the Organization and it acted in the Congo solely under the Organization's orders. Neither the Governments of the States which provided contingents nor the Government of the Congo were able to issue "operational" orders to members of the Force, nor were they able to co-operate with the Secretary-General in directing operations. Moreover, the cost of the operations was borne entirely by the Organization. Accordingly, it was to the United Nations that the Belgian Government applied for compensation for damage suffered by Belgian nationals at the hands of members of the Force; and the Organization accepted responsibility. The dispute between the Belgian Government and the United Nations, which was protracted owing to the difficulty of establishing the facts, was settled at New York by an exchange of letters dated 20 February 1965 between U. Thant, the Secretary-General, and the Belgian Minister for Foreign Affairs, Mr. Spaak. In this exchange of letters, the principle of the responsibility of the Organization for the unjustifiable injury caused to innocent persons by "agents of the United Nations" was accepted, and a lump sum compensation was paid to the Belgian Government.<sup>423</sup> Neither Belgium nor the Organization seems even to have considered the possibility of claiming damages from the States providing the contingents. Agreements with a content analogous to the one concluded with Belgium were concluded with Greece on 20 June 1966, with Luxembourg on 28 December 1966 and with Italy on 18 January 1967.<sup>424</sup> The principle of the responsibility of the United Nations for damage wrongfully caused by members of the United Nations Force in Katanga was also upheld in the United Kingdom Parliament by the Under-Secretary for Foreign Affairs in a statement made on 7 March 1962.<sup>425</sup>

<sup>423</sup> It should be noted that the Soviet representative, Mr. Morozov, opposed the payment of such indemnity not because he contested in general the principle of the Organization's responsibility for acts of forces under its authority, but for the specific reason that Belgium had, in his opinion, committed an aggression against the Republic of the Congo, and, being the aggressor, had no moral or legal title to present claims to the United Nations, whether on her own behalf or on behalf of her nationals (see *Official Records of the Security Council, Twentieth Year, Supplement for July, August and September 1965*, document S/6589).

On the dispute with Belgium, see P. de Visscher, "Observations sur le fondement et la mise en œuvre du principe de la responsabilité de l'Organisation des Nations Unies", *Revue de droit international et de droit comparé* (Brussels, Nos. 3-4, 1963) pp. 165 *et seq.*; and J. J. A. Salmon, "Les accords Spaak-U Thant du 20 février 1965", *Annuaire français de droit international*, 1965 (Paris, vol. XI, 1966), pp. 468 *et seq.*, 496-497.

<sup>424</sup> These agreements have been published in United Nations, *Juridical Yearbook, 1966* (United Nations publication, Sales No. E.68.V.6), pp. 41 *et seq.*; *ibid.*, 1967 (Sales No. E.69.V.2), pp. 85 *et seq.*

<sup>425</sup> See E. Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law* (London, The British

213. Writers on international law who have considered the problems dealt with in this section have, in general, supported the principles emerging from international practice, though some have done so more unequivocally than others. Brownlie and Durante seem to be the only writers who have dealt explicitly with responsibility for the conduct of organs placed by one State at the disposal of another. Without distinguishing very thoroughly between the different situations, Brownlie holds that in these cases it is the State at whose disposal the organs are placed which is answerable for their acts and omissions; Durante, on the contrary, recognizes that it is important to this end to determine which of the two States has directed and organized the activity of these organs.<sup>426</sup> Among the various writers who have considered both the situation where organs have been placed at the disposal of an international organization by a State and the situation where organs have been placed at the disposal of a State by an organization, the one with the most definite views is Ritter. He says:

The organization is not responsible for the acts of persons under the authority of other subjects of international law, especially of member States, even if these other subjects of international law have caused these persons to act by agreement with organization.<sup>427</sup>

He goes on to say:

If persons entrusted with the execution of an operation decided upon by an international organization are placed under the exclusive authority of the organization, it is correct to describe them as agents of the organization, despite their original status as agents of member States, and to say that their acts, including wrongful acts, are imputable to the organization. Conversely, if an agent of the organization is placed at the disposal of a State, [...] responsibility for the acts of this person are imputable to the State or to the organization, depending on whose instructions the agent in question is required to follow.<sup>428</sup>

Other jurists, including Seyersted,<sup>429</sup> Bothe<sup>430</sup> and P. de Visscher<sup>431</sup> have reached similar conclusions. According to de Visscher, when armed forces have been lent by a State to an international organization, the decisive test to be applied in establishing which of the two is responsible is "effective control" (*maîtrise effective*).

214. Consequently, irrespective of whether an organ is "lent" or "transferred" by one State to another, by a State to an international organization or by an international organization to a State, only one principle can be applied: the beneficiary of the "loan" or "transfer" must be held responsible for any violations of international law committed by the organ placed at its disposal, when the acts of that organ are genuinely performed in the name and on

Institute of International and Comparative Law, 1962), p. 100. With regard to the compensation paid by the United Nations to the International Committee of the Red Cross for the murder, at Elizabethville, of three members of the Committee, see Seyersted, *op. cit.*, p. 195.

<sup>426</sup> Brownlie, *Principles...* (*op. cit.*), p. 376; Durante, *Responsabilità internazionale e attività cosmiche* (Padua, 1969), pp. 40 *et seq.*

<sup>427</sup> Ritter, *op. cit.*, p. 441.

<sup>428</sup> *Ibid.*, p. 444. Italics supplied by the Special Rapporteur.

<sup>429</sup> Seyersted, *op. cit.*, pp. 117 *et seq.*

<sup>430</sup> Bothe, *op. cit.*, pp. 53 *et seq.*, 67 *et seq.*, and 166 *et seq.*

<sup>431</sup> P. de Visscher, *op. cit.*, p. 169.

behalf of the beneficiary and in accordance with orders issued by the beneficiary alone. As we have seen, if this principle had not been confirmed by international practice, it would have to be applied for reasons of legal logic, effectiveness and equity. In view of the increasing number of cases in which it may have to be applied in future especially in relations between States and international organizations, to formulate the principle more clearly will contribute to the progressive development of international law. Our task now therefore is to find a definition which expresses the criterion adequately and indicates clearly the essential requirement which must be fulfilled before it is possible to consider as acts of a particular State, the acts or omissions of a person belonging to the apparatus of

another State or, more generally, of another subject of international law. In the light of the various elements which have to be taken into consideration, we envisage the following formulation:

*Article 9. Attribution to the State, as a subject of international law, of the acts of organs placed at its disposal by another State or by an international organization*

The conduct of a person or group of persons having, under the legal order of a State or of an international organization, the status of organs and who have been placed at the disposal of another State, is considered to be an act of that State in international law, provided that those organs are actually under the authority of the State at whose disposal they have been placed and act in accordance with its instructions.

## REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

## DOCUMENT A/8410/REV.1

Report of the International Law Commission on the work of its twenty-third session,  
26 April–30 July 1971

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\* Same as mimeographed documents A/8410/Add. 1 and A/8410/Add. 2.

\*\* Originally issued as document A/C.6/L.821.

### ABBREVIATIONS

BIRPI	United International Bureaux for the Protection of Intellectual Property	IMF	International Monetary Fund
CMEA	Council for Mutual Economic Assistance	ITU	International Telecommunication Union
ECA	Economic Commission for Africa	OAS	Organization of American States
EEC	European Economic Community	OECD	Organisation for Economic Co-operation and Development
FAO	Food and Agriculture Organization of the United Nations	OEEC	Organization for European Economic Co-operation
IAEA	International Atomic Energy Agency	UNCITRAL	United Nations Commission on International Trade Law
IBRD	International Bank for Reconstruction and Development	UNDP	United Nations Development Programme
ICAO	International Civil Aviation Organization	UNESCO	United Nations Educational, Scientific and Cultural Organization
I.C.J.	International Court of Justice	UNIDO	United Nations Industrial Development Organization
ICSID	International Centre for Settlement of Investment Disputes	UNITAR	United Nations Institute for Training and Research
IDA	International Development Association	UPU	Universal Postal Union
IFC	International Finance Corporation	WHO	World Health Organization
ILO	International Labour Organisation	WIPO	World Intellectual Property Organization
		WMO	World Meteorological Organization

## Chapter I

### ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its twenty-third session at the United Nations Office at Geneva from 26 April to 30 July 1971. The work of the Commission during this session is described in the present report. Chapter II of the report, on relations between States and international organizations, contains a description of the Commission's work on that topic, together with 82 draft articles and commentaries thereon and an annex, as finally approved by the Commission. Chapter III contains a description of the Commission's progress of work on the following topics, currently under consideration by the Commission: (1) succession of States: (a) succession in respect of treaties; (b) succession in respect of matters other than treaties; (2) State responsibility; (3) the most-favoured-nation clause. Chapter IV is devoted to the question of treaties concluded between States and international organizations or between two or more international organizations. Chapter V deals with the organization of the Commission's future work and a number of administrative and other questions.

#### A. Membership and attendance

2. The commission consists of the following members:

Mr. Roberto AGO (Italy);  
 Mr. Fernando ALBÓNICO (Chile);  
 Mr. Gonzalo ALCÍVAR (Ecuador);  
 Mr. Milan BARTOŠ (Yugoslavia);  
 Mr. Mohammed BEDJAOU (Algeria);  
 Mr. Jorge CASTAÑEDA (Mexico);  
 Mr. Erik CASTRÉN (Finland);  
 Mr. Abdullah EL-ERIAN (United Arab Republic);  
 Mr. Taslim O. ELIAS (Nigeria);  
 Mr. Constantin Th. EUSTATHIADES (Greece);  
 Mr. Richard D. KEARNEY (United States of America);  
 Mr. NAGENDRA SINGH (India);  
 Mr. Alfred RAMANGASOAVINA (Madagascar);  
 Mr. Paul REUTER (France);  
 Mr. Shabtai ROSENNE (Israel);  
 Mr. José María RUDA (Argentina);  
 Mr. José SETTE CÁMARA (Brazil);  
 Mr. Abdul Hakim TABIBI (Afghanistan);  
 Mr. Arnold J. P. TAMMES (Netherlands);  
 Mr. Doudou THIAM (Senegal);  
 Mr. Senjin TSURUOKA (Japan);

Mr. Nikolai USHAKOV (Union of Soviet Socialist Republics);  
 Mr. Endre USTOR (Hungary);  
 Sir Humphrey WALDOCK (United Kingdom of Great Britain and Northern Ireland);  
 Mr. Mustafa Kamil YASSEEN (Iraq).

3. All members attended meetings of the twenty-third session of the Commission.

#### B. Officers

4. At its 1087th meeting, held on 26 April 1971, the Commission elected the following officers:

*Chairman:* Mr. Senjin Tsuruoka;  
*First Vice-Chairman:* Mr. Roberto Ago;  
*Second Vice-Chairman:* Mr. Milan Bartoš;  
*Rapporteur:* Mr. José Sette Cámara.

#### C. Drafting Committee

5. At its 1092nd meeting, held on 4 May 1971, the Commission appointed a Drafting Committee composed as follows:

*Chairman:* Mr. Roberto Ago;  
*Members:* Mr. Gonzalo Alcívar, Mr. Erik Castrén, Mr. Taslim O. Elias, Mr. Richard D. Kearney, Mr. Nagendra Singh, Mr. Alfred Ramangasoavina, Mr. Paul Reuter, Mr. Nikolai Ushakov, Mr. Endre Ustor and Sir Humphrey Waldoock.

Mr. Abdullah El-Erian took part in the Committee's work on relations between States and international organizations in his capacity as Special Rapporteur for that topic. Mr. José Sette Cámara also took part in the Committee's work in his capacity as Rapporteur of the Commission.

#### D. Secretariat

6. Mr. Constantin A. Stravropoulos, Legal Counsel, attended the 1138th to 1148th meetings held from 16 to 30 July 1971, and represented the Secretary-General on those occasions. Mr. Anatoly P. Movchan, 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. Mr. Nicolas Teslenko acted as Deputy Secretary to the Commission. Mr. Santiago Torres-Bernárdez, Mr. Eduardo Valencia-Ospina and Miss Jacqueline Dauchy served as assistant secretaries.

### E. Agenda

7. The Commission adopted an agenda for the twenty-third session, consisting of the following items:

1. Relations between States and international organizations.
2. Succession of States:
  - (a) Succession in respect of treaties;
  - (b) Succession in respect of matters other than treaties.
3. State responsibility.
4. Most-favoured-nation clause.
5. Question of treaties concluded between States and international organizations or between two or more international organizations.
6. General Assembly resolution 2669 (XXV) on progressive development and codification of the rules of international law relating to international watercourses.

7. Review of the Commission's long-term programme of work.
8. Organization of future work.
9. Co-operation with other bodies.
10. Date and place of the twenty-fourth session.
11. Other business.

8. In the course of the session, the Commission held 62 public meetings (1087th to 1148th meetings). In addition, the Drafting Committee held 14 meetings, the Working Group on Relations between States and International Organizations (see para. 39 below) held 18 meetings, and the Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations (see para. 114 below) held two meetings. The Commission considered all the items on its agenda with the exception of items 2 (Succession of States: (a) succession in respect of treaties; (b) succession in respect of matters other than treaties), 3 (State responsibility) and 4 (Most-favoured-nation clause), owing to the lack of time. However, in view of the fact that at this session further reports were submitted by Special Rapporteurs on some of the above-mentioned topics, the Commission decided to include in chapter III of the present report an account of the progress of work thereon resulting from the submission of those reports.

## Chapter II

### RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

#### A. Introduction

##### 1. SUMMARY OF THE COMMISSION'S PROCEEDINGS

9. At its tenth session, in 1958, the Commission submitted to the General Assembly forty-five draft articles on diplomatic intercourse and immunities. The report covering the work of that session specified that the draft articles dealt only with permanent diplomatic missions.<sup>1</sup> It noted, however, in paragraph 52, that:

Apart from diplomatic relations between States, there are also relations between States and international organizations. There is likewise the question of the privileges and immunities of the organizations themselves. However, these matters are, as regards most of the organizations, governed by special conventions.

10. By resolution 1289 (XIII), of 5 December 1958, the General Assembly invited the Commission

to give further consideration to the question of relations between States and inter-governmental international organizations at the appropriate time, after study of diplomatic intercourse and immunities, consular intercourse and immunities and *ad hoc* diplomacy has been completed by the United Nations and in the light of the results of that study and of the discussion in the General Assembly.

11. At its eleventh session, in 1959, the Commission took note of the above-mentioned resolution and decided to consider the question in due course.<sup>2</sup>

12. At its fourteenth session, in 1962, the Commission decided to place the question on the agenda of its next session. It appointed Mr. Abdullah El-Erian as Special Rapporteur, and requested him to submit a report on the subject to the next session of the Commission.<sup>3</sup>

13. At the fifteenth session of the Commission, in 1963, the Special Rapporteur presented a first report on "relations between States and inter-governmental organizations"<sup>4</sup> in which he made a preliminary study of the subject with a view to defining its scope and the order of the Commission's future work on it. At its 717th and 718th meetings, the Commission had a first general discussion of that report and asked the Special Rapporteur to continue his work with a view to further consideration of the question at a later stage.<sup>5</sup>

<sup>2</sup> *Ibid.*, 1959, vol. II, p. 123, document A/4169, p. 48.

<sup>3</sup> *Ibid.*, 1962, vol. II, p. 192, document A/5209, para. 75.

<sup>4</sup> *Ibid.*, 1963, vol. II, p. 159, document A/CN.4/161 and Add.1.

<sup>5</sup> *Ibid.*, p. 225, document A/5509, para. 66.

<sup>1</sup> *Yearbook of the International Law Commission*, 1958, vol. II, p. 89, document A/3859, para. 51.

14. At the sixteenth session of the Commission, in 1964, the Special Rapporteur submitted a working paper<sup>6</sup> on the definition of the scope and method of treatment of the subject. That working paper contained a list of questions which related to:

(a) The scope of the subject [interpretation of General Assembly resolution 1289 (XIII)];

(b) The approach to the subject (either as an independent subject or as collateral to the treatment of other topics);

(c) The method of treatment (whether priority should be given to "diplomatic law" in its application to relations between States and international organizations);

(d) The order of priorities (whether the status of permanent missions accredited to international organizations and delegations to organs of and conferences convened by international organizations should be taken up before the status of international organizations and their agents);

(e) The question whether the Commission should concentrate in the first place on international organizations of universal character or should deal also with regional organizations.

15. The Special Rapporteur informed the Commission that he had begun consultations with the legal advisers of several international organizations.<sup>7</sup> As a result of these consultations, two questionnaires were prepared by the Legal Counsel of the United Nations and addressed by him to the legal advisers of the specialized agencies and IAEA. The first questionnaire related to the "status, privileges and immunities of representatives of Member States to specialized agencies and IAEA", and the second to the "status, privileges and immunities of the specialized agencies and of IAEA, other than those relating to representatives". After receiving replies from the organizations concerned, the Secretariat of the United Nations issued in 1967 a study entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities".<sup>8</sup> That document is referred to hereafter as the "Study of the Secretariat".

16. The conclusion reached by the Commission on the scope and method of treatment of the topic was recorded in paragraph 42 of the report on the work of its sixteenth session, in the following terms:

At its 755th to 757th meetings, the Commission discussed these questions, and certain other related questions that arose in connexion therewith. The majority of the Commission, while agreeing in principle that the topic had a broad scope, expressed the view that for the purpose of its immediate study the question of diplomatic law in its application to relations between States and inter-governmental organizations should receive priority.<sup>9</sup>

<sup>6</sup> A/CN.4/L.104.

<sup>7</sup> *Yearbook of the International Law Commission, 1964*, vol. I, 757th meeting, para. 20.

<sup>8</sup> *Ibid.*, 1967, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2.

<sup>9</sup> *Ibid.*, 1964, vol. II, p. 227, document A/5809, para. 42.

17. Also at its sixteenth session, in 1964, the Commission adopted its programme of work for 1965 to 1966, in which it decided to complete the study of the law of treaties and of special missions during those two years. That decision was taken having regard, in particular, to the fact that the term of office of the members of the Commission was to expire at the end of 1966 and that it was desirable to concentrate in the meantime on the study of both subjects. The topic of special missions was chosen in preference to that of relations between States and intergovernmental organizations in the light of General Assembly resolution 1289 (XIII), of 5 December 1958.<sup>10</sup>

18. At the nineteenth session of the Commission, in 1967, the Special Rapporteur submitted a second report on relations between States and inter-governmental organizations.<sup>11</sup> The report contained: (a) a summary of the Commission's discussions at its fifteenth and sixteenth sessions; (b) a discussion of general problems relating to the diplomatic law of international organizations; (c) a survey of the evolution of the institution of permanent missions to international organizations; (d) a brief account of the preliminary questions which should be discussed by the Commission before it considered draft articles; and (e) three draft articles relating to general provisions, of an introductory nature. The Commission, however, devoted that session almost entirely to the conclusion of its work on the subject of special missions, and was thus unable to discuss the Special Rapporteur's second report.

19. At the twentieth session of the Commission, in 1968, the Special Rapporteur submitted a third report<sup>12</sup> containing a full set of draft articles, with commentaries, on the legal position of representatives of States to international organizations. Those draft articles were divided into the following four parts:

Part I: General provisions;

Part II: Permanent missions to international organizations;

Part III: Delegations to organs of international organizations and to conferences convened by international organizations;

Part IV: Permanent observers from non-member States to international organizations.

20. The third report also included a summary of the discussion which had taken place in the Sixth Committee during the twenty-second session of the General Assembly on the "Question of diplomatic privileges and immunities" (agenda item 98), since that discussion had touched on a number of the general problems and preliminary questions raised in the second report in relation to the diplomatic law of international organizations in general, and the legal position of representatives of States to international organizations in particular.

21. At its 986th meeting, on 31 July 1968, the Commission adopted a provisional draft of twenty-one articles with the Commission's commentary on each article. The first

<sup>10</sup> *Ibid.*, p. 226, paras. 36-37.

<sup>11</sup> *Ibid.*, p. 133, document A/CN.4/195 and Add.1.

<sup>12</sup> *Ibid.*, 1968, vol. II, p. 119, document A/CN.4/203 and Add.1-5.

five articles formed part I (General provisions). The remaining articles made up the first section of part II (Permanent missions to international organizations). That section was entitled "Permanent missions in general".

22. In the course of the discussion, some members of the Commission expressed the view that the scope of the draft articles should be confined to permanent missions to international organizations. The Commission was of the opinion that no decision should be taken on that question until it had had an opportunity to consider the articles (included in the Special Rapporteur's third report) on delegations to organs of international organizations and to conferences convened by international organizations and permanent observers of non-Member States to international organizations.

23. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit the provisional draft of those twenty-one articles, through the Secretary-General, to Governments for their observations.<sup>13</sup>

24. By resolution 2400 (XXIII), of 11 December 1968, the General Assembly *inter alia* recommended that the Commission should

continue its work [...] on relations between States and international organizations, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII).

25. At the twenty-first session of the Commission, in 1969, the Special Rapporteur submitted a fourth report<sup>14</sup> containing a revised set of draft articles with commentaries, on representatives of States to international organizations. Those draft articles covered the following subjects: facilities, privileges and immunities of permanent missions to international organizations; conduct of the permanent mission and its members; and end of the functions of the permanent representative (sections 2, 3 and 4 of part II). The Special Rapporteur also submitted a working paper<sup>15</sup> containing draft articles on permanent observers of non-members to international organizations.

26. The fourth report also included a summary of the discussion which had taken place in the Sixth Committee during the twenty-third session of the General Assembly on the "Report of the International Law Commission on the work of its twentieth session" (agenda item 84)<sup>16</sup> and on the "Draft Convention on Special Missions" (agenda item 85),<sup>17</sup> since those discussions had touched on certain questions which might present some interest as regards representatives of States to international organizations and conferences.

27. The Commission adopted a provisional draft of twenty-nine articles constituting sections 2 (Facilities,

privileges and immunities), 3 (Conduct of the permanent mission and its members) and 4 (End of functions) of part II (Permanent missions to international organizations).

28. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit that group of draft articles, through the Secretary-General, to Governments for their observations. It also decided to transmit it, together with the previous group, to the Secretariats of the United Nations, the specialized agencies and IAEA for their observations. Bearing in mind the position of Switzerland as the host State in relation to the Office of the United Nations at Geneva and to a number of specialized agencies, as well as the wish expressed by the Government of that country, the Commission deemed it useful to transmit also both groups of draft articles to that Government for its observations.

29. At the same session, the Commission again considered the question referred to in paragraph 22 above. At its 992nd meeting, it reached the conclusion that its draft should also include articles dealing with permanent observers for non-member States to international organizations and with delegations to sessions of organs of international organizations. Opinions were divided on whether the draft should, in addition, include articles on delegations to conferences convened by international organizations or whether that question ought to be considered in connexion with another topic. At its 993rd meeting, the Commission took a provisional decision on the subject, leaving the final decision to be taken at a later stage. It expressed the intention to consider at its twenty-second session draft articles on permanent observers for non-member States and on delegations to sessions of organs of international organizations and to conferences convened by such organizations.

30. The Commission also briefly considered the desirability of dealing, in separate articles, with the possible effects of exceptional situations—such as absence of recognition, absence or severance of diplomatic relations or armed conflict—on the representation of States in international organizations. In view of the delicate and complex nature of those questions, the Commission decided to resume their examination at a future session and to postpone any decision on them at that stage.

31. By resolution 2501 (XXIV), of 12 November 1969, the General Assembly *inter alia* recommended that the Commission should

continue its work on relations between States and international organizations, with a view to completing in 1971 its draft articles on representatives of States to international organizations.

32. At the twenty-second session of the Commission, in 1970, the Special Rapporteur submitted a fifth report<sup>18</sup> containing draft articles, with commentaries, on permanent observers of non-member States to international organizations (part III) and delegations to organs of international organizations and to conferences convened by international organizations (part IV). The Special

<sup>13</sup> *Ibid.*, p. 195, document A/7209/Rev.1, para. 22.

<sup>14</sup> *Ibid.*, 1969, vol. II, p. 1, document A/CN.4/218 and Add.1.

<sup>15</sup> A/CN.4/L.136.

<sup>16</sup> *Official Records of the General Assembly, Twenty-third Session, Sixth Committee*, 1029th to 1039th meetings.

<sup>17</sup> *Ibid.*, 1039th to 1059th, 1061st to 1072nd and 1087th to 1090th meetings.

<sup>18</sup> *Yearbook of the International Law Commission, 1970, vol. II, p. 1*, document A/CN.4/227 and Add.1 and 2.

Rapporteur also submitted a working paper on temporary observer delegations and conferences not convened by international organizations<sup>19</sup> but the Commission did not consider that it should take up the matter at that time.

33. The fifth report also contained a summary of that part of the discussion in the Sixth Committee during the twenty-fourth session of the General Assembly on the agenda items entitled "Report of the International Law Commission on the work of its twenty-first session" (item 86)<sup>20</sup> and "Draft Convention on Special Missions" (item 87)<sup>21</sup> which touched on certain questions presenting some interest concerning representatives of States to international organizations and conferences.

34. The Commission adopted provisionally draft articles constituting sections 1 (Permanent observer missions in general) 2 (Facilities, privileges and immunities of permanent observer missions), 3 (Conduct of the permanent observer mission and its members) and 4 (End of functions) of part III (Permanent observer missions to international organizations) and sections 1 (Delegations in general), 2 (Facilities, privileges and immunities of delegations), 3 (Conduct of the delegation and its members) and 4 (End of functions) of part IV (Delegations of States to organs and to conferences). It expressed the intention to determine during the second reading of the whole draft whether it would be possible to reduce the number of articles by combining provisions susceptible of uniform treatment.

35. In view of the decision taken at the twenty-first session (see para. 30 above), the Commission also decided to examine at its second reading the question of the possible effects of exceptional situations on the representation of States in international organizations in general and to postpone at that stage any decision on this point in the context of Parts III and IV.

36. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit parts III and IV of the draft articles, through the Secretary-General, to Governments of Member States for their observations. It further decided to transmit them to the secretariats of the United Nations, the specialized agencies and IAEA for their observations and also to Switzerland as the host State in relation to the Office of the United Nations at Geneva and to a number of specialized agencies (see para. 28 above).

37. By resolution 2634 (XXV), of 12 November 1970, the General Assembly *inter alia* recommended that the Commission should

continue its work on relations between States and international organizations, taking into account the views expressed at the twenty-third, twenty-fourth and twenty-fifth sessions of the General Assembly and the comments which may be submitted by Governments, with the object of presenting in 1971 a final draft on the topic.

38. At its present session the Commission re-examined the draft articles in the light of the comments of Governments and the secretariats of the United Nations, specialized agencies and IAEA (see annex I below). It had before

it the Sixth Report of the Special Rapporteur (A/CN.4/241 and Add.1-6)<sup>22</sup> which summarized the written comments of Governments and the secretariats of the United Nations, specialized agencies and IAEA and also those made orally by delegations in the General Assembly, and contained proposals for the revision of the articles. The Special Rapporteur further submitted to the Commission three working papers: the first paper (A/CN.4/L.166)<sup>23</sup> examined the question of the possible effects of exceptional situations such as absence of recognition, absence or severance of diplomatic and consular relations, effects of armed conflict on the representation of States in international organizations; the second paper (A/CN.4/L.171)<sup>24</sup> examined the question of the inclusion in the draft articles of a provision on the settlement of disputes; the third paper (A/CN.4/L.173)<sup>25</sup> contained draft articles on observer delegations of States to organs and to conferences. The Commission also had before it editorial observations and suggestions submitted by the Secretariat concerning the various language versions of the draft articles (A/CN.4/L.162/Rev.1 and Corr.1, A/CN.4/L.163, A/CN.4/L.164, A/CN.4/L.165, A/CN.4/L.167).

39. At its 1088th to 1110th, 1121st and 1122nd meetings the Commission considered the Sixth report of the Special Rapporteur and the above-mentioned working papers. At its 1110th to 1127th meetings it considered the reports of the Drafting Committee. The Commission established a small Working Group to assist in revising, co-ordinating and consolidating the different parts of the draft articles. The Working Group held 18 meetings and submitted a series of papers (documents A/CN.4/L.174 and Add.1-6; <sup>26</sup> A/CN.4/L.177 and Add.1-3) that proposed a new organization of the draft articles and a substantial reduction in their number. The Commission considered those papers at its 1130th to 1140th, 1142nd and 1146th meetings. It adopted certain new articles, revised the title of the draft and certain earlier articles, and decided upon the order and structure of all the articles. At its 1147th meeting, the Commission adopted the final text of its draft articles on the representation of States in their relations with international organizations and the annex thereto. In accordance with its statute, it submits them herewith to the General Assembly, together with the recommendation contained in paragraphs 57 to 59 below.

## 2. FORM AND STRUCTURE OF THE DRAFT ARTICLES

40. In its report on the work of its twentieth session (1968), the Commission stated:

In preparing the draft articles the Commission had in mind that they were intended to serve as a basis for a draft convention and constitute a self-contained and autonomous unit.<sup>27</sup>

<sup>22</sup> See p. I above.

<sup>23</sup> To be printed in *Yearbook*, 1971, vol. II, part two.

<sup>24</sup> *Idem.*

<sup>25</sup> *Idem.*

<sup>26</sup> *Idem.*

<sup>27</sup> *Yearbook of the International Law Commission*, 1968, vol. II, p. 195, document A/7209/Rev.1, para. 24.

<sup>19</sup> A/CN.4/L.151.

<sup>20</sup> *Official Records of the General Assembly, Twenty-fourth Session, Sixth Committee*, 1103rd to 1111th meetings.

<sup>21</sup> *Ibid.*, 1142nd, 1143rd and 1148th meetings.

41. At its present session, the Commission re-examined the question in the light of the comments of certain governments and international organizations on the question of the form ultimately to be given to the draft articles, and of the view of one government and one specialized agency that the form should be that of a code rather than a convention. Doubts were expressed by the government concerned regarding the curtailing effects which the adoption of general rules in the form of a convention might have on the development of special arrangements in practice. The Commission wishes to recall that in paragraph 5 of the commentary on articles 4 and 5 as they were provisionally adopted at the twentieth session of the Commission, (article 5 related to future agreements which may contain provisions in conflict with some of the rules laid down in the draft articles) it stated:

The Commission believes, however, that situations may arise in the future in which States establishing a new international organization may find it necessary to adopt different rules more appropriate to such an organization. It must also be noted that the draft articles are not intended—and should not be regarded as intending—in any way to preclude any further development of the law in this area.<sup>28</sup>

42. Furthermore, the Commission continues to believe that the reasons given by it in favour of the preparation of a convention in the case of the law of treaties<sup>29</sup> are equally applicable in the present context, namely: an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and the codification 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. It should also be noted that the consolidation of the diplomatic law of relations between States and international organizations is of particular importance at the present time when the forms and activities of institutionalized international co-operation are multiplying and many developments are taking place in the field of international organizations. Accordingly, the Commission reaffirms its decision of 1968 to prepare draft articles “intended to serve as a basis for a draft convention”.

43. In submitting the final text of the draft articles on the representation of States in their relations with international organizations, the Commission maintains the view which it accepted at the outset of its work on the topic of relations between States and international organizations and which it has expressed in its report of 1968. A corresponding recommendation is made in paragraph 57 below.

44. In formulating the draft articles at its twenty-second session (1970), the Commission gave careful consideration to the method of drafting the articles on facilities, privileges and immunities for both part III (Permanent observer missions to international organizations) and part IV (Delegations of States to organs and to conferences). Some members of the Commission were in favour of the preparation of general articles which would extend, *mutatis mutandis*, to permanent observer missions and to dele-

gations of States to organs and to conferences the relevant provisions of part II relating to permanent missions. Other members preferred for the purposes of the first reading the preparation of only those articles which were essential to permanent observer missions and to delegations of States to organs and to conferences, and to refer to the applicable provisions of part II in an explanatory passage in the Commission's report. At that session, the Commission adopted a provisional solution which falls in between the two positions outlined above.

45. Also at its twenty-second session, the Commission developed, in the course of the preparation of the articles on facilities, privileges and immunities, a set of draft articles for part III (Permanent observer missions) based largely on the provisions concerning permanent missions and a set of draft articles for part IV (Delegations of States to organs and to conferences) taking into account certain provisions of the Convention on Special Missions<sup>30</sup> and of part II of the draft articles (Permanent missions). In doing so, it examined each individual facility, privilege and immunity with reference to both permanent observer missions and delegations to organs of international organizations or to conferences convened by international organizations. In its review, the Commission was particularly concerned with determining what distinctions should be drawn, in specific cases, between special missions, permanent missions, permanent observer missions and delegations of States to organs and to conferences. It satisfied itself, in several instances, that such distinctions need not be drawn and accordingly concluded that it was not necessary to repeat in both parts III and IV the substance of the analogous articles on permanent missions. Consequently, in parts III and IV, there were both specific articles (in those cases where changes were required to take into account the differences existing between permanent missions and permanent observer missions or delegations of States to organs and to conferences) and articles which employed the technique of “drafting by reference”.

46. At its present session the Commission considered the consolidation of the provisions concerning missions of a permanent character to international organizations (Permanent missions [part II] and Permanent observer missions [part III]). This was achieved by including in article 1 two new terms. The terms “mission” and “head of mission” were made generic terms covering, respectively, both “permanent mission” and “permanent observer mission”, and both “permanent representative” and “permanent observer”. In all cases where the only difference between part II and part III was the use in the latter of the word “observer”, generic terms have been used—thus facilitating the merger of the two parts. In the few cases where the substantive differences between the corresponding provisions of parts II and III did not allow for such consolidation, a single article has been established, including in separate paragraphs, under a common heading, the provisions particular to each kind of mission. In these instances, the specific terminology “permanent mission”, “permanent observer mission”, “permanent representative”, “permanent observer” has been maintained. Only

<sup>28</sup> *Ibid.*, p. 199.

<sup>29</sup> *Ibid.*, 1962, vol. II, p. 160, document A/5209, para. 17.

<sup>30</sup> General Assembly resolution 2530 (XXIV), annex.

in the case of the functions of each kind of mission has the Commission preserved the format of the original provisions in two separate, though consecutive, articles.

47. The Commission also at its present session established the texts of introductory provisions intended to apply to the draft articles as a whole and of further provisions generally applicable to missions to international organizations and to delegations to organs and to conferences. This was achieved by applying to the general provisions included mainly in part I of the Commission's draft of 1968 and to the provisions contained in part IV of the Commission's draft of 1970 (Delegations of States to organs and to conferences), techniques similar to those described in the preceding paragraph.

48. The present set of consolidated draft articles is divided into four parts: part I ("Introduction") concerns the introductory provisions which are intended to apply to the draft articles as a whole; part IV ("General provisions") contains those further provisions which are generally applicable to missions to international organizations and to delegations to organs and to conferences; part II ("Missions to international organizations") contains provisions dealing specifically with missions as they emerged from the process of consolidating the rules on permanent missions with those on permanent observer missions, explained in paragraph 46 above; part III ("Delegations to organs and to conferences") contains provisions dealing specifically with delegations to organs and to conferences.

49. The draft articles contain also a set of provisions on observer delegations to organs and conferences. In view of the fact that these provisions were not included in the provisional draft<sup>31</sup> and therefore Governments and international organizations did not have opportunity to comment on them, the Commission deemed it appropriate to present this set of provisions in the form of an annex. Should any international conference which might be convened to consider the draft articles decide in favour of including provisions on observer delegations, this set of provisions could conveniently be integrated into the set of draft articles.

50. The Commission's work on the representation of States in their relations with international organizations constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls. Some of the commentaries, however, indicate that certain new rules are being proposed for the consideration of the General Assembly and of Governments.

<sup>31</sup> The texts of the articles of the "provisional draft", together with the commentaries, have been published as follows:

Articles 1-21: *Yearbook of the International Law Commission, 1968*, vol. II, pp. 196 *et seq.*, document A/7209/Rev.1;

Articles 22-50: *Ibid.*, 1969, vol. II, pp. 207 *et seq.*, document A/7610/Rev.1;

Articles 51-116: *Ibid.*, 1970, document A/8010/Rev.1, chap. II, section B.

### 3. SCOPE OF THE DRAFT ARTICLES

51. The draft articles deal with the representation of States in their relations with international organizations. In the course of the consideration of these draft articles some members of the Commission stated that they would have preferred to see the draft articles combined with those on the representation of organizations to States which the Commission might prepare at a future stage. They pointed out that relations between States and international organizations had two aspects—that of representation of States in their relations with international organizations and that of representation of international organizations to States; and that since the two aspects were closely related, it would be preferable to treat them in one instrument. The majority of the members of the Commission thought, however, that since representatives of international organizations to States were officials of the organizations, the question of their status was an integral part of the question of the status of the organizations themselves, a subject the consideration of which the Commission had deferred for the time being as a consequence of its decision to concentrate its work at the present stage on the subject of representation of States in their relations with international organizations.

52. To make it clear that the draft articles relate only to that specific aspect of the topic, the Commission decided that they should be entitled "Draft articles on the representation of States in their relations with international organizations".

53. In the course of the consideration of these articles, some members of the Commission referred to the status of the host State as a sending State. The Commission noted that the case when the host State is a member of the organization gives rise to the question of the application to it of the draft articles in its capacity as a sending State also. In such a case a considerable part of the rules relating to the sending State apply also, as appropriate, to the host State. However, as regards privileges and immunities of the members of the mission or delegation of the host State, this question is to be decided in accordance with the internal law of the State.

54. The draft articles do not contain provisions concerning representatives of entities other than States (e.g. representatives of national liberation movements, petitioners and representatives of non-governmental organizations) who might participate in the work of organs of international organizations or conferences convened by or under the auspices of international organizations. The Commission considers that such categories can be more appropriately dealt with under the subject of representatives of international organizations and their officials and in conjunction with experts and other persons who may be engaged in the official service of international organizations.

55. Moreover, and as in the case of previous topics, the Commission did not think it advisable to deal with the possible effects of armed conflict on representation of States in their relations with international organizations. The reasons for this are stated in the commentary on

article 79 which relates to non-recognition of States or Governments or absence of diplomatic or consular relations.

56. Members of the Commission had differing opinions on whether the work of the Commission on the topic should extend to regional organizations. In the conclusion to his first report, the Special Rapporteur had suggested that the Commission should concentrate its work on this topic first on international organizations of a universal character and prepare its draft articles with reference to these organizations only, and should examine later whether the draft articles could be applied to regional organizations as they stood, or whether they required modification.<sup>32</sup> In explaining his suggestion he stated that the study of regional organizations raised a number of problems, which would require the formulation of particular rules for those organizations. Some members of the Commission took issue with that suggestion. They thought that regional organizations should be included in the study, pointing out that relations between States and organizations of a universal character might not differ appreciably from relations between States and similar regional organizations. Indeed, they considered that there were at least as great differences between some of the universal organizations—for example, between UPU, the ILO and the United Nations—as between the United Nations and the major regional organizations. They further pointed out that if the Commission were to confine itself to the topic of relations of organizations of a universal character with States, it would be leaving a serious gap in the draft articles. Other members, however, expressed themselves in favour of the suggestion by the Special Rapporteur to exclude regional organizations at least from the initial stage of the study. They stated that any draft convention to be prepared concerning relations between States and international organizations should deal with organizations of a universal character and not with regional organizations, though the experience of the latter could be taken into account in the study. They argued that regional organizations were so diverse that uniform rules applicable to all of them could hardly be formulated. They therefore thought that it would probably be better to leave those regional organizations great latitude to settle their own relations with Governments. It was further pointed out that some regional organizations had their own codification organs, and that they should therefore be free to develop their own rules. The Commission adopted an intermediary solution which is contained in paragraphs 2 and 4 of article 2 of the draft articles.

#### **B. Recommendation of the Commission to convene an international conference on the representation of States in their relations with international organizations**

57. At its 1146th meeting, on 28 July 1971, the Commission decided, in conformity with article 23, paragraph 1 (d), of its Statute, to recommend that the General Assembly should convene an international conference of

plenipotentiaries to study the Commission's draft articles on the representation of States in their relations with international organizations and to conclude a convention on the subject.

58. The Commission expresses the hope that appropriate arrangements will be made by the General Assembly for associating the United Nations, the specialized agencies and IAEA in the stage of the adoption of the convention envisaged. Reference has been made in the previous paragraphs to the contribution of these organizations in the Commission's work on this topic. The Commission wishes to express its appreciation for the valuable contribution made by these organizations.

59. The Commission wishes to refer to the titles given to parts and articles of its draft, which it considers helpful for an understanding of the structure of the draft and for promoting ease of reference. It expresses the hope, as it did concerning its draft articles on consular relations, law of treaties and special missions, that these titles, subject to any appropriate changes, will be retained in any convention which may be concluded in the future on the basis of the Commission's draft articles.

#### **C. Resolution adopted by the Commission**

60. The Commission, at its 1148th meeting on 30 July 1971, unanimously adopted the following resolution:

*The International Law Commission,*

*Having adopted* the draft articles on the representation of States in their relations with international organizations,

*Desires to express* to the Special Rapporteur, Mr. Abdullah El-Erian, its deep appreciation of the outstanding contribution he has made to the treatment of the topic during the past years by his tireless devotion and scholarly research, thus enabling the Commission to bring to a successful conclusion the important task of completing, with this draft, the work on codification already carried out in connexion with diplomatic and consular relations and special missions.

#### **D. Draft articles on the representation of States in their relations with international organizations**

##### **PART I. INTRODUCTION**

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

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

- (1) "international organization" means an intergovernmental organization;
- (2) "international organization of universal character" means an organization whose membership and responsibilities are on a world-wide scale;
- (3) "Organization" means the international organization in question;
- (4) "organ" means:
  - (a) any principal or subsidiary organ of an international organization, or

<sup>32</sup> Yearbook of the International Law Commission, 1963, vol. II, p. 185, document A/CN.4/161 and Add.1, para. 179.

<sup>33</sup> Articles 1, 51 and 78 of the provisional draft (for the reference to the articles of the provisional draft, see foot-note 31 above).



- (b) any commission, committee or sub-group of any such organ,  
in which States are members;
- (5) "conference" means a conference of States convened by or under the auspices of an international organization;
- (6) "permanent mission" means a mission of permanent character, representing the State, sent by a State member of an international organization to the Organization;
- (7) "permanent observer mission" means a mission of permanent character, representing the State, sent to an international organization by a State not member of the Organization;
- (8) "mission" means, as the case may be, the permanent mission or the permanent observer mission;
- (9) "delegation to an organ" means the delegation sent by a State to participate on its behalf in the proceedings of the organ;
- (10) "delegation to a conference" means the delegation sent by a State to participate on its behalf in the conference;
- (11) "delegation" means, as the case may be, the delegation to an organ or the delegation to a conference;
- (12) "host State" means the State in whose territory:
- (a) the Organization has its seat or an office, or
  - (b) a meeting of an organ or a conference is held;
- (13) "sending State" means the State which sends:
- (a) a mission to the Organization at its seat or to an office of the Organization, or
  - (b) a delegation to an organ or a delegation to a conference;
- (14) "permanent representative" means the person charged by the sending State with the duty of acting as the head of the permanent mission;
- (15) "permanent observer" means the person charged by the sending State with the duty of acting as the head of the permanent observer mission;
- (16) "head of mission" means, as the case may be, the permanent representative or the permanent observer;
- (17) "members of the mission" means the head of mission and the members of the staff;
- (18) "head of delegation" means the delegate charged by the sending State with the duty of acting in that capacity;
- (19) "delegate" means any person designated by a State to participate as its representative in the proceedings of an organ or in a conference;
- (20) "members of the delegation" means the delegates and the members of the staff;
- (21) "members of the staff" means the members of the diplomatic staff, the administrative and technical staff and the service staff of the mission or the delegation;
- (22) "members of the diplomatic staff" means the members of the staff of the mission or the delegation who enjoy diplomatic status for the purpose of the mission or the delegation;
- (23) "members of the administrative and technical staff" means the members of the staff employed in the admini-

strative and technical service of the mission or the delegation;

(24) "members of the service staff" means the members of the staff employed by the mission or the delegation as household workers or for similar tasks;

(25) "private staff" means persons employed exclusively in the private service of the members of the mission or the delegation;

(26) "premises of the mission" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purpose of the mission, including the residence of the head of mission;

(27) "premises of the delegation" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purpose of the delegation, including the accommodation of the head of delegation.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

#### *Commentary*

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

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

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

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

(5) The term "organ" (sub-paragraph 4) applies only to bodies in which States are members. The Commission has divided the sub-paragraph into two sub-sections concerning respectively "any principal or subsidiary organ of an international organization" and "any commission, com-

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

mittee or sub-group of any such organ", in order to make it clear that the expression "in which States are members" applies to both sets of bodies. That expression excludes from the scope of the draft articles bodies composed of individual experts who serve in a personal capacity. This was necessary in order to limit the expression to the aspects dealt with in the present subject. The term, as used, would not exclude the somewhat exceptional case when an organ has both States and individuals as members. The draft articles however deal only with the aspects of State participation.

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

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

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

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

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

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

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

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

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

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

### *Article 2.<sup>41</sup> Scope of the present articles*

**1. The present articles apply to the representation of States in their relations with international organizations of universal character and to their representation at conferences convened by or under the auspices of such organizations.**

**2. The fact that the present articles do not relate to other international organizations is without prejudice to the application to the representation of States in their relations with such other organizations of any of the rules set forth in the present articles which would be applicable under international law independently of these articles.**

**3. The fact that the present articles do not relate to other conferences is without prejudice to the application to the representation of States at such other conferences of any of**

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

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

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

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

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

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

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

the rules set forth in the present articles which would be applicable under international law independently of these articles.

4. Nothing in the present articles shall preclude States from agreeing that the present articles apply in respect of:

(a) international organizations other than those of universal character, or

(b) conferences other than those convened by or under the auspices of such organizations.

#### *Commentary*

(1) Article 2 embodies the decision of the Commission to make the draft articles applicable both to the representation of States in their relations with international organizations of universal character and to their representation at conferences convened by or under the auspices of such organizations.

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

(3) Paragraph 2 lays down a reservation to the effect that the limitation of the scope of the draft articles to the representation of States in their relations with international organizations of universal character does not affect the application to the relations of States with other organizations of any of the rules set forth in the draft articles which would be applicable under international law independently of these articles. The purpose of that reservation is to give due recognition to the fact that certain provisions in the draft articles are or are likely to become customary international law.

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

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

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

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

#### **Article 3.<sup>45</sup> Relationship between the present articles and the relevant rules of international organizations or conferences**

**The application of the present articles is without prejudice to any relevant rules of the Organization or to any relevant rules of procedure of the conference.**

#### *Commentary*

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

(2) The purpose of this article is twofold. First, given the diversity of international organizations and their heterogeneous character, in contradistinction to that of States, the draft articles are designed to establish a common

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

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

denominator and to provide general rules to regulate the diplomatic law of relations between States and international organizations in the absence of regulations on any particular point by an individual international organization.

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

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

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

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

#### **Article 4.<sup>46</sup> Relationship between the present articles and other international agreements**

##### **The provisions of the present articles**

(a) are without prejudice to other international agreements in force between States or between States and international organizations of universal character, and

(b) shall not preclude the conclusion of other international agreements regarding the representation of States in their relations with international organizations of universal character or their representation at conferences convened by or under the auspices of such organizations.

##### *Commentary*

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

it was preferable to include a specific provision on the point.

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

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

(4) Certain governments expressed the view that the fact that existing agreements would remain in force might deprive the draft articles of much of their practical effect. The draft articles, however, contain many provisions on questions which have not been regulated by existing treaties; these provisions will have their binding effect but at the same time the new régime will not prejudice certain rules which prevail within certain organizations and which reflect the particular needs of an organization. Certain governments also referred to the situation which might arise if one or several sending States ratified the future convention and the host State did not. The Commission wishes to point out that such a situation of treaties having different parties or having conflicting provisions involves problems governed by the general law of treaties and in particular article 30 of the Convention on the Law of Treaties.

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

## **PART II. MISSIONS TO INTERNATIONAL ORGANIZATIONS**

### **Article 5.<sup>47</sup> Establishment of missions**

**1. Member States may, if the rules of the Organization so admit, establish permanent missions for the performance of the functions mentioned in article 6.**

**2. Non-member States may, if the rules of the Organization so admit, establish permanent observer missions for the performance of the functions mentioned in article 7.**

**3. The Organization shall notify to the host State the institution of a mission, if possible prior to its establishment.**

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

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

### Commentary

(1) Article 5 lays down a general rule according to which States may establish missions to international organizations of universal character. These missions are normally established at the seat of the Organization. However, the United Nations has an Office at Geneva where a large number of States maintain missions as liaison with that Office as well as with a number of specialized agencies which have established their seats at Geneva (ILO, ITU, WHO and WMO). Missions have also been established by States at the headquarters of United Nations regional economic commissions.<sup>48</sup>

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

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

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

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

missions in the United Nations and agencies of the United Nations family.

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

(6) Accordingly, paragraph 1 of article 5 regulates the establishment of "permanent missions" by "member States" and paragraph 2 of "permanent observer missions" by "non-member States". As stated in paragraph 1, member States may, if the rules of the Organization so admit, establish permanent missions for the performance of the functions mentioned in article 6 of the present draft articles. Paragraph 2, in turn, provides that non-member States may, if the rules of the Organization so admit, establish permanent observer missions for the performance of the functions mentioned in article 7 of the present draft articles.

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

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

### Article 6.<sup>50</sup> Functions of the permanent mission

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

(a) ensuring the representation of the sending State to the Organization;

(b) maintaining the necessary liaison between the sending State and the Organization;

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

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

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

- (c) negotiating with or in the Organization;
- (d) ascertaining activities in the Organization and reporting thereon to the Government of the sending State;
- (e) promoting co-operation for the realization of the purposes and principles of the Organization.

*Commentary*

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

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

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

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

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

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

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

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

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

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

### *Article 7.<sup>53</sup> Functions of the permanent observer mission*

The functions of the permanent observer mission consist *inter alia* in:

- (a) ensuring, in relations with the Organization, the representation of the sending State and maintaining liaison with the Organisation;
- (b) ascertaining activities in the Organization and reporting thereon to the Government of the sending State;
- (c) promoting co-operation with the Organization and, when required, negotiating with it.

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

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

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

*Commentary*

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

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

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

In my introduction to last year's annual report as well as in previous years, I have already expressed my strong feeling that all countries should be encouraged and enabled, if they wish to do so, to follow the work of the Organization more closely by maintaining observers at the Headquarters of the United Nations, at Geneva and in the regional economic commissions. They will thus be exposed to the impact of the work of the Organization and the currents and cross-currents of opinion that prevail within it, besides gaining opportunities to contribute to that exchange.<sup>54</sup>

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

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

### **Article 8<sup>55</sup> Multiple accreditation or appointment**

#### **1. The sending State may accredit the same person as head of mission to two or more international organizations or**

**appoint a head of mission as a member of the diplomatic staff of another of its missions.**

**2. The sending State may accredit a member of the diplomatic staff of the mission as head of mission to other international organizations or appoint a member of the staff of the mission as a member of the staff of another of its missions.**

*Commentary*

(1) There have been a number of cases where a head of mission, permanent representative or permanent observer, has been accredited or appointed by the sending State to more than one international organization; at the Office of the United Nations at Geneva the practice has been developed of accrediting the same person as head of mission both to the various specialized agencies having their headquarters in Geneva and to the Office itself. Other members of a mission to an international organization are likewise sometimes called upon to exercise functions on behalf of their respective States at another organization; for instance members of missions at United Nations Headquarters have exercised functions on behalf of their respective States at specialized agencies in Washington.<sup>56</sup> The practice of accrediting or appointing the same person, head of mission or member of the staff of the mission, to two or more organizations is not limited to organizations of universal character. Representatives have on occasion simultaneously represented their country both at the United Nations and at regional organizations (e.g. at the OAS).<sup>57</sup> Permanent representatives of certain European countries to the Council of Europe have been simultaneously accredited to EEC. The provisions set forth in article 8 are, therefore, based on a well established and generalized practice.

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

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

<sup>54</sup> *Official Records of the General Assembly, Twenty-second Session, Supplement No. 1A (A/6701/Add.1).*

<sup>55</sup> Articles 8 and 54 of the provisional draft.

<sup>56</sup> Study of the Secretariat [see foot-note 51 above], op.cit., p. 169, para. 38.

<sup>57</sup> *Ibid.*, para. 39.



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

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

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

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

#### *Commentary*

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

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

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

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

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

#### **Article 10.<sup>60</sup> Credentials of the head of mission**

**The credentials of the head of mission shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or, if the rules of the Organization so admit, by another competent authority of the sending State and shall be transmitted to the Organization.**

#### *Commentary*

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

[The General Assembly]

#### *Recommends*

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

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

<sup>59</sup> *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98, document A/C.6/385, para. 4.

<sup>60</sup> Articles 12 and 57 of the provisional draft.

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

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

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

<sup>58</sup> Articles 10 and 55 of the provisional draft.

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

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

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

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

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

(7) Article 10 is therefore designed to consolidate the practice in the matter where such practice exists, and to set up a general pattern for the submission of the credentials of the head of mission, whether permanent representative or permanent observer, to the Organization. The article provides that the credentials of the head of mission shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or, if the rules of the Organization so admit, by another competent authority of the sending State. The latter words, namely "or, if the rules of the Organization so

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

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

#### **Article 11.<sup>65</sup> Accreditation to organs of the Organization**

**1. A member State may specify in the credentials issued to its permanent representative that he is authorized to act as a delegate to one or more organs of the Organization.**

**2. Unless a member State provides otherwise its permanent representative may act as a delegate to organs of the Organization for which there are no special requirements as regards representation.**

**3. A non-member State may specify in the credentials issued to its permanent observer that he is authorized to act as an observer delegate to one or more organs of the Organization when this is admitted.**

#### *Commentary*

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

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

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

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

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

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

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

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

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

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

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

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

#### **Article 12.<sup>67</sup> Full powers in the conclusion of a treaty with the Organization**

1. The head of mission in virtue of his functions and without having to produce full powers is considered as representing his State for the purpose of adopting the text of a treaty between that State and the Organization.

2. The head of mission is not considered in virtue of his functions as representing his State for the purpose of signing a treaty, whether in full or *ad referendum*, between that State and the Organization unless it appears from the practice of the Organization, or from other circumstances, that the intention of the parties was to dispense with full powers.

#### *Commentary*

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

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

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

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

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

#### *Article 7: Full powers*

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

...

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

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

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

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

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

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

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

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

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

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

#### *Commentary*

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

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

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

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

especially as regards international organizations of a technical character.

### **Article 14.<sup>72</sup> Size of the mission**

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

#### *Commentary*

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

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

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

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

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

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

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

<sup>71</sup> *Yearbook of the International Law Commission, 1958*, vol. II, p. 94, document A/3859, para. 53.

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

<sup>73</sup> Emphasis supplied.

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

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

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

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

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

#### **1. The sending State shall notify the Organization of:**

(a) the appointment, position, title and order of precedence of the members of the mission, their arrival and final departure or the termination of their functions with the mission;

(b) the arrival and final departure of any person belonging to the family of a member of the mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission;

(c) the arrival and final departure of persons employed on the private staff of members of the mission and the fact that they are leaving that employment;

(d) the beginning and the termination of the employment of persons resident in the host State as members of the staff of the mission or as persons employed on the private staff;

(e) the location of the premises of the mission and of the private residences enjoying inviolability under articles 23 and 29, as well as any other information that may be necessary to identify such premises and residences.

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

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

**4. The Sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2.**

#### *Commentary*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Article 16.<sup>78</sup> *Chargé d'affaires ad interim*

If the post of head of mission is vacant, or if the head of mission is unable to perform his functions, a *chargé d'affaires ad interim* shall act as head of mission. The name of the *chargé d'affaires ad interim* shall be notified to the Organization.

#### Commentary

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

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

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

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

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

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

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

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

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

#### Commentary

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

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

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

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

### **Article 18.<sup>80</sup> Office of the mission**

**The sending State may not, without the prior consent of the host State, establish an office of the mission in a locality within the host State other than that in which the seat or an office of the Organization is established.**

#### *Commentary*

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

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

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

### **Article 19.<sup>81</sup> Use of flag and emblem**

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

**2. The permanent observer mission shall have the right to use the flag and emblem of the sending State on its premises.**

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

#### *Commentary*

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

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

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

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

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

**1. The host State shall accord:**

**(a) to the permanent mission all facilities for the performance of its functions;**

**(b) to the permanent observer mission the facilities required for the performance of its functions.**

**2. The Organization shall assist the mission in obtaining those facilities and shall accord to the mission such facilities as lie within its own competence.**

#### *Commentary*

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

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

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

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

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



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

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

#### **Article 21.<sup>84</sup> Premises and accommodation**

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

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

#### *Commentary*

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

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

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

These considerations equally underlie paragraph 1 of the present article.

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

<sup>85</sup> *Yearbook of the International Law Commission, 1958*, vol. II, p. 95, document A/3859, para. 53.

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

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

#### **Article 22.<sup>86</sup> Assistance by the Organization in respect of privileges and immunities**

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

#### *Commentary*

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

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

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

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

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

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

### *Article 23.<sup>89</sup> Inviolability of the premises*

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

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

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

#### *Commentary*

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

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

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

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

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

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

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

<sup>90</sup> Amendment adopted at the 1088th meeting of the Sixth Committee during the consideration of the item entitled "Draft Convention on Special Missions" at the twenty-third session (1968) of the General Assembly (See *Official Records of the General Assembly, Twenty-third Session. Annexes*, agenda item 85, document A/7375, paras. 190, 192, 194 and 195).

<sup>91</sup> Study of the Secretariat, op. cit., p. 187, para. 154.

<sup>92</sup> cf. article 22 of the Convention on Diplomatic Relations and article 25 of the Convention on Special Missions.

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

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

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

#### **Article 24.<sup>93</sup> Exemption of the premises from taxation**

**1. The premises of the mission of which the sending State or any person acting on its behalf is the owner or the lessee shall be exempt from all national, regional or municipal dues and taxes other than such as represent payment for specific services rendered.**

**2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State or any person acting on its behalf.**

#### *Commentary*

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

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

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

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

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

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

#### *Commentary*

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

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

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

#### **Article 26.<sup>96</sup> Freedom of movement**

**Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure freedom of movement and travel in its territory to all members of the mission and members of their families forming part of their respective households.**

#### *Commentary*

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

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

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

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

<sup>95</sup> *Yearbook of the International Law Commission, 1958*, vol. II, p. 96, document A/3859, para. 53.

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

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

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

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

### *Article 27.<sup>97</sup> Freedom of communication*

1. The host State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government of the sending State, its permanent diplomatic missions, consular posts, permanent missions, permanent observer missions, special missions and delegations, wherever situated, the mission may employ all appropriate means, including couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the host State.

2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

3. The bag of the mission shall not be opened or detained.

4. The packages constituting the bag of the mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the mission.

5. The courier of the mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the mission may designate couriers *ad hoc* of the mission. In such cases the provisions of paragraph 5 shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the mission's bag in his charge.

7. The bag of the mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the mission. By arrangement with the appropriate authorities of the host State, the mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

### *Commentary*

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

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

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

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

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

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

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

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

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

**The persons of the head of mission and of the members of the diplomatic staff of the mission shall be inviolable. They shall not be liable to any form of arrest or detention. The**

<sup>98</sup> *Yearbook of the International Law Commission*, 1969, vol. II, p. 211, document A/7610/Rev.1, chap. II, B.

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

host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

**Article 29.<sup>100</sup> Inviolability of residence and property**

1. The private residence of the head of mission and of the members of the diplomatic staff of the mission shall enjoy the same inviolability and protection as the premises of the mission.

2. Their papers, correspondence and, except as provided in paragraph 3 of article 30, their property, shall likewise enjoy inviolability.

*Commentary*

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

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

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

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

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

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

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

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

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

**Article 30.<sup>102</sup> Immunity from jurisdiction**

1. The head of mission and the members of the diplomatic staff of the mission shall enjoy immunity from the criminal jurisdiction of the host State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the host State unless the person in question holds it on behalf of sending State for the purposes of the mission;

(b) action relating to succession in which the person in question is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the person in question in the host State outside his official functions;

(d) an action for damages arising out of an accident caused by a vehicle used by the person in question outside the exercise of the functions of the mission where those damages are not recoverable from insurance.

2. The head of mission and the members of the diplomatic staff of the mission are not obliged to give evidence as witnesses.

3. No measures of execution may be taken in respect of the head of mission or a member of the diplomatic staff of the mission except in cases coming under sub-paragraphs *a*, *b*, *c* and *d* of paragraph 1, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of the head of mission or of a member of the diplomatic staff of the mission from the jurisdiction of the host State does not exempt him from the jurisdiction of the sending State.

*Commentary*

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

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

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

<sup>101</sup> *Yearbook of the International Law Commission*, vol. II, p. 98, document A/3859, para. 53.

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

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

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

After a lengthy discussion, the Commission was unable owing to a wide divergence of views, to reach any decision on the substance of the provision in sub-paragraph 1 (*d*). It decided to place the provision in brackets and to bring it to the attention of Governments. Those favouring the proposal, which was based on sub-paragraph (2) (*d*) of article 31 of the draft articles on special missions, argued that it would meet a real and growing problem which had, it was said, been inadequately recognized at the 1961 Vienna Conference on Diplomatic Intercourse and Immunities. Further, there were problems in some countries concerning the application and effect of insurance laws and practices as well as the adequacy of the insurance coverage. On the other hand, it was argued that the Vienna precedent should be followed, since it provided the closer analogy. In addition, considerable emphasis was placed on articles 34 and 45 of the present draft [articles 31, paragraph 5, and 75 of the present draft articles]; the former provision, which goes beyond the corresponding resolution of the 1961 Vienna Conference, requires the sending State to waive immunity in respect of civil claims in the host State "when this can be done without impeding the performance of the functions of the permanent mission"; if immunity is not waived the sending State "shall use its best endeavours to bring about a just settlement of such claims".<sup>103</sup> The latter provision requires all persons enjoying privileges and immunities to respect the laws and regulations of the host State. Those opposing the proposal in sub-paragraph 1 (*d*) also argued that one particular kind of claim should not be singled out in this way and that the functional line drawn in it would be difficult to apply.<sup>104</sup>

(4) At its present session, the Commission examined again the question of the advisability of including sub-paragraph *d* of paragraph 1 in the text of the article as well as its formulation. Several Governments had submitted comments on the matter but, as the Special Rapporteur had pointed out, those comments were "not sufficient in themselves to give to the Commission any clear directive as to the manner in which the question should be finally resolved". (A/CN.4/241 and Add.1-6,<sup>105</sup> chap. II, observations on article 32, para. 21.) Most members were in favour of including sub-paragraph *d* of paragraph 1 in the text of the article, as the General Assembly did in article 31 of the Convention on Special Missions, with a slightly different wording to reflect the frequently expressed desire that the vehicles of members of missions to international organizations should be insured against third-party risks.

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

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

### *Article 31.<sup>106</sup> Waiver of immunity*

**1. The immunity from jurisdiction of the head of mission and members of the diplomatic staff of the mission and of persons enjoying immunity under article 36 may be waived by the sending State.**

**2. Waiver must always be express.**

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

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

**5. If the sending State does not waive the immunity of any of the persons mentioned in paragraph 1 in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.**

### *Commentary*

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

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

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

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

<sup>104</sup> *Yearbook of the International Law Commission, 1969*, vol. II, pp. 212-213, document A/7610/Rev.1, chap. II, B.

<sup>105</sup> See p. 1 above.

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

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

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

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

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

The sending State shall waive the immunity of any of the persons mentioned in paragraph 1 of article 33 [paragraph 1 of the present article] in respect of civil claims in the host State when this can be done without impeding the performance of the functions of the permanent mission. If the sending State does not waive immunity, it shall use its best endeavours to bring about a just settlement of such claims.

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

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

### **Article 32.<sup>109</sup> Exemption from social security legislation**

**1. Subject to the provisions of paragraph 3, the head of mission and the members of the diplomatic staff of the**

**mission shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the host State.**

**2. The exemption provided for in paragraph 1 shall also apply to persons who are in the sole private employ of the head of mission or of a member of the diplomatic staff of the mission, on condition:**

**(a) that such employed persons are not nationals of or permanently resident in the host State; and**

**(b) that they are covered by the social security provisions which may be in force in the sending State or a third State.**

**3. The head of mission and the members of the diplomatic staff of the mission who employ persons to whom the exemption provided for in paragraph 2 does not apply shall observe the obligations which the social security provisions of the host State impose upon employers.**

**4. The exemption provided for in paragraph 1 and 2 shall not preclude voluntary participation in the social security system of the host State provided that such participation is permitted by that State.**

**5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.**

### *Commentary*

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

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

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

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

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

<sup>108</sup> *Yearbook of the International Law Commission, 1967*, vol. II, p. 365, document A/6709/Rev.1, chap. II, D.

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

<sup>110</sup> *Yearbook of the International Law Commission, 1967*, vol. II, p. 362, document A/6709/Rev.1, chap. II, D.



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

### **Article 33.<sup>111</sup> Exemption from dues and taxes**

**The head of mission and the members of the diplomatic staff of the mission shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:**

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

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

**(c) estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 38;**

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

**(e) charges levied for specific services rendered;**

**(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 24.**

#### *Commentary*

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

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

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

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

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

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

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

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

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

### **Article 34.<sup>113</sup> Exemption from personal services**

**The host State shall exempt the head of mission and the members of the diplomatic staff of the mission from all**

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

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

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

#### *Commentary*

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

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

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

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

#### *Article 35.<sup>116</sup> Exemption from customs duties and inspection*

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

**(a) articles for the official use of the mission;**

**(b) articles for personal use of the head of mission or a member of the diplomatic staff of the mission, including articles intended for his establishment.**

**2. The personal baggage of the head of mission or a member of the diplomatic staff of the mission shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. In such cases, inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.**

#### *Commentary*

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

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

<sup>114</sup> *Yearbook of the International Law Commission*, 1958, vol. II, p. 100, document A/3859, para. 53.

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

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

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

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

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

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

(6) Apart from minor drafting changes in some language versions, the Commission made only one change in the wording of the corresponding provisions of the provisional draft. It had deleted from paragraph 1, sub-paragraph b, the phrase "or members of his family forming part of his household". That phrase was unnecessary because the provisions of article 35 concerning the members of the family of the head of mission and the members of the family of a member of the diplomatic staff of the mission were incorporated in article 36, paragraph 1.

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

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

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

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

**Article 36.<sup>121</sup> Privileges and immunities of other persons**

1. The members of the family of the head of mission forming part of his household and the members of the family of a member of the diplomatic staff of the mission forming part of his household shall, if they are not nationals of the host State, enjoy the privileges and immunities specified in articles 28, 29, 30, 32, 33, 34 and in paragraphs 1 *b* and 2 of article 35.

2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households who are not nationals of or permanently resident in the host State, shall enjoy the privileges and immunities specified in articles 28, 29, 30, 32, 33 and 34, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 30 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1 *b* of article 35 in respect of articles imported at the time of first installation.

3. Members of the service staff of the mission enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption provided for in article 32.

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

*Commentary*

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

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

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

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

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

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

**Article 37.<sup>122</sup> Nationals of the host State and persons permanently resident in the host State**

1. Except in so far as additional privileges and immunities may be granted by the host State, the head of mission and any member of the diplomatic staff of the mission who are nationals of or permanently resident in that State shall enjoy only immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of their functions.

2. Other members of the staff of the mission and persons on the private staff who are nationals of or permanently resident in the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those members and persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

*Commentary*

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

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

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

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

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

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

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

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

### **Article 38.<sup>129</sup> Duration of privileges and immunities**

**1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the**

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

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

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

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

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

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

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

host State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the host State by the Organization or by the sending State.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the mission not a national of or permanently resident in the host State or of a member of his family forming part of his household, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property which is in the host State solely because of the presence there of the deceased as a member of the mission or of the family of a member of the mission.

### *Commentary*

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

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

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

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

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

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

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

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

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

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

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

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

#### *Commentary*

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

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

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

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

### **Article 40.<sup>133</sup> End of the functions of the head of mission or of a member of the diplomatic staff**

**The functions of the head of mission or of a member of the diplomatic staff of the mission shall come to an end, *inter alia*:**

**(a) on notification of their termination by the sending State to the Organization;**

**(b) if the mission is finally or temporarily recalled.**

#### *Commentary*

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

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

### **Article 41.<sup>134</sup> Protection of premises, property and archives**

**1. When the mission is temporarily or finally recalled, the host State must respect and protect the premises as well as the property and archives of the mission. The sending State must take all appropriate measures to terminate this special duty of the host State within a reasonable time. It may entrust custody of the premises, property and archives of the mission to a third State acceptable to the host State.**

**2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and the archives of the mission from the territory of the host State.**

#### *Commentary*

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

<sup>132</sup> A similar position was adopted by the Commission in connexion with its draft articles on special missions in paragraph 2 of the commentary on article 49 of that draft. See *Yearbook of the International Law Commission*, 1967, vol. II, p. 367, document A/6709/Rev.1, chap. II, D. Draft article 49 was adopted without change by the General Assembly; it became article 48 of the Convention on Special Missions.

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

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

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

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

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

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

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

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

#### *Commentary*

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

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

<sup>136</sup> New article.

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

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

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

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

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

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

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

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

(Continued overleaf)

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

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

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

*Commentary*

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

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

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

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

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

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

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

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

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

**Article 44.<sup>139</sup> Credentials of delegates**

The credentials of the head of delegation and of other delegates shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or, if the rules of the Organization or the rules of procedure of the conference so admit, by another competent authority of the sending State. They shall be transmitted, as the case may be, to the Organization or to the Conference.

*Commentary*

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

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

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

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

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

1. Heads of State, Heads of Government and Ministers for Foreign Affairs, in virtue of their functions and without having to produce full



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

### **Article 45.<sup>142</sup> Composition of the delegation**

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

#### *Commentary*

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

powers, are considered as representing their State for the purpose of performing all acts relating to the conclusion of a treaty in a conference or in an organ.

2. A representative to an organ or in a delegation to a conference, in virtue of his functions and without having to produce full powers, is considered as representing his State for the purpose of adopting the text of a treaty in that organ or conference.

3. A representative to an organ or in a delegation to a conference is not considered in virtue of his functions as representing his State for the purpose of signing a treaty (whether in full or *ad referendum*) concluded in that organ or conference unless it appears from the circumstances that the intention of the Parties was to dispense with full powers.

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

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

### **Article 46.<sup>144</sup> Size of the delegation**

**The size of the delegation shall not exceed what is reasonable and normal, having regard, as the case may be, to the functions of the organ or the object, as well as the needs of the particular delegation and the circumstances and conditions in the host State.**

#### *Commentary*

(1) Article 46 parallels article 14. The Commission wishes to point out one difference between these two articles. Article 14 refers to the "functions" of the organization. Article 46 does use that term as regards organs, but it uses the word "object" in referring to conferences, which in the opinion of the Commission is more appropriate in relation to conferences.

(2) In their written comments on the provisional draft, some Governments criticized the formulation of the provision on the size of the delegation, in that, unlike article 11, paragraph 1 of the Convention on Diplomatic Relations, it does not apportion to the host State the right to determine "what is reasonable and normal". It is to be noted that article 46 is based on article 14 which relates to missions to international organizations. In its commentary on this latter article, the Commission explained the reasons why a different rule is required for relations between States and international organizations than that for bilateral diplomatic relations. The Commission wishes also to underline the procedures available to the host State under articles 81 and 82 of the draft.

(3) In their written comments on the provisional draft certain international organizations referred to provisions contained in their constituent instruments relating to the composition of delegations or defining the number of delegates and alternates. They expressed fears of what they called contradiction between such provisions and the rule stated in article 46. The Commission is of the opinion that no such contradiction exists. Article 46 seeks to regulate the size of the delegation as a whole, and does not purport to pose limitations on the specific category of delegates. Moreover, the constituent instruments would necessarily prevail under articles 3 and 4 of the draft.

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

**1. The sending State shall notify the Organization or, as the case may be, the conference of:**

**(a) the composition of the delegation, including the position, title and order of precedence of the members of the delegation, and any subsequent changes therein;**

**(b) the arrival and final departure of members of the delegation and the termination of their functions with the delegation;**

**(c) the arrival and final departure of any person accompanying a member of the delegation;**

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

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

(d) the beginning and the termination of the employment of persons resident in the host State as members of the staff of the delegation or as persons employed on the private staff;

(e) the location of the premises of the delegation and of the private accommodation enjoying inviolability under articles 54 and 60 as well as any other information that may be necessary to identify such premises and accommodation.

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

3. The Organization or, as the case may be, the conference shall transmit to the host State the notifications referred to in paragraphs 1 and 2.

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

#### *Commentary*

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

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

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

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

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

#### *Article 48.<sup>146</sup> Acting head of the delegation*

1. If the head of delegation is absent or unable to perform his functions, an acting head shall be designated from among the other delegates by the head of delegation or, in case he is unable to do so, by a competent authority of the sending State. The name of the acting head shall be notified, as the case may be, to the Organization or to the conference.

2. If a delegation does not have another delegate available to serve as acting head, another person may be designated for that purpose. In such case credentials must be issued and transmitted in accordance with article 44.

#### *Commentary*

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

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

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

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

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

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

*Commentary*

(1) Article 49 parallels article 17.

(2) The text of article 90 of the provisional draft provided that precedence among delegations was determined by the alphabetical order used in the host State. In its written comment on that text, one Government observed that it remains to some extent unclear by what alphabetical order the precedence among delegates shall be determined in countries which have several official languages. To meet this point and taking into account the practice of international organizations as indicated in the written comments of some of these organizations,<sup>148</sup> according to which it is the alphabetical order used in the organization rather than that used in the host State which is generally followed to determine precedence among delegations to organs and conferences, the Commission redrafted the article accordingly.

(3) During the discussion of article 49 some members of the Commission criticized the use of the word "precedence" which in their view raised questions regarding the principle of sovereign equality of States. The Commission decided, however, to retain that word, as it had been used in the Conventions on Diplomatic Relations and on Consular Relations and in the Convention on Special Missions. The word has thus acquired a special connotation in convention of this character, with respect to matters of etiquette and protocol.

**Article 50.<sup>149</sup> Status of the Head of State and persons of high rank**

**1. The Head of the sending State, when he leads the delegation, shall enjoy in the host State or in a third State, in addition to what is granted by the present articles, the facilities, privileges and immunities accorded by international law to Heads of State.**

**2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a delegation of the sending State, shall enjoy in the host State or in a third State, in addition to what is granted by the present articles, the facilities, privileges and immunities accorded by international law to such persons.**

*Commentary*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**The host State shall accord to the delegation all facilities for the performance of its tasks. The Organization or, as the case may be, the conference shall assist the delegation in obtaining those facilities and shall accord to the delegation such facilities as lie within their own competence.**

#### *Commentary*

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

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

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

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

### **Article 52.<sup>152</sup> Premises and accommodation**

**The host State shall assist the delegation, if it so requests, in procuring the necessary premises and obtaining suitable accommodation for its members. The Organization or, as the case may be, the conference shall, where necessary, assist the delegation in this regard.**

#### *Commentary*

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

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

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

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

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

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

**Article 53.<sup>153</sup> Assistance in respect of privileges and immunities**

The Organization or, as the case may be, the Organization and the conference shall, where necessary, assist the sending State, its delegation and the members of the delegation in securing the enjoyment of the privileges and immunities provided for by the present articles.

*Commentary*

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

**Article 54.<sup>154</sup> Inviolability of the premises**

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

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

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

*Commentary*

(1) Article 54 parallels article 23.

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

(3) If, as is often the case, offices of the delegation are established in premises which already enjoy the privileges

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

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

**Article 55.<sup>155</sup> Exemption of the premises from taxation**

1. The sending State and the members of the delegation acting on behalf of the delegation shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the delegation other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State or with a member of the delegation.

*Commentary*

(1) Article 55 parallels article 24 and is modelled on article 24 of the Convention on Special Missions. At the second reading, however, on the basis of governmental comments, the Commission decided to delete at the beginning of paragraph 1 the phrase "To the extent compatible with the nature and duration of the functions performed by a delegation to an organ or to a conference" which had been included in the provisional draft following the wording of the above-mentioned article of the convention on Special Missions. Paragraph 2 reproduces unchanged the text of the corresponding provision of the provisional draft.

(2) In their observations, Governments were concerned about the meaning of the phrase at the beginning of paragraph 1, which they considered could be interpreted in either a liberal or a narrow sense. Its deletion is intended to simplify the application of the provision set forth in paragraph 1 of article 55.

(3) The wording of paragraph 1 of this article has not, however, been brought into line with the corresponding provision of part II (paragraph 1 of article 24). The Commission considered that, as its duration was relatively

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

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

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

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

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

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

*Commentary*

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

**Article 57.<sup>157</sup> *Freedom of movement***

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure to all members of the delegation such freedom of movement and travel in its territory as is necessary for the performance of the tasks of the delegation.

*Commentary*

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

**Article 58.<sup>158</sup> *Freedom of communication***

1. The host State shall permit and protect free communication on the part of the delegation for all official purposes. In communicating with the Government of the sending State, its permanent diplomatic missions, consular posts,

permanent missions, permanent observer missions, special missions and other delegations, wherever situated, the delegation may employ all appropriate means, including couriers and messages in code or cipher. However, the delegation may install and use a wireless transmitter only with the consent of the host State.

2. The official correspondence of the delegation shall be inviolable. Official correspondence means all correspondence relating to the delegation and its tasks.

3. Where practicable, the delegation shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission, of the permanent mission or of the permanent observer mission of the sending State.

4. The bag of the delegation shall not be opened or detained.

5. The packages constituting the bag of the delegation must bear visible external marks of their character and may contain only documents or articles intended for the official use of the delegation.

6. The courier of the delegation, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

7. The sending State or the delegation may designate couriers *ad hoc* of the delegation. In such cases the provisions of paragraph 6 shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the delegation's bag in his charge.

8. The bag of the delegation may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the delegation. By arrangement with the appropriate authorities of the host State, the delegation may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

*Commentary*

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

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

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

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

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

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

The persons of the head of delegation and of other delegates and members of the diplomatic staff of the delegation shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

**Article 60.<sup>160</sup> Inviolability of private accommodation and property**

1. The private accommodation of the head of delegation and of other delegates and members of the diplomatic staff of the delegation shall enjoy the same inviolability and protection as the premises of the delegation.

2. Their papers, correspondence and, except as provided in paragraph 3 of article 61, their property shall likewise enjoy inviolability.

*Commentary*

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

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

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

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

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

nity from the criminal jurisdiction of the host State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the host State, unless the person in question holds it on behalf of the sending State for the purposes of the delegation;

(b) an action relating to succession in which the person in question is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the person in question in the host State outside his official functions;

(d) an action for damages arising out of an accident caused by a vehicle used by the person in question outside the performance of the tasks of the delegation where those damages are not recoverable from insurance.

2. The head of delegation and other delegates and members of the diplomatic staff of the delegation are not obliged to give evidence as witnesses.

3. No measures of execution may be taken in respect of the head of delegation or any other delegate or member of the diplomatic staff of the delegation except in cases coming under sub-paragraphs *a*, *b*, *c* and *d* of paragraph 1, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his accommodation.

4. The immunity of the head of delegation and of other delegates and members of the diplomatic staff of the delegation from the jurisdiction of the host States does not exempt them from jurisdiction of the sending State.

*Commentary*

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

<sup>162</sup> *Alternative A:*

1. The representatives in a delegation to an organ or to a conference and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the host State.

2. They shall also enjoy immunity from the civil and administrative jurisdiction of the host State, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the delegation;

(b) An action relating to succession in which the person concerned is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the person concerned in the host State outside his official functions;

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

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

4. No measures of execution may be taken in respect of a representative in the delegation or a member of its diplomatic staff except in the cases coming under sub-paragraphs *a*, *b*, *c* and *d* of paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person or his accommodation.

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

(Continued overleaf)

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

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

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



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

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

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

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

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

#### *Alternative B:*

1. The representatives in a delegation to an organ or to a conference and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the host State.
2. (a) The representatives and members of the diplomatic staff of delegation shall enjoy immunity from the civil and administrative jurisdiction of the host State in respect of all acts performed in the exercise of their official functions.  
(b) No measures of execution may be taken in respect of a representative or a member of the diplomatic staff of the delegation unless the measures concerned can be taken without infringing the inviolability of his person or his accommodation.
3. The representatives and members of the diplomatic staff of the delegation are not obliged to give evidence as witnesses.
4. The immunity from jurisdiction of the representatives and members of the diplomatic staff of the delegation does not exempt them from the jurisdiction of the sending State.

<sup>163</sup> Yearbook of the International Law Commission, 1970, vol. II, document A/8010/Rev.1, chap. II, B.

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

#### *Article 62.<sup>164</sup> Waiver of immunity*

1. The immunity from jurisdiction of the head of delegation and of other delegates and members of the diplomatic staff of the delegation and of persons enjoying immunity under article 67 may be waived by the sending State.

2. Waiver must always be express.

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

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

5. If the sending State does not waive the immunity of any of the persons mentioned in paragraph 1 in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

#### *Commentary*

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

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

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

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

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

**Article 63.<sup>165</sup> Exemption from social security legislation**

1. Subject to the provisions of paragraph 3, the head of delegation and other delegates and members of the diplomatic staff of the delegation shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the host State.

2. The exemption provided for in paragraph 1 shall also apply to persons who are in the sole private employ of the head of delegation or of any other delegate or member of the diplomatic staff of the delegation, on condition:

(a) that such employed persons are not nationals of or permanently resident in the host State; and

(b) that they are covered by the social security provisions which may be in force in the sending State or a third State.

3. The head of delegation and other delegates and members of the diplomatic staff of the delegation who employ persons to whom the exemption provided for in paragraph 2 does not apply shall observe the obligations which the social security provisions of the host State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 shall not preclude voluntary participation in the social security system of the host State provided that such participation is permitted by that State.

5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded

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

*Commentary*

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

**Article 64.<sup>166</sup> Exemption from dues and taxes**

The head of delegation and other delegates and members of the diplomatic staff of the delegation shall be exempt from all dues and taxes, personal or real, national or municipal, except:

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

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

(c) estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 69;

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

(e) charges levied for specific services rendered;

(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 55.

*Commentary*

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

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

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

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

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

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

#### **Article 65.<sup>168</sup> Exemption from personal services**

The host State shall exempt the head of delegation and other delegates and members of the diplomatic staff of the delegation from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

##### *Commentary*

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

#### **Article 66.<sup>169</sup> Exemption from customs duties and inspection**

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

(a) articles for the official use of the delegation;

(b) articles for the personal use of the head of delegation or of any other delegate or member of the diplomatic staff of the delegation.

2. The personal baggage of the head of delegation or of any other delegate or member of the diplomatic staff of the delegation shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1, or articles the import or export of which is prohibited by the law or controlled by the regulations of the host State. In such cases, inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

##### *Commentary*

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

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

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

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

#### **Article 67.<sup>170</sup> Privileges and immunities of other persons**

1. The members of the family of the head of delegation who accompany him, and the members of the family of any other delegate or member of the diplomatic staff of the delegation who accompany him shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 59, 60, 61, 63, 64, 65 and paragraphs 1 (b) and 2 of article 66.

2. Members of the administrative and technical staff of the delegation, together with members of their families who accompany them and who are not nationals of or permanently resident in the host State, shall enjoy the privileges and immunities specified in articles 59, 60, 61, 63, 64 and 65, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 61 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1 (b) of article 66 in respect of articles imported at the time of their first entry into the territory of the host State for the purpose of attending the meeting of the organ or conference.

3. Members of the service staff of the delegation shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption provided for in article 63.

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

##### *Commentary*

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

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

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

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

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

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

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

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

**Article 68.<sup>171</sup> Nationals of the host State and persons permanently resident in the host State**

1. Except in so far as additional privileges and immunities may be granted by the host State, the head of delegation and any other delegate or member of the diplomatic staff of the delegation who are nationals of or permanently resident in that State shall enjoy only immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of their functions.

2. Other members of the staff of the delegation and persons on the private staff who are nationals of or permanently resident in the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those members and persons in such a manner as not to interfere unduly with the performance of the tasks of the delegation.

*Commentary*

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

**Article 69.<sup>172</sup> Duration of privileges and immunities**

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State for the purpose of attending the meeting of an organ or conference or, if already in its territory, from the moment when his appointment is notified to the host State by the Organization, by the conference or by the sending State.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do

so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the delegation, immunity shall continue to subsist.

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

4. In the event of the death of a member of the delegation not a national of or permanently resident in the host State or of a member of his family accompanying him, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property which is in the host State solely because of the presence there of the deceased as a member of the delegation or of the family of a member of the delegation.

*Commentary*

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

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

(3) Articles 38 and 69 have, however, some differences in wording, due mainly to the temporary nature of delegations. In paragraph 1 the phrase "on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the host State by the Organization or by the sending State" has been replaced by the phrase "for the purpose of attending the meeting of an organ or conference or, if already in its territory, from the moment when his appointment is notified to the host State by the Organization, by the conference or by the sending State." The words "by the conference" have been inserted in order to cover the case when notification is made by the conference itself and not by the organization responsible for convening it, or directly by the sending State. The expression "forming part of his household" has been replaced by the expression "accompanying him" in paragraph 4.

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

**Article 70.<sup>173</sup> End of the functions of the head of delegation or any other delegate or member of the diplomatic staff**

The functions of the head of delegation or of any other delegate or member of the diplomatic staff of the delegation shall come to an end, *inter alia*:

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

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

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

(a) on notification of their termination by the sending State to the Organization or the conference;

(b) upon the conclusion of the meeting of the organ or the conference.

*Commentary*

(1) Article 70 parallels article 40.

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

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

**Article 71.<sup>174</sup> Protection of premises, property and archives**

1. When the meeting of an organ or a conference comes to an end, the host State must respect and protect the premises of the delegation so long as they are assigned to it, as well as the property and archives of the delegation. The sending State must take all appropriate measures to terminate this special duty of the host State within a reasonable time.

2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and the archives of the delegation from the territory of the host State.

*Commentary*

(1) Article 71 parallels article 41.

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

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

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

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

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

PART IV. GENERAL PROVISIONS

**Article 72.<sup>175</sup> Nationality of the members of the mission or the delegation**

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

*Commentary*

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

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

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

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

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

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

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

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

### **Article 73.<sup>176</sup> Laws concerning acquisition of nationality**

**Members of the mission or the delegation not being nationals of the host State, and members of their families forming part of their household or, as the case may be, accompanying them, shall not, solely by the operation of the law of the host State, acquire the nationality of that State.**

#### *Commentary*

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

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

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

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

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

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

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

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

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

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

<sup>179</sup> *Yearbook of the International Law Commission, 1958*, vol. II, p. 101, document A/3859, para. 53.

**Article 74.<sup>180</sup> Privileges and immunities in case of multiple functions**

**When members of the permanent diplomatic mission or of a consular post in the host State are included in a mission or delegation, they shall retain their privileges and immunities as members of their permanent diplomatic mission or consular post in addition to the privileges and immunities accorded by the present articles.**

*Commentary*

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

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

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

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

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

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

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

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

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

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

**Article 75.<sup>181</sup> Respect for the laws and regulations of the host State**

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

**2. In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from jurisdiction, the sending State shall, unless it waives the immunity of the person concerned, recall him, terminate his functions with the mission or the delegation or secure his departure, as appropriate. The sending State shall take the same action in case of grave and manifest interference in the internal affairs of the host State. The provisions of this paragraph shall not apply in the case of any act that the person concerned performed in carrying out the functions of the mission or the tasks of the delegation.**

**3. The premises of the mission and the premises of the delegation shall not be used in any manner incompatible with the exercise of the functions of the mission or the performance of the tasks of the delegation.**

*Commentary*

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

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

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



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

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

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

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

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

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

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

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

##### **1. The host State shall permit entry into its territory of:**

**(a) members of the mission and members of their families forming part of their respective households, and**

<sup>182</sup> New article.

(b) members of the delegation and members of their families accompanying them.

2. Visas, when required, shall be granted as promptly as possible to any person referred to in paragraph 1.

#### Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) The Secretariat of IAEA noted that:

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

<sup>183</sup> Paragraph 2 of the commentary to article 48. See *Yearbook of the International Law Commission*, 1969, vol. II, p. 221, document A/7620/Rev.1.

<sup>184</sup> Commentary to article 115. See *Yearbook of the International Law Commission*, 1970, vol. II, p. 299, document A/8010/Rev.1.

<sup>185</sup> See p. 1 above.

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

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

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

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

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

#### *Article 77.<sup>188</sup> Facilities for departure*

The host State shall, if requested, grant facilities to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave its territory.

##### *Commentary*

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

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

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

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

#### *Article 78.<sup>189</sup> Transit through the territory of a third State*

1. If a head of mission or a member of the diplomatic staff of the mission, a head of delegation, other delegate or member of the diplomatic staff of the delegation passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to resume his functions, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return.

2. The provisions of paragraph 1 shall also apply in the case of:

(a) members of the family of the head of mission or of a member of the diplomatic staff of the mission forming part of his household and enjoying privileges and immunities, whether travelling with him or travelling separately to join him or to return to their country;

(b) members of the family of the head of delegation, of any other delegate or member of the diplomatic staff of the delegation who are accompanying him and enjoy privileges and immunities, whether travelling with him or travelling separately to join him or to return to their country.

3. In circumstances similar to those specified in paragraphs 1 and 2, third States shall not hinder the passage of members of the administrative and technical or service staff, and of members of their families, through their territories.

4. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as the host State is bound to accord under the present articles. They shall accord to the couriers of the mission or of the delegation, who have been granted a passport visa if such visa was necessary, and to the bags of the mission or of the delegation in transit the same inviolability and protection as the host State is bound to accord under the present articles.

5. The obligations of third States under paragraphs 1, 2, 3 and 4 shall also apply to the persons mentioned respectively in those paragraphs, and to the official communications and bags of the mission or of the delegation when they are present in the territory of the third State owing to *force majeure*.

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

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

### Commentary

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

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

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

While there is little practice, the Secretariat takes the position that such States are obliged to grant access and transit to the representatives of Member States for the purpose in question.<sup>190</sup>

(4) During the discussion in the Commission it was noted that when the Commission had drafted the corresponding articles of the draft on diplomatic intercourse and immunities and of the draft on special missions, it had not intended to lay down an obligation for third States to grant transit, but merely wished to regulate the status of diplomatic agents in transit.<sup>191</sup> Doubts were expressed as to whether such an obligation would be a positive rule at present and as to whether States would be prepared to accept it as *lex ferenda*. Reference was made to the difficulties which the obligation of granting transit would give rise to and in particular to the difficulties that would be encountered in the case in which the request for transit was made on behalf of a person who might be objectionable to the third State. Particular attention was given to the situation when a member of a mission or a delegation, being a national of a land-locked State, finds himself obliged to pass through the territory of the third State. In such an exceptional situation there is perhaps a case for asserting the existence of an obligation on the part of the third State, at least when it is a member of the organization concerned, by virtue of Articles 104 and 105 of the United Nations Charter and similar provisions in the constitutions of specialized agencies and regional organizations.

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

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

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

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

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

### Article 79.<sup>192</sup> *Non-recognition of States or governments or absence of diplomatic or consular relations*

1. The rights and obligations of the host State and of the sending State under the present articles shall be affected neither by the non-recognition by one of those States of the other State or of its governments nor by the non-existence or the severance of diplomatic or consular relations between them.

2. The establishment or maintenance of a mission, the sending or attendance of a delegation or any act in application of the present articles shall not by itself imply recognition by the sending State of the host State or its government or by the host State of the sending State or its government.

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

<sup>191</sup> Paragraph 2 of the commentary to article 39 of the draft articles on diplomatic intercourse and immunities [see *Yearbook of the International Law Commission*, 1958, vol. II, p. 103, document A/3859, para. 53] and paragraph 2 of the commentary to article 43 of the draft articles on special missions [*ibid.*, 1967, vol. II, p. 365, document A/6709/Rev. 1, chap. II, D].

<sup>192</sup> New article.

### Commentary

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

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

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

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

and article 7 of the Convention on Special Missions that The existence of diplomatic or consular relations is not necessary for the sending or reception of a special mission.

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

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

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

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

any problems that may arise in the sphere of treaties from the absence of recognition of a Government do not appear to be such as should be covered in a statement of the general law of treaties.<sup>199</sup>

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

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

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

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

<sup>194</sup> *Yearbook of the International Law Commission*, 1969, vol. II, p. 206, document A/7610/Rev.1, para. 18.

<sup>195</sup> *Ibid.*, 1970, vol. II, p. 276, document A/8010/Rev.1, para. 22.

<sup>196</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 b, document A/7746, para. 22.

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

<sup>198</sup> *Yearbook of the International Law Commission*, 1967, vol. II, p. 350, document A/6709/Rev.1, chap. II, D.

<sup>199</sup> *Ibid.*, 1966, vol. II, p. 260, document A/6309/Rev.1, part II, chap. II.

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

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

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

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

#### *Commentary*

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

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

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

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

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

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

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

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

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

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

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

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

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

**Article 81.<sup>203</sup> Consultations between the sending State, the host State and the Organization**

If any dispute between one or more sending States and the host State arises out of the application or interpretation of the present articles, consultations between (a) the host State, (b) the sending State or States concerned, and (c) the Organization or, as the case may be, the Organization and the conference, shall be held upon the request of any such State or of the Organization itself with a view to disposing of the dispute.

**Article 82.<sup>204</sup> Conciliation**

1. If the dispute is not disposed of as a result of the consultations referred to in article 81 within three months from the date of their inception, it may be submitted by any State party to the dispute to such procedure applicable to the settlement of the dispute as may be established in the Organization. In the absence of any such procedure, any State party to the dispute may bring it before a conciliation commission to be constituted in accordance with the provisions of this article by giving written notice to the Organization and to the other States participating in the consultations.

2. A conciliation commission will be composed of three members, of whom one shall be appointed by the host State, and one by the sending State. Two or more sending States may agree to act together, in which case they shall jointly appoint the member of the conciliation commission. These two appointments shall be made within two months of the written notice referred to in paragraph 1. The third member, the chairman, shall be chosen by the other two members.

3. If either side has failed to appoint its member within the time limit referred to in paragraph 2, the chief administrative officer of the Organization shall appoint such member within a further period of one month. If no agreement is reached on the choice of the chairman within four months of the written notice referred to in paragraph 1, either side may request the chief administrative officer of the Organization to appoint the chairman. The appointment shall be made within a period of one month. The chief administrative officer of the Organization shall appoint as the chairman a qualified jurist who is neither an official of the Organization nor a national of any State party to the dispute.

4. Any vacancy shall be filled in the same manner as the original appointment was made.

5. The Commission shall establish its own rules of procedure and shall reach its decisions and recommendations by a majority vote. If so authorized in accordance with the Charter of the United Nations the Commission may request an advisory opinion from the International Court of Justice regarding the interpretation or application of these articles.

6. If the Commission is unable to obtain an agreement among the parties on a settlement of the dispute within six months of its initial meeting, it shall prepare as soon as possible a report of its proceedings and transmit it to the parties and to the Organization. The report shall include the Commission's conclusions upon the facts and questions of law and the recommendations it has submitted to the parties in order to facilitate a settlement of the dispute. The six months time limit may be extended by decision of the Commission.

7. Nothing in the preceding paragraphs shall preclude the establishment of another appropriate procedure for the settlement of disputes arising in connexion with the conference.

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

*Commentary*

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

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

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

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

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

<sup>204</sup> New article.

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



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

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

(7) Paragraph 1 of article 82 provides that if the dispute is not disposed of as a result of the consultations referred to in article 81 within three months from the date of their inception, it may be submitted by any State party to the dispute to such procedure applicable to the settlement of the dispute as may have been established in the organization. The Commission considers that the logical steps following the consultations in case they prove unsatisfactory should be the utilization of any settlement procedure which may be available in the organization. The Commission presumes that the adoption of these articles may encourage the development of such process. If an international organization has not provided for a dispute settlement procedure to deal with problems of this character, then any State party to such a dispute having participated in the consultations may have recourse to the conciliation procedure provided in article 82.

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

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

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

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

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

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

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

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

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

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

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

## ANNEX

### OBSERVER DELEGATIONS TO ORGANS AND TO CONFERENCES

#### General comments

(1) At the twenty-second session of the Commission, the Special Rapporteur submitted a working paper on temporary observer delegations and conferences not convened by international organizations<sup>209</sup> but the Commission did not consider that it should take up the matter at that time.<sup>210</sup> In the course of the consideration of the Commission's report by the Sixth Committee at the twenty-fifth session of the General Assembly, some delegations expressed themselves in favour of supplementing the draft articles with provisions regulating the status of observer delegations to organs and conferences. The matter was also raised by a number of Governments in their written comments. At its present session the Commission examined this question and instructed the Special Rapporteur to prepare for its consideration a set of draft articles. Accordingly, the Special Rapporteur submitted a working paper (A/CN.4/L.173).<sup>211</sup>

(2) The Study of the Secretariat does not include detailed information on temporary observers. According to the information provided to the Special Rapporteur by the Legal Advisers of some specialized agencies, the practice relating to the privileges and immunities of temporary observers is fragmentary and varied.

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

Under the rules of procedure of the Assembly of WHO,<sup>212</sup> when a State applies for admission to membership of the Organization,

under article 6 of the Constitution of WHO,<sup>213</sup> it may, in accordance with rule 46 of the rules of procedure of the World Health Assembly, appoint an observer, who may attend any open meeting of the World Health Assembly or of its main committees and who may, upon the invitation of the President and with the consent of the Assembly or committee, make a statement on the subject under discussion. As a matter of practice, these observers have been treated in the same manner as other representatives.

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

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

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

" . . . " <sup>214</sup>

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

<sup>213</sup> *Ibid.*, p. 1.

<sup>214</sup> See FAO, *Report of the Ninth Session of the Conference (2-23 November 1957)*, Rome, 1958, pp. 221-222.

<sup>209</sup> A/CN.4/L.151.

<sup>210</sup> *Yearbook of the International Law Commission, 1970*, vol. II, p. 274, document A/8010/Rev.1, para. 14.

<sup>211</sup> To be printed in *Yearbook of the International Law Commission, 1971*, vol. II, part II.

<sup>212</sup> See WHO, *Basic Documents*, 22nd ed. (Geneva, April 1971), p. 97.

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

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

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

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

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

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

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

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

## Draft articles

### Article A. Use of terms

[For the purposes of the present articles:]

- (a) "observer delegation to an organ" means the delegation sent by a State to observe on its behalf the proceedings of the organ;
- (b) "observer delegation to a conference" means the delegation sent by a State to observe on its behalf the proceedings of the conference;
- (c) "observer delegation" means, as the case may be, the observer delegation to an organ or the observer delegation to a conference;
- (d) "sending State" means the State which sends:
  - ...
  - (iii) an observer delegation to an organ or an observer delegation to a conference;
- (e) "observer delegate" means any person designated by a State to attend as an observer the proceedings of an organ or of a conference;
- (f) "members of the observer delegation" means the observer delegates and the members of the administrative and technical staff of the observer delegation;
- (g) "members of the administrative and technical staff" means the persons employed in the administrative and technical service of the observer delegation.

### Article B. Sending of observer delegations

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

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

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

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

The letter of appointment of the observer delegate shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or, if the rules of the Organization or the rules of procedure of the conference so admit, by another competent authority of the sending State. It shall be transmitted, as the case may be, to the Organization or to the conference.

### Article E. Composition of the observer delegation

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

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

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

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

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

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

#### *Article F. Notifications*

1. The sending State shall notify the Organization or, as the case may be, the conference of:

(a) the composition of the observer delegation and any subsequent changes therein;

(b) the arrival and final departure of members of the observer delegation and the termination of their functions with the observer delegation;

(c) the arrival and final departure of any person accompanying a member of the observer delegation;

(d) the beginning and the termination of the employment of persons resident in the host State as members of the administrative and technical staff of the observer delegation;

(e) the location of the accommodation enjoying inviolability under article N as well as any other information that may be necessary to identify such accommodation.

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

3. The Organization or, as the case may be, the conference, shall transmit to the host State the notifications referred to in paragraphs 1 and 2.

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

#### *Article G. Precedence*

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

#### *Article H. General facilities*

The host State shall accord to the observer delegation the facilities required for the performance of its task. The Organization or, as the case may be, the conference shall assist the observer delegation in obtaining those facilities and shall accord to the observer delegation such facilities as lie within their own competence.

#### *Article I. Assistance in respect of privileges and immunities*

The Organization or, as the case may be, the Organization and the conference shall, where necessary, assist the sending State, its observer delegation and the members of the observer delegation in securing the enjoyment of the privileges and immunities provided for in the present articles.

#### *Article J. Inviolability of archives and documents*

The archives and documents of the observer delegation shall be inviolable at any time and wherever they may be.

#### *Article K. Freedom of movement*

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure to all members of the observer delegation such freedom of movement and travel as is necessary for the performance of the task of the observer delegation.

#### *Article L. Freedom of communication*

1. The host State shall permit and protect free communication on the part of the observer delegation for all official purposes. In communicating with the Government of the sending State, its permanent diplomatic missions, permanent missions and permanent observer

missions wherever situated, the observer delegation may employ all appropriate means, including couriers and messages in code or cipher.

2. The official correspondence of the observer delegation shall be inviolable. Official correspondence means all correspondence relating to the observer delegation and its tasks.

3. Where practicable, the observer delegation shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission, of the permanent mission or of the permanent observer mission of the sending State.

4. The bag of the observer delegation shall not be opened or detained.

5. The packages constituting the bag of the observer delegation must bear visible external marks of their character and may contain only documents or articles intended for the official use of the observer delegation.

6. The courier of the observer delegation, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

#### *Article M. Personal inviolability*

The person of the observer delegate shall be inviolable. He shall not be liable to any form of arrest or detention. The host State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

#### *Article N. Inviolability of accommodation and property*

1. The accommodation of an observer delegate shall be inviolable. The agents of the host State may not enter it except with the consent of the observer delegate. Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the observer delegate.

2. The host State is under a special duty to take all appropriate steps to protect the accommodation of the observer delegate against any intrusion or damage.

3. The accommodation of the observer delegate, its furnishings and other property thereon and the means of transport of the observer delegate shall be immune from search, requisition, attachment or execution.

4. The papers, correspondence and, except as provided in paragraph 3 of article O, the property of the observer delegate shall likewise enjoy inviolability.

#### *Article O. Immunity from jurisdiction*

1. The observer delegate shall enjoy immunity from the criminal jurisdiction of the host State.

2. The observer delegate shall enjoy immunity from the civil and administrative jurisdiction of the host State in respect of all acts performed in the exercise of his official functions.

3. No measures of execution may be taken in respect of the observer delegate except in cases which do not fall under paragraph 2 and provided that the measures concerned can be taken without infringing the inviolability of his person or accommodation.

4. The observer delegate is not obliged to give evidence as a witness.

5. The immunity from jurisdiction of the observer delegate does not exempt him from the jurisdiction of the sending State.

#### *Article P. Waiver of immunity*

1. The immunity from jurisdiction of the observer delegate and of persons enjoying immunity under article U may be waived by the sending State.

2. Waiver must always be express.
3. The initiation of proceedings by any of the persons referred to in paragraph 1 shall preclude them from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.
4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.
5. If the sending State does not waive the immunity of any of the persons referred to in paragraph 1 in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

*Article Q. Exemption from social security legislation*

1. The observer delegate shall, with respect to services rendered for the sending State, be exempt from social security provisions which may be in force in the host State.
2. The provisions of this article shall not affect bilateral or multi-lateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

*Article R. Exemption from dues and taxes*

The observer delegate shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

- (a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
- (d) dues and taxes on private immovable property situated in the territory of the host State, unless he holds it on behalf of the sending State for the purpose of the observer delegation;
- (c) estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article W;
- (d) dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State;
- (e) charges levied for specific services rendered;
- (f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property.

*Article S. Exemption from personal services*

The host State shall exempt the observer delegate from all personal services, from all public service of any kind whatsoever and from military obligations such as those connected with requisitioning, military contributions and billeting.

*Article T. Exemption from customs duties and inspection*

1. The host State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:
  - (a) articles for the official use of the observer delegation;
  - (b) articles for the personal use of the observer delegate.
2. The personal baggage of the observer delegate shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemption mentioned in paragraph 1, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. In such cases, inspection shall be conducted only in the presence of the observer delegate or of his authorized representative.

*Article U. Privileges and immunities of other persons*

1. Members of the family of an observer delegate shall, if they accompany him, enjoy the privileges and immunities specified in articles M, N, O, Q, R, S and T provided that they are not nationals of or permanently resident in the host State.
2. Members of the administrative and technical staff of the observer delegation, together with members of their families who accompany them and who are not nationals of or permanently resident in the host State, shall enjoy the privileges specified in articles M, N, O, Q and S. They shall also enjoy the privileges specified in paragraph 1 b of article T in respect of articles imported at the time of their first entry into the territory of the host State for the purpose of attending the meeting of the organ or conference and exemption from dues and taxes on the emoluments they receive by reason of their employment.

*Article V. Nationals of the host State and persons permanently resident in the host State*

1. Except in so far as additional privileges and immunities may be granted by the host State, an observer delegate who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of his functions.
2. Members of the administrative and technical staff of the observer delegation who are nationals of or permanently resident in the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those members in such a manner as not to interfere unduly with the performance of the task of the observer delegation.

*Article W. Duration of privileges and immunities*

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State for the purpose of attending the meeting of an organ or conference or, if already in its territory, from the moment when his appointment is notified to the host State by the Organization, by the conference or by the sending State.
2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the observer delegation, immunity shall continue to subsist.
3. In case of the death of a member of the observer delegation, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.
4. In the event of the death of a member of the observer delegation not a national of or permanently resident in the host State or of a member of his family accompanying him the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property which is in the host State solely because of the presence there of the deceased as a member of the observer delegation or of the family of a member of the observer delegation.

*Article X. End of the functions of the observer delegate*

The functions of the observer delegate shall come to an end, *inter alia*:

- (a) on notification of their termination by the sending State to the Organization or the conference;
- (b) upon the conclusion of the meeting of the organ or the conference.

### Chapter III

#### PROGRESS OF WORK ON TOPICS CURRENTLY UNDER DISCUSSION

61. As indicated in paragraph 8 above, the Commission, owing to the lack of time, did not consider agenda items 2 (Succession of States: (a) succession in respect of treaties, and (b) succession in respect of matters other than treaties), 3 (State responsibility) and 4 (Most-favoured-nation clause). It decided however to include in the present chapter an account of the progress of work on the above-mentioned topics. This chapter therefore consists of four sections dealing respectively with succession in respect of treaties, succession in respect of matters other than treaties, State responsibility and most-favoured-nation clause; each section has been prepared by the Special Rapporteur for the topic.

##### A. Succession of States: succession in respect of treaties

62. Sir Humphrey Waldock, the Special Rapporteur, has submitted four reports on this topic. The first report,<sup>219</sup> submitted in 1968, was considered by the Commission at its twentieth session. At its twenty-second session, the Commission considered together, in a preliminary manner, certain draft articles contained in the second<sup>220</sup> and third<sup>221</sup> reports, submitted in 1969 and 1970.

63. At the present session the Special Rapporteur submitted a fourth report (A/CN.4/249)<sup>222</sup> dealing with the general rule regarding succession in respect of bilateral treaties. In preparing this report he made use, *inter alia*, of a series of Secretariat studies entitled "Succession of States in respect of bilateral treaties" and covering respectively (I) "Extradition treaties",<sup>223</sup> (II) "Air transport agreements" (A/CN.4/243),<sup>224</sup> and (III) "Trade agreements" (A/CN.4/243/Add.1). The first of these studies was circulated to the Commission at its twenty-second session and the other two have been added at the present session.

64. The Special Rapporteur's first report was of a preliminary character. However, the second, third and fourth reports contain, in all, seventeen articles on succession in respect of treaties together with introductions and commentaries. These articles deal with: (a) the use of certain

terms in the draft (article 1); (b) the area of territory passing from one State to another, that is the so-called principle of "moving treaty-frontiers" (article 2); (c) devolution agreements and unilateral declarations by successor States (articles 3 and 4); (d) treaties providing for the participation of "new States" (article 5); (e) the general rules governing the position of "new States" in regard to multilateral treaties (articles 6-12); and (f) the general rules governing the position of "new States" in regard to bilateral treaties (articles 13-17).

65. In presenting his fourth report the Special Rapporteur explained that he had also prepared a very substantial commentary on the subject of so-called "dispositive", "localized" or "territorial" treaties. He recognized the importance attached to this subject by many members of the Commission and by representatives in the Sixth Committee, and that his proposals concerning the position of new States in regard to multilateral and bilateral treaties could not be fully appreciated until his draft concerning this category of treaties had been completed. Since, however, he had found the subject extremely complex as well as controversial and the Commission was finding it impossible to take up the topic of succession of States at the present session, he had decided to give the subject further study and to defer his proposals regarding this category of treaties until his fifth report.

66. The Special Rapporteur recalled the meaning attributed in his third report to the expression "new State" found in articles 5-17 and the explanations given in that report of his use of that expression as a term of art for the purposes of the draft.<sup>225</sup> The term was used in the draft as meaning a succession where a territory which previously formed part of an existing State has itself become an independent State. It was designed to cover succession in its simplest and purest form of the separation of part of the metropolitan territory of an existing State or of the emergence of an associated territory to independence but to exclude other cases such as unions of States, federations, or the emergence of protected States, mandates and trusteeships to independence. Both for purposes of study and drafting he thought it convenient, and indeed essential, first to identify the basic principles applicable to "new States" in their purest form before considering the possible effect of special factors in particular cases of succession. It followed that articles 5-17 as drafted related only to "new States" as defined in the way he had mentioned. The same would be true of any provisions he might propose in his fifth

<sup>219</sup> *Yearbook of the International Law Commission*, 1968, vol. II, p. 87, document A/CN.4/202.

<sup>220</sup> *Ibid.*, 1969, vol. II, p. 45, document A/CN.4/214 and Add.1 and 2.

<sup>221</sup> *Ibid.*, 1970, vol. II, p. 25, document A/CN.4/224 and Add.1.

<sup>222</sup> See p. 143 above.

<sup>223</sup> *Yearbook of the International Law Commission*, 1970, vol. II, document A/CN.4/229.

<sup>224</sup> Documents A/CN.4/243 and Add. 1 are to be printed in *ibid.*, 1971, vol. II, part II.

<sup>225</sup> *Ibid.*, 1970, vol. II, pp. 27-28, document A/CN.4/224 and Add. 1, para. 9 (cf. *ibid.*, article 1 (additional provisions), para. 1 (e) and the commentary to that article).

report in regard to so-called "dispositive", "localized" or "territorial" treaties, which would also form part of the series of articles dealing with the position of "new States" as so defined.

67. The Special Rapporteur further explained that his fifth report would contain an examination of the various special categories of succession and include such further articles concerning these special categories as that examination might show to be required. It seemed clear that, at the very least, some special provisions would be needed for the cases of unions of States and federations and of the dissolution of unions and federations; and certain other cases required careful consideration. At the same time, it was conceivable that the outcome of the examination of some of the special categories of succession might be to render some adjustment of the definition of "new State" or even of the provisions of articles 5-17 themselves desirable.

68. The Special Rapporteur drew attention to the opinion expressed by him in previous reports concerning the need, in the interests of uniformity, to co-ordinate the scope, the language and the provisions of the present draft with those of the Vienna Convention on the Law of Treaties, adopted in 1969.<sup>226</sup> In his first preliminary report he had made concrete proposals to this end by suggesting certain general provisions regarding the use of terms, the scope of the draft and the application of relevant rules of international organizations (articles 1 (1), 2 and 3). He said that in due course he would have to revert to these proposals. On the last mentioned point, a representative of the ILO had in fact intimated to him during the present session its anxiety lest an established practice of the organisation regarding succession to treaties adopted within it might be prejudiced by the rule proposed in article 6 (no general obligation on a new State to consider itself bound by its predecessor's treaties). The point was clearly a valid one and the practice in question had been expressly mentioned in the Special Rapporteur's first report as an illustration of the need to include such a safeguarding provision in the present draft. He thought there would also be some other general provisions to be inserted in the introductory part of the draft articles such as the one referred to in the Commission's report on the work of its twenty-second session.<sup>227</sup> This would be a provision, modelled on article 43 of the Vienna Convention on the Law of Treaties, which would underline that the cessation of the application of a treaty under article 6 of the present draft would not release any State from its duty "to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty".

69. As to his fourth report submitted at the present session, the Special Rapporteur explained that further study of the position of new States in regard to bilateral

treaties had confirmed the provisional view which he had expressed at the twenty-second session.<sup>228</sup> In contrast with multilateral treaties, a new State did not appear to have an actual right to the continuance in force of a bilateral treaty applicable in respect of its territory at the date of the succession. The legal nexus arising from the treaty having been in force in respect of the new State's territory prior to the succession seemed rather to sanction a legally recognized process for bringing about the entry into force of the treaty between the successor State and the other State party by novation. It created a faculty to renew the treaty in respect of the territory by mutual consent but no more. That consent might on one side or the other be tacit and merely inferred from conduct. But the continuance in force of the treaty still depended on the consent of both the new State and the other State party. This was the general rule proposed in article 13 of the draft; but it was, of course, without prejudice to any particular rules for so-called "dispositive", "localized" or "territorial" treaties that might be proposed in the Special Rapporteur's fifth report. Further articles contained in the fourth report dealt with the duration of a bilateral treaty that is considered as continuing in force after the succession (article 14); the non-application of the treaty as between the predecessor and successor State (article 15); cases of the bilateral application of a multilateral treaty between a successor State and a party to the treaty (article 16), and the effect of the termination or amendment of the original treaty on the treaty-relation between the successor State and the other State party (article 17).

70. The Special Rapporteur also referred to the valuable discussion of his second and third reports which had taken place at the Commission's twenty-second session and to the extensive summary of it contained in its report for that session.<sup>229</sup> The comments of members of the Commission in that debate, and subsequently of representatives in the Sixth Committee, would be of considerable assistance to him in completing the draft articles in his fifth report. The intention of the Commission, as he understood it, was to carry out its first reading of the whole of the topic of state succession in respect of treaties at its twenty-fourth session; and it would therefore be essential for the Commission then to have a comprehensive draft covering all the main elements of the topic. Although he had been obliged for various reasons to present his draft articles in sections in successive reports, he recognized that for ease of work it might be desirable for the Commission to have at its twenty-fourth session a consolidated text at least of the articles as a whole.

#### **B. Succession of States: succession in respect of matters other than treaties**

71. Mr. Mohammed Bedjaoui, the Special Rapporteur, has prepared four reports on this topic. The first two

<sup>226</sup> *Official Records of the United Nations Conference on the Law of Treaties. Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 289.

<sup>227</sup> *Yearbook of the International Law Commission, 1970*, vol. II, p. 304, document A/8010/Rev.1, para. 58.

<sup>228</sup> *Ibid.*, p. 303, para. 47.

<sup>229</sup> *Ibid.*, pp. 303 *et seq.*, paras. 49-63.



reports<sup>230</sup> were examined by the Commission at its twentieth<sup>231</sup> and twenty-first<sup>232</sup> sessions. The third report<sup>233</sup> and fourth report (A/CN.4/247 and Add.1)<sup>234</sup> submitted at the twenty-second and twenty-third sessions respectively, have not yet been examined by the Commission. Their subject was succession to public property.

72. In taking up the topic of succession to public property the Special Rapporteur did not base his approach on theory, but simply tried to state some pragmatic rules drawn from the practice of States. He therefore deliberately refrained from going into the preliminary question whether the transfer of public property was in fact part of the international law of State succession. It might well be argued that, since the effect of State succession was to replace one sovereignty over a territory by another, this meant that the previous sovereignty automatically lost its material support, and that the right of the predecessor State to public property therefore passed *ipso jure* to the successor State. The right to public property would thus be seen as an effect of the coming into existence, or of the existence, of a subject of international law in the territory concerned, and not as a consequence of State succession *per se*.

73. The Special Rapporteur observed that, viewed in this light, the theory of State succession would not apply to the rights and obligations of the State in relation to public property. Once international law recognized the validity of the new juridical order, this entailed for the successor State a right to all State-owned public property. More precisely, international law would simply recognize the validity of the new juridical order of the State expressed by and through the municipal legislation under which the automatic transfer of the right to public property took place.

74. This approach reduced sovereignty to something that would be inconceivable without a set of operational and material attributes such as, for example, the public property which the State used to meet certain essential requirements of the inhabitants of its territory. However, this approach was open to one rather serious objection. If the successor State automatically acquired public property by the mere fact of its own sovereignty and its own power, how did it come about that property situated outside the territory affected by the change—i.e. outside the successor State's sphere of territorial jurisdiction—might fall within its patrimony?

75. The Special Rapporteur accordingly abstained from any purely theoretical study of this problem and of other

problems which may arise from State succession to public property, and confined himself to preparing draft articles in terms as specific as possible. Throughout his work he tried to keep in mind a concern which may be expressed in the form of three questions:

(a) What is *public property*? (problems of defining and determining such property);

(b) What is *transmissible* public property? (Is it all public property, or property of public authorities, or State property alone? Is it all State property or only the property appertaining to sovereignty?);

(c) Is the ownership of the property transmitted (this is a question of succession to property *stricto sensu*) or is the property merely placed under the control of the new juridical order (this brings in succession to legislation as well)?

76. With these questions in mind, the Special Rapporteur began in his third report and continued in his fourth report a study, presented in the form of draft articles, on State succession to public property.

#### 1. The third report by the Special Rapporteur<sup>235</sup>

77. The third report by the Special Rapporteur contained four draft articles with commentaries. Article 1 gave a *definition*, and also suggested methods for the *determination*, of public property. Such property was said to be "public" in character by virtue of its *belonging* to the State, to a territorial authority thereof or to a public body. The Special Rapporteur's commentaries stressed three points:

(a) That a purely internationalist approach to the notion of public property was impracticable, since there was in international law no independent criterion for determining what constituted public property;

(b) That determination of public property by treaty or by the decisions of international tribunals had its limitations and did not solve all problems; and

(c) That whatever the circumstances, recourse to municipal law for such determination seemed inevitable, the essential question being which legislation—that of the predecessor State, that of the successor State or that of the territory affected by the change of sovereignty—should be applied for that purpose.

78. The Special Rapporteur, finding practice and judicial decisions somewhat contradictory, proposed in article 1 that the determination of what constituted public property should be made by reference to the municipal law which governed the territory concerned, "save in the event of serious conflict with the public policy of the successor State". He explained his reasons for this in paragraphs 9 to 13 of the commentaries on article 1. In his view however, it stood to reason that, as soon as the municipal law of the predecessor State or of the territory affected by the change of sovereignty had performed its function of determining what constituted public property, it gave way to the juridical order of the successor State. Once the property had been classified for purposes of

<sup>230</sup> *Ibid.*, 1968, vol. II, p. 94, document A/CN.4/204, and *ibid.*, 1969, vol. II, p. 69, document A/CN.4/216/Rev.1.

<sup>231</sup> *Ibid.*, 1968, vol. II, p. 216, document A/7209/Rev.1, paras. 45–79.

<sup>232</sup> *Ibid.*, 1969, vol. II, p. 225, document A/7610/Rev.1, paras. 35–63.

<sup>233</sup> *Ibid.*, 1970, vol. II, p. 131, document A/CN.4/226.

<sup>234</sup> See p. 157 above.

<sup>235</sup> *Yearbook of the International Law Commission*, 1970, vol. II, document A/CN.4/226.

devolution, the successor State resumed its sovereign power to change the legal status of the property transmitted to it, if it so desired. In the drafting of article 1, however, the Special Rapporteur had left the problem open to discussion by proposing provisionally a solution which made it possible to waive the application of the law of the predecessor State in favour of the legislation of the successor State if there would otherwise be a risk of serious conflict with public policy.

79. Be that as it may, the Special Rapporteur's only ambition in the draft definition was to define "public property", whether it belonged to the State, to a territorial authority or to a public body. A further problem was whether all this public property was *transmissible* to the successor State. This, indeed, was the whole problem to be settled by the succeeding draft articles. Thus the definition and determination of public property were to open the way to the distinction between the actual transmittal of State property and the mere placing of public property under the control of the juridical order of the successor State (A/CN.4/247 and Add.1,<sup>236</sup> paras. 2-5 of the commentary to article 5).

80. Bearing in mind that neither the writers nor judicial decisions had exhausted discussion on the question whether property in the *private domain* of the State is transmissible *ipso jure* on the same grounds as property in its *public domain*, the Special Rapporteur sought to avoid this distinction—which, indeed, was unknown to some national systems of law—and proposed for discussion by the Commission, in his third report, an article 2 under which the general principle of immediate transmittal without compensation can apply only to "property appertaining to sovereignty". By that expression, the Special Rapporteur meant property which, in accordance with the legislation of the predecessor State, helps to serve the general interest and through which the State expresses its sovereignty over the territory. The composition of such property varied from State to State and from one political system to another. That was inevitable. All property which closely followed the legal destiny of the territory and which was necessary to *public* activity or to the expression of the State's sovereignty was transmissible. It was, as Bluntschli puts it, "an inseparable attribute of sovereignty, which moves with it, no special stipulation being required in order to transfer the attendant benefit and responsibility".

81. In article 2 the Special Rapporteur brought out the difference between State property appertaining to sovereignty, which is transmissible, and property of the territory ceded, which remains in that territory's patrimony. While it seemed evident that this property should not devolve to the successor State and that it remained the territory's property (except where the predecessor State was absorbed in its entirety—in other words, when there was, *ex hypothesi*, no property of the territory itself distinct from the property of the State which had ceased to exist, the ceded territory being co-extensive with the former territory) it was no less evident that this did not amount to maintenance of the *status quo ante*. The Special Rapporteur explained that public property owned by the ceded territory continued to belong to it, but must

of course follow the legal and political destiny of the territory which passed under another sovereignty. It was therefore governed henceforth by the legislation of the successor State. In brief, it was not affected by the change of sovereignty so far as ownership was concerned, but passed within the juridical order of the successor State.

82. Another article (article 7) dealt with the fate of *public archives*, works of art, museums and public libraries. The Special Rapporteur noted that this matter had been regulated by treaty—at any rate in cases of what may be called traditional succession—in quite considerable detail. In his opinion, the principle of the transmittal of archives to the successor State seemed to be accepted, irrespective of the nature of the items concerned. The link between archives and territory had not been overlooked, since the proposed text stated the principle that the handing over applies to archives "relating directly or belonging to the territory". The Special Rapporteur held that practice authorized the transmittal to the successor State of archives situated outside the territory because they had been either removed thither or established there. However, this did not occur without a *quid pro quo* and the imposition of responsibilities on the successor State: in particular, the obligation to supply the predecessor State and any third State concerned with copies of these items, save where they affected the security or sovereignty of their new owner.

83. The distribution of public documents among more than one successor State raised more complex but, in view of the advances made in methods of reproduction, by no means insoluble problems. In so far as the archives were divisible, each of the successor State received such part of the archives as was situated in the territory over which it was henceforth exercising its sovereignty. If the central archives were indivisible they were placed in the charge of the State which they concerned most directly, and that State was then responsible for making copies of them for the other States. The Special Rapporteur had also described the practice followed with regard to the transmittal of archives and libraries free of cost and with regard to time-limits for handing over the archives.

84. A fourth article (article 8) dealt with the fate of *public property of the ceded territory which is situated outside it*. Subject to the application of the rules relating to recognition, such public property passed not into the patrimony, but within the juridical order, of the successor State. The actual ownership of this property devolved to the successor State only in cases of total absorption or of decolonization: i.e. where the territory affected by the change of sovereignty no longer possessed a separate personality or legal status (absorption) or had acquired a new one (decolonization). The Special Rapporteur considered separately the case of property of a ceded territory situated in a predecessor State which had not ceased to exist, and the case of property situated in a third State.

## 2. The fourth report by the Special Rapporteur

85. In his fourth report (A/CN.4/247 and Add.1),<sup>237</sup> submitted at the Commission's twenty-third session, the Special Rapporteur supplemented the four articles which

<sup>236</sup> See p. 157 above.

<sup>237</sup> *Idem*.

he had prepared for the twenty-second session with further provisions, beginning with the articles listed in his previous report for formulation later. These related to:

(a) *Intangible property and rights* (currency and the privilege of issue, Treasury and public funds, public debt-claims and rights in respect of the authority to grant concessions);

(b) *Property of the State in public enterprises or public corporations* (public enterprises, establishments and corporations; provincial and municipal property); and

(c) *Treatment of foundations.*

86. Article 7 dealt with currency and the privilege of issue. The complex technical problem of currency concerned both *succession to public property* and *succession to public debts*. In theory, paper money constituted a debt owed by the institution of issue to the bearer of the fiduciary currency. As to the privilege of issue, the predecessor State lost this privilege in the territory transmitted, and its place was taken by the privilege of issue which the successor State exercised in its own right. The proposed article specified that this privilege "shall belong" to the new sovereign, signifying that it was not inherited (see A/CN.4/247 and Add.1, para. 4 of the commentary to article 7). All monetary tokens proper to the territory transmitted (where there had previously been monetary autonomy, as in the case of former colonies) passed into the control of the successor State. Cases of dismemberment and cases where there was more than one successor State were also contemplated, in paragraph 3 of article 7. At that stage of his study of the question, however, the Special Rapporteur did not consider it possible to propose a general rule for the apportionment of currency that would take into account all the quantitative factors involved (the numerical size of the various populations, the level of wealth of the territory, its past contribution to the formation of central monetary reserves, the proportion of paper money in circulation in the territory, and so on).

87. Article 8 dealt with the problems of the *Treasury and public funds*. Where public funds were the property of the territory transmitted (*ibid.*, para. 1 of the commentary to article 8), they passed under the control of the new juridical order. So far as the remainder—i.e. the State Treasury—was concerned, the successor State, upon closure of the public accounts, received the assets and assumed responsibility for costs relating thereto and for budgetary and Treasury deficits. It also assumed the liabilities, on such terms and in accordance with such rules as applied to succession to the public debt, which would be examined at a later stage. The Special Rapporteur pointed out in his fourth report that the proposed article did not contain a specific provision for cases where more than one successor State was involved (*ibid.*, para. 3). Practice showed that, in such cases, the public funds were divided "equitably"; but a careful scrutiny of such practice revealed the extreme technical complexity and variety of the arrangements that had been adopted. This made it impossible, at that stage, to go any further towards laying down a comprehensive and detailed rule.

88. The question of *public debt-claims*, with which the Special Rapporteur dealt in article 9, was presented first of all in terms of a distinction between *State debt-claims*

and *territorial debt-claims*. The Special Rapporteur drew attention to the difficulty of formulating a uniform general rule on the subject of public debt-claims which would apply to all types of succession. Leaving aside the eminently clear case of total absorption, in which the predecessor State ceases to exist and its successor may properly take over all its debt-claims as well as all its rights, the Special Rapporteur felt able to affirm that claims properly belonging to the territory transmitted, in respect of which the debtor, title or pledge (if any) might be situated either within or outside the territory, remained in the patrimony of that territory irrespective of the type of succession and were not affected by the change of sovereignty. If there was any change in the beneficiary or in the status of the claims, it occurred not as a result of State succession but by the will of the new State, acting not as successor, but as the new sovereign in the territory. Where State debt-claims, irrespective of their motive, were *receivable* by the predecessor State by virtue of its activity or its sovereignty in the territory transmitted, the successor State became the beneficiary. The Special Rapporteur stressed in his commentary the magnitude and variety of such claims, which included tax debt-claims (*ibid.*, paras. 8–23 of the commentary to article 9). Cases where there was more than one successor State were always complex and were usually resolved by specific agreements dealing in detail, mainly through expert commissions, with the technical and financial problems involved.

89. In article 10 the Special Rapporteur dealt with *rights in respect of the authority to grant concessions*. The successor State was subrogated to the property rights which belonged to the predecessor State in its capacity as the conceding authority in respect of natural resources in the territory transmitted, and generally in respect of all public property covered by concessions. This provision expressed the concern, approved by the United Nations, to secure recognition for the right of nations to their natural resources. It implied the extinction, as soon as the transmittal of territory had taken place, of the competence and prerogatives of the former conceding authority and their replacement by the prerogatives of the new conceding authority, henceforth embodied in the successor State. Article 10 did not approach the problem from the standpoint of *mineral rights* held by private individuals or companies, but was concerned rather with the rights exercised by the conceding authority.

90. The purpose of the four paragraphs of article 11 was to determine the treatment of State property in *public enterprises, establishments and corporations*. Here again a distinction had been drawn between the property of the predecessor State (in its enterprises, establishments and so forth) and property which belonged to the territory transmitted. The former passed to the successor State, which was subrogated to the rights, and also to the costs and obligations, pertaining thereto; the latter was not affected by the fact of the change of sovereignty. Where the property of enterprises or establishments belonging to the territory or to the State was situated in parts of the territory falling within the jurisdiction of different sovereigns, the Special Rapporteur proposed that it should be apportioned equitably between the said parts, due regard being had to the viability of the parts and to the geogra-

phical location and origin of the property, and subject, where necessary, to equalization payments and offset.

91. *Provincial and municipal property* formed the subject of article 12, which consisted of the following four proposals:

(a) The change of sovereignty should, as a rule, leave intact the patrimonial property, rights and interests of the provinces and municipalities transmitted. Strictly speaking, this was not a question of State succession, but it became one by virtue of the fact that the property, rights and interests in question were henceforth to be governed by the juridical order of the successor State in the same way as the communities which owned them;

(b) Where the change of sovereignty had the effect of dividing a province or a municipality by attaching its several parts to two or more successor States, the property, rights and interests of the former territorial authority were to be apportioned equitably between the new territorial authorities according to criteria of viability, with due regard to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset;

(c) The successor State was subrogated to the rights and obligations of its predecessor in respect of the latter's share in the property, rights and interests of provinces and municipalities;

(d) Where there were two or more successor States, the aforementioned share of the predecessor State was to be apportioned equitably between them in accordance with criteria of equity, viability, etc.

92. Article 13 dealt with the treatment of religious, charitable or cultural foundations, whose legal status was not affected by the territorial change unless it seriously conflicted with public policy in the successor State.

93. After completing the first draft of these articles, the Special Rapporteur deemed it useful to precede them by various *preliminary provisions* which appear in his fourth report. He drew up four such provisions: i.e., articles 1-4.

94. Article 1 raised the preliminary problem of the treatment of property in the event of *irregular acquisition of territory*. In article 2 the Special Rapporteur had attempted to state a rule on the *transfer of territory and of public property as they exist*, firstly by placing the successor State under a duty to assume the responsibilities and obligations corresponding to its rights of succession to public property and secondly by placing on the predecessor State the obligation to maintain the public property in good faith until the date of actual transmittal, the whole being determined in accordance with the municipal law applied in the transmitted territory hitherto. Article 3 was concerned with the *date of transfer* of the property, which in practice was not always the same as the date of transmittal of the territory itself. Article 4 dealt with the *limitations by treaty* on the general principle of the transmittal of State-owned public property.

95. These draft rules presented as *preliminary provisions* were not, of course, concerned solely with the succession of States in respect of matters other than treaties or, *a fortiori*, solely with succession to public property. The Special Rapporteur had made a point of emphasizing this

in his fourth report (A/CN.4/247 and Add.2), in particular in paragraph 3 and in the commentary to article 2 (para. 2) and to article 3 (para. 1). He had accordingly submitted the draft rules with that reservation, since they were provisions common to several aspects of State succession, some of which fell within the competence of other Special Rapporteurs. It was for the Commission to decide whether, in the last analysis, it seemed wiser to plan to examine these and perhaps other articles at a later stage of its work, when sufficient progress had been made in exploring the various aspects of State succession.

96. The same observations could be made with regard, in particular, to the preliminary provision on the problem of irregular acquisition of territory, with the difference that while deferred examination would be appropriate from the methodological standpoint, logically this provision nevertheless represented a problem preliminary to all or any succession. It was true that, in the study of State succession as in any other study, it was necessary to take a number of rules for granted, and to assume that certain conditions in other sectors of general international law were satisfied, from the outset. The Special Rapporteur nevertheless thought it appropriate that a provision in the form of an "exception of non-succession" in case of irregular transfer of territory should be included in that preliminary setting even if the consideration of that provision had to be postponed or the drafting modified to take account of subsequent work.

97. A similar problem arose, for example, in connexion with the law of treaties when the Special Rapporteur on that subject, wishing to study the effect of the law of war on the law of treaties, thought of devoting a provision to the effect of hostilities on a treaty. It was to be noted however that he had had to abandon that idea.

98. In view of the present state of progress in the Special Rapporteur's work, there were probably two more operations to be carried out in the immediate future:

- (i) *To complete the draft articles on succession to public property*, in particular by considering, in the next phase, how far the articles already proposed, which constituted common provisions, could be supplemented by more specific articles relating to the various types of succession (merger, division, decolonization, partial transmittal of territory, restoration of States). The Special Rapporteur could not, at that stage, say how much work this would entail. However, in the light of that work once it was done, it might prove necessary to reorganize the draft somewhat so as to begin exclusively with general rules common to all types of succession and continue with as many special chapters as there were specific types of State succession;
- (ii) *To begin the study of succession to public debts* and to submit a first set of draft articles on that subject.

### C. State responsibility

99. In 1969, Mr. Roberto Ago, the Special Rapporteur, submitted his first report on the responsibility of States.<sup>238</sup>

<sup>238</sup> *Ibid.*, 1969, vol. II, p. 125, document A/CN.4/217 and Add.1. This report has been supplemented by document A/CN.4/217/Add.2, reproduced above, p. 193.

This report contained a review of previous work on the codification of the topic and reproduced, as annexes, the most important texts prepared in the course of the earlier codification work. At the conclusion of its examination of that report, the Commission established criteria as a guide for its future work.<sup>239</sup> These criteria were on the whole favourably received by the Sixth Committee of the General Assembly which also expressed its approval of the plan adopted for the study, in successive stages, of the exceedingly complex topic of international responsibility.<sup>240</sup>

100. In 1970, the Special Rapporteur submitted a second report entitled "The origin of international responsibility",<sup>241</sup> comprising an introduction and a first chapter devoted to the general fundamental rules governing the topic as a whole. Owing to lack of time, the Commission was unable to do more than discuss the report generally. The conclusions reached at that discussion, both on questions of method and on points of substance and problems of terminology, were of particular importance for the continuation of the work on responsibility and were accordingly summarized in the Commission's report on its twenty-second session.<sup>242</sup> At the close of the discussion on his report, the Commission invited the Special Rapporteur to continue his study of the topic and the preparation of the draft articles. It was agreed that the Special Rapporteur should include in a third and more extensive report the part which had been examined at the twenty-second session, revised in the light of the discussion. The Commission hoped to be able to embark on a detailed examination of that report at its twenty-third session.<sup>243</sup>

101. At the present session, the Special Rapporteur submitted his third report entitled "The internationally wrongful act of the State, source of international responsibility" (A/CN.4/246 and Add.1-3).<sup>244</sup> This report began with an introduction describing the progress achieved in the work on State responsibility and setting out in detail the various conclusions reached by the Commission following its examination of the second report; these were to serve as a guide for the preparation of the draft as a whole. It was followed by a first chapter ("General principles"), divided into four sections, each ending with a draft article (articles 1-4). In this the Special Rapporteur reproduced the material included in chapter I of his second report, revised and supplemented in the light of the discussion in the Commission of its twenty-second session. Thus the first section of chapter I of his third

report dealt with the definition of the principle attaching responsibility to any internationally wrongful act of the State; the second was devoted to the determination of the conditions for the existence of a wrongful act under international law; and the third established the principle that any State is capable at the international level of being considered as the author of a wrongful act, a source of international responsibility. To these three sections, which appeared in a different form in the previous report, the Special Rapporteur added a fourth section dealing with the principle that the municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law.

102. The basic general principles having thus been identified and defined, the Special Rapporteur's third report also presented six sections of chapter II of his draft ("The 'act of the State' according to international law"). These examined successively and in detail the conditions in which the actual conduct of a specific individual or group of individuals should be considered as an "act of the State" from the point of view of international law. The first section contained preliminary considerations designed to clear away certain difficulties, caused basically by false premises, and to assert the autonomy of international law in the matter. The rest of the chapter was devoted first to establishing the individuals or groups of individuals whose conduct may be considered to constitute conduct attributable to the State at the international level. The Special Rapporteur indicated that the next step would be to determine which of the various types of conduct engaged in by those individuals or groups should be specifically attributed to the State. The analysis would then conclude a negative approach, showing the categories of individuals or groups whose conduct cannot be regarded as conduct of the State, and at the same time considering the possible international situation of the State in relation to such conduct.

103. In the context of the first group of questions, chapter II, section 2, defined the rule which represented the starting-point in this field, namely, that an act or omission may be taken into consideration for attribution to the State as an internationally wrongful act if it was committed by an individual or group of individuals recognized as an organ of the State under the legal system of the State concerned which acted in that capacity in the case in point (acts of organs of the State). The third section posed the question whether, in the light of the rule thus defined, a distinction should be drawn according to whether the organ in question belonged to one of the main branches of the State machinery or whether its functions related to international relations or were concerned solely with domestic matters, or whether its functions fell into a higher or lower category. The fourth section was devoted to an examination of the question whether these should be taken into account, for the purpose of attributing to the State as a subject of international law, acts or omissions by individuals or groups who, under the internal legal system of the State, were not regarded properly speaking as organs of the State but as organs of separate public institutions such as autonomous national public institutions or local public collectivities (States members of a federal State, cantons, regions, departments, municipali-

<sup>239</sup> See *Yearbook of the International Law Commission*, 1969, vol. II, p. 233, document A/7610/Rev.1, paras. 79-84.

<sup>240</sup> See *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 87.

<sup>241</sup> *Yearbook of the International Law Commission*, 1970, vol. II, p. 177, document A/CN.4/233.

<sup>242</sup> *Ibid.*, pp. 307 *et seq.*, document A/8010/Rev.1, paras. 70-82.

<sup>243</sup> *Ibid.*, para. 83.

<sup>244</sup> See p. 199 above.

ties, autonomous administrations of territories or dependent territories, and so on). The fifth section dealt with the possibility of considering as imputable to the State—again for the purpose of establishing the international responsibility of the State—the conduct of individuals or groups which although not formally possessing the capacity of organs had in fact acted in that capacity (*de facto* organs, government auxiliaries, individuals occasionally performing public functions, and so on). Lastly, a sixth section discussed the specific question of the possibility of attributing to a State an act or omission by an organ placed at the disposal of that State by another State or by an international organization. Except for the first section, which was introductory in character, all the sections of chapter II presented in the third report concluded with a draft article (articles 5 to 9).

104. As has already been mentioned, the Special Rapporteur indicated that chapter II would be completed later by new sections dealing with the other two groups of questions arising in connexion with the determination of what is an “act of State” in international law. He expressed the intention of examining these other groups of questions in his fourth report. First he proposed to examine in a seventh section the controversial question whether the conduct of an organ which has exceeded its competence or disregarded its instructions can be imputed to the State, and the possible limitations of such imputation. An effort would also be made to clarify the situation which may arise when an individual has continued to act as an organ despite having lost that capacity, in fact if not in form. The third group of questions would be dealt with in the eighth and ninth sections of chapter II. The first of these would be devoted to an examination of the reasons for excluding in principle the possibility of imputing to the State, at the international level, the acts of individuals who have acted as such. It would then examine the circumstances in which the existence of an internationally wrongful act of State could legitimately be envisaged in connexion with the conduct of individuals. The next section would deal with the exclusion, in principle, of the possibility of imputing to the State acts or omissions by individuals acting as organs of insurrectional movements against that State and the limitations on such exclusion. The possibility of linking the conduct of such individuals to the insurrectional movement itself, as a separate subject of international law, would also be examined. Three further draft articles would thus complete the series proposed in chapter II.

105. At that point, the examination of the conditions in which specific conduct may be regarded as an “act of the State” could be considered as having been completed. The next step would be to deal, in another chapter devoted to “the violation” in international law (chapter III), with an examination of the various aspects of what has been called the objective element of the internationally wrongful act: the failure to fulfil an international obligation. First, it would be made clear that the source of the international legal obligation which had been violated (customary, treaty or other) did not affect in any way the determination as to whether the violation was an internationally wrongful act. The Special Rapporteur would then

endeavour to define the aspects of the violation of an obligation regarding conduct and the distinction to be drawn between cases where the specific purpose of the obligation was to ensure some particular conduct as such, and cases where the obligee was only required to ensure that a certain event did not occur. He would next deal with the characteristics of the violation when the obligation violated was one of those which required, in a general way, an assurance of the occurrence of a certain result, without specifying the means by which the result was to be obtained. In that connexion he would also examine the force of the condition of the exhaustion of local remedies before the violation of an obligation regarding the treatment of individuals could be established. Finally, he would examine the problem of determining the *tempus commissi delicti* in cases where failure to fulfil an international obligation lead to an apparently permanent situation or was the result of separate and successive types of conduct. Once all these points had been settled, a number of special problems would still remain to be considered, such as the possibility of simultaneous imputation of an internationally wrongful act to more than one State in connexion with a single specific situation, and the possibility of making a State responsible, in certain circumstances, for an act committed by another State. After that, detailed consideration of the various circumstances excluding wrongful action would complete the first part of the Special Rapporteur’s study of State responsibility for internationally wrongful acts.

#### D. The most-favoured-nation clause

106. At its nineteenth session, in 1967, the Commission decided to place on its programme the topic of most-favoured-nation clauses in the law of treaties and appointed Mr. Endre Ustor as Special Rapporteur thereon.<sup>245</sup>

107. At the Commission’s twentieth session the Special Rapporteur submitted a working paper<sup>246</sup> giving an account of the preparatory work undertaken by him on the topic and outlining the possible contents of a report to be presented at a later stage. The Special Rapporteur also submitted a questionnaire listing points on which he specifically asked the members of the Commission to express their opinion. The Commission, while recognizing fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, instructed the Special Rapporteur not to confine his studies to that area but to explore the major fields of application of the clause. The Commission considered that it should focus on the legal character of the clause and the legal conditions governing its application and that it should clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application. It wished to base its studies on the broadest possible foundations without, however, entering

<sup>245</sup> *Yearbook of the International Law Commission*, 1967, vol. II, p. 369, document A/6709/Rev.1, para. 48.

<sup>246</sup> *Ibid.*, 1968, vol. II, p. 165, document A/CN.4/L.127.

into fields outside its functions. In the light of these considerations, the Commission instructed the Special Rapporteur to consult, through the Secretariat, all organizations and interested agencies which might have particular experience in the application of the most-favoured-nation clause.<sup>247</sup>

108. By resolution 2400 (XXIII) of 11 December 1968, the General Assembly recommended that the Commission, *inter alia*, continue its study of the most-favoured-nation clause.

109. At the twenty-first session of the Commission in 1969, the Special Rapporteur submitted his first report,<sup>248</sup> containing a history of the most-favoured-nation clause up to the time of the Second World War, with particular emphasis on the work on the clause undertaken in the League of Nations or under its aegis. The Commission considered the report at its 1036th meeting and, accepting the suggestion of the Special Rapporteur, instructed him to prepare next a study based mainly on the replies from organizations and interested agencies consulted by the Secretary-General and having regard also to three cases dealt with by the International Court of Justice relevant to the clause.<sup>249</sup>

110. Following the instructions of the Commission, the Special Rapporteur submitted his second report<sup>250</sup> at the twenty-second session of the Commission in 1970. Part I of this report attempted to present an analytical survey of the views held by the parties and the judges on the nature and function of the clause in the three cases dealt with by the International Court of Justice pertaining to the clause: the *Anglo-Iranian Oil Company Case (Jurisdic-*

*tion)* [1952],<sup>251</sup> the *Case concerning the Rights of Nationals of the United States of America in Morocco (Judgment)* [1952]<sup>252</sup> and the *Ambatielos Case (Merits: obligation to arbitrate)* [1953].<sup>253</sup> The Award handed down on 6 March 1956 by the Commission of Arbitration established by the Agreement of 24 February 1955 between the Governments of Greece and the United Kingdom for the arbitration of the Ambatielos claim was also dealt with in the first part of the report.<sup>254</sup>

111. Part II of the second report was intended to present in a systematic manner the replies of international organizations and interested agencies to the circular letter of the Secretary-General dated 23 January 1969. In this letter the organizations concerned were requested to submit for transmittal to the Special Rapporteur, all the information derived from the experience of the organization concerned which might assist him and the Commission in the work of codification and progressive development of the rules of international law concerning the most-favoured-nation clause. They were particularly requested to draw attention to any relevant bilateral or multilateral treaty, statement, practice or fact and to give their views as to the existing rules which could be discerned in respect of the clause. A number of international organizations gave a detailed answer to the circular letter and those answers served as a basis for the part II of the report.

112. Although the General Assembly by its resolution 2501 (XXIV) of 12 November 1969 and 2634 (XXV) of 12 November 1970 recommended that the Commission continue its study of the most-favoured-nation clause, the Commission found itself obliged to postpone the consideration of the topic owing to the lack of time.

113. At the present session, however, on the suggestion of the Special Rapporteur, the Commission requested the Secretariat to prepare on the basis of the collections of law reports available to it and of the information to be requested from governments a "Digest of decisions of national courts relating to most-favoured-nation clauses".

<sup>247</sup> *Ibid.*, p. 223, document A/7209/Rev.1, paras. 92-94.

<sup>248</sup> *Ibid.*, 1969, vol. II, p. 157, document A/CN.4/213.

<sup>249</sup> *Ibid.*, p. 234, document A/7610/Rev.1, para. 89.

<sup>250</sup> *Ibid.*, 1970, vol. II, p. 199, document A/CN.4/228 and Add.1.

<sup>251</sup> *I.C.J. Reports 1952*, p. 93.

<sup>252</sup> *Ibid.*, p. 176.

<sup>253</sup> *I.C.J. Reports 1953*, p. 10.

<sup>254</sup> United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No.: 63.V.3), p. 91.

## Chapter IV

### THE QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

114. At its twenty-second session, the Commission, following the recommendation contained in General Assembly resolution 2501 (XXIV) of 12 November 1969, decided to include in its general programme of work the question of treaties concluded between States and international organizations or between two or more international

organizations. It set up a Sub-Committee composed of the following thirteen members: Mr. Reuter (Chairman), Mr. Alcívar, Mr. Castrén, Mr. El-Erian, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Sette Câmara, M. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ustor and Sir Humphrey Waldoock and entrusted it with



the task of considering preliminary problems involved in the study of this new topic.<sup>255</sup> The Sub-Committee submitted to the Commission a report which contained various proposals and was adopted by the Commission.<sup>256</sup> In accordance with those proposals, the Secretary-General was requested to prepare a number of documents for the use of members of the Commission; in addition, the Chairman of the Sub-Committee was asked to submit to members of the Sub-Committee a questionnaire regarding the method of treating the topic and its scope and the members were requested to send their replies to this questionnaire, together with any other comments they might wish to make.

115. At the twenty-third session, in accordance with the proposals of the Sub-Committee as adopted by the Commission, the Secretary-General submitted to the Commission a working paper containing a short bibliography, a historical survey of the question and a preliminary list of the relevant treaties published in the United Nations *Treaty Series* (A/CN.4/L.161 and Add.1 and 2).

116. During the twenty-third session, the Sub-Committee held two meetings and submitted to the Commission a report (A/CN.4/250) which is reproduced in annex to this chapter. That report contained a summary of the views expressed by members of the Sub-Committee in reply to

<sup>255</sup> *Yearbook of the International Law Commission, 1970*, vol. I, 1069th meeting, paras. 82-85.

<sup>256</sup> *Ibid.*, vol. II, p. 310, document A/8010/Rev.1, para. 89.

the questionnaire prepared by its Chairman; the questionnaire and the full text of the replies received from members appeared in annex I and II, respectively, to that report.<sup>257</sup>

117. The Commission considered the report of the Sub-Committee at its 1129th meeting on 5 July 1971 and adopted it without change.

118. On the basis of the recommendations contained in paragraph 15 of the report, the Commission took the following decisions:

(a) It unanimously appointed Mr. Paul Reuter Special Rapporteur for the question of treaties concluded between States and international organizations or between two or more international organizations;

(b) It confirmed the request it had addressed to the Secretary-General at its twenty-second session concerning the preparation of documentation for the use of members of the Commission, it being understood that the Secretary-General will, in consultation with the Special Rapporteur, phase and select the studies required for the preparation of that documentation which will include, in addition to as full a bibliography as possible, an account of the relevant practice of the United Nations and the principal international organizations;

(c) It decided that the historical survey contained in document A/CN.4/L.161 and Add.1 and 2, for which it expressed its appreciation to the Secretariat, should be included in the relevant Yearbook of the International Law Commission.

<sup>257</sup> The annexes to the report will be printed in *Yearbook of the International Law Commission*, vol. II, part II.

## ANNEX

### REPORT OF THE SUB-COMMITTEE ON TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS <sup>258</sup>

#### I. INTRODUCTION

1. The Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations was set up by the International Law Commission at its 1069th meeting on 12 June 1970. Its members are: Mr. Reuter (Chairman), Mr. Alcivar, Mr. Castrén, Mr. El-Erian, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ustor and Sir Humphrey Waldock.

2. The Sub-Committee's task is to consider preliminary problems involved in the study of the question of treaties concluded between States and international organizations or between two or more international organizations, a question included by the Commission in its general programme of work.

3. During the Commission's twenty-third session, the Sub-Committee held two meetings, on 16 June and 1 July 1971.

4. In accordance with the decisions taken by the Commission at its twenty-second session on the recommendation of the Sub-Committee,<sup>259</sup> the Sub-Committee had before it the following documents:

(a) A working paper by the Secretariat containing a short bibliography, a historical survey of the question and a preliminary list of the relevant treaties published in the United Nations *Treaty Series* (A/CN.4/L.161 and Add.1 and 2);

(b) A questionnaire prepared by the Chairman of the Sub-Committee regarding the method of treating the topic and its scope (A/CN.4/250, annex I), a working paper containing the replies of members to this questionnaire (A/CN.4/250, annex II), and an introduction prepared by the Chairman of the Sub-Committee.

<sup>258</sup> Document A/CN.4/250.

<sup>259</sup> See foot-note 256 above.

## II. SUMMARY OF THE VIEWS EXPRESSED ON THE BASIS OF THE QUESTIONNAIRE PREPARED BY THE CHAIRMAN OF THE SUB-COMMITTEE

5. The questionnaire sent to the members of the Sub-Committee and their replies were, in the nature of things, of an exploratory character. Even so, consideration of those documents showed that there were a number of important points on which the Sub-Committee is in agreement.

6. In the first place, the subject certainly requires very extensive study; not only is the practice less well known than in the case of treaties between States and the information difficult to obtain, but the full range of specific problems raised by these treaties is only now beginning to emerge. The historical survey contained in the working paper prepared by the Secretariat (A/CN.4/L.161 and Add.1), which gives an objective account of the Commission's work on the subject, clearly shows that the Commission, and its special rapporteurs, following a distinct pattern, on several occasions decided to include in the study of international treaties those concluded by international organizations only to defer consideration of the latter treaties until a later occasion. Apart from the drafting problems which the Commission has been anxious to avoid, the Commission's decisions to defer consideration of the topic seem to have been due also to doubts as to the extent of the problem to be solved. The same hesitations manifested themselves at the Vienna Conference on the Law of Treaties.

7. As to the scope of the research to be undertaken, there was also broad agreement in the Sub-Committee that the study should be confined to treaties in written form. Although unwritten agreements have their importance, it seems wiser to confine the work to written agreements for the same reasons as led the Commission and the Vienna Conference to do so in regard to treaties between States. This would not of course exclude appropriate treatment of the element of tacit consent as part of the general law of treaties.

8. On the question to what international organizations the Commission's proposals will apply, there was agreement in the Sub-Committee that it is highly desirable that the rules proposed by the Commission should in principle be applicable to all international organizations. In the particular cases in which the 1969 Vienna Convention on the Law of Treaties<sup>260</sup> deals with matters relating to intergovernmental international organizations, it refers to all such organizations without exception, and it would not be very satisfactory if the topic as a whole were governed by multiple sets of different rules over and above that Convention, when the subject itself is naturally homogeneous. Against this, it is to be noted that the Commission's proposals on the status of representatives of States to international organizations are confined to international organizations of universal character.<sup>261</sup> The future special rapporteur for the present topic will have to take into account the availability of information in regard to the practice of international organizations. In the light of that information, he should be requested to make appropriate recommendations to the Commission as to the scope of the draft to be prepared.

9. The Sub-Committee also dealt with questions of method. While thinking it necessary to leave the future special rapporteur the

widest discretion, there was general agreement in the Sub-Committee on certain fundamental points.

10. In the first place, the articles of the Vienna Convention on the Law of Treaties provide a firm basis for research. Not only must nothing be done which could directly or indirectly weaken their effect in their own field of application, a point which is self-evident; but these articles show the broad outline of a very detailed picture of what may be called treaty problems, and this will greatly facilitate the research to be done on the treaties of international organizations.

11. The replies of the members of the Sub-Committee, either by taking examples or by examining the articles of the Vienna Convention as a whole, have shown how much can be gained from recourse to the provisions of the Vienna Convention. In general, for example, they have taken the view that questions which the Vienna Convention had left aside in regard to treaties between States should also remain in abeyance in regard to treaties concluded by international organizations. Since the Vienna Convention had avoided a comprehensive classification of treaties concluded by States, the members of the Sub-Committee felt that it would be desirable that the rules now to be prepared should be drafted also without preparing a comprehensive classification of treaties concluded by international organizations.

12. It was at the same time pointed out that this does not mean that the Commission's task is limited to adapting the articles of the Vienna Convention to the particular case of international organizations. The special rapporteur will have to look for the relevant broad questions of principle governing the particular subject which the Vienna Convention did not have to take into account.

13. Lastly, the Sub-Committee agreed that consultation with the organizations concerned can only be arranged at a later stage, after the special rapporteur has himself made specific proposals to the Commission.

14. In general, the Sub-Committee felt that the Commission should include this topic in the list of items under active consideration. The Vienna Conference on the Law of Treaties showed that there is a genuine and profound need to clarify a number of questions which are still pending. In its current work, the Commission has frequently found it necessary to refer to problems arising out of the treaties concluded by international organizations, and other United Nations organs are in the same position.

## III. RECOMMENDATIONS TO THE COMMISSION

15. The Sub-Committee therefore recommends that the Commission should decide:

(a) To appoint a special rapporteur for this topic;

(b) To confirm the request addressed to the Secretary-General concerning the preparation of documents for the use of members of the Commission, on the understanding that if the Commission appoints a special rapporteur in accordance with the recommendation addressed to it, the Secretary-General would, in consultation with him, phase and select the studies within the general framework laid down for him by the Commission in 1970;

(c) To request that the historical survey prepared by the Secretariat on the question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/L.161 and Add.1), for which the Commission will doubtless wish to express its appreciation to the Secretariat, should be included among the publications of the Commission.

<sup>260</sup> For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 289.

<sup>261</sup> Article 1, paragraph 1 (2) and article 2 of the draft articles on the representation of States in their relations with international organizations, reproduced in chapter II, section D above.

## Chapter V

### OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

#### A. Progressive development and codification of the rules of international law relating to international watercourses

119. By paragraph 1 of resolution 2669 (XXV) of 8 December 1970, the General Assembly recommended

that the International Law Commission should, as a first step, take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification and, in the light of its scheduled programme of work, should consider the practicability of taking the necessary action as soon as the Commission deems it appropriate.

120. In the light of the General Assembly's recommendation quoted above, the Commission, at its 1128th meeting, decided to include a question entitled "Non-navigational uses of international watercourses" in its general programme of work without prejudging the priority to be given in the future to its study. It would be for the Commission in its new composition to decide what priority the topic should be given and what other concrete actions should be taken, bearing in mind the current programme of work of the Commission as well as its revised long-term programme.

121. The Commission agreed that for undertaking the substantive study of the rules of international law relating to non-navigational uses of international water courses with a view to its progressive development and codification on a world-wide basis, all relevant materials on States' practice should be appropriately analyzed and compiled. The Commission noted that a considerable amount of such substantive materials had already been published in the Secretary-General's report on "Legal problems relating to the utilization and use of international rivers"<sup>262</sup> prepared pursuant to General Assembly resolution 1401 (XIV) of 21 November 1959, as well as in the United Nations Legislative Series.<sup>263</sup> On the other hand, paragraph 2 of General Assembly resolution 2669 (XXV) requested the Secretary-General to continue the study initiated in accordance with General Assembly resolution 1401 (XIV) in order to prepare a "supplementary report" on the legal problems relating to the question, taking into account the recent application in State practice and international adjudication of the law of international watercourses

and also intergovernmental and non-governmental studies of this matter.

It is the understanding of the Commission that in preparing that supplementary report, the Secretary-General will certainly invite Governments of Member States to provide him with additional materials regarding legislative texts and treaty provisions, as well as any other relevant information which may be useful as evidence of their practice.

122. Finally, the Commission decided to print, as appropriate, in its *Yearbook* the Secretary-General's report (A/5409) prepared in accordance with General Assembly resolution 1401 (XIV). This report has never been printed before and it is, at present, out of stock. The Commission considered it necessary to print that report in its *Yearbook* because the new report requested by General Assembly resolution 2669 (XXV) will be of a supplementary nature and, therefore, intended to be used together with the former one.

#### B. Review of the Commission's long-term programme of work

123. Confirming its intention of bringing up to date its long-term programme of work, taking into account recommendations of the General Assembly and the international community's current needs, and discarding those topics on the 1949 list<sup>264</sup> which were no longer suitable for treatment, the Commission, at its twenty-second session, asked the Secretary-General to submit at its twenty-third session a working paper as a basis for the Commission to select a list of topics which may be included in its long-term programme of work.<sup>265</sup>

124. At the present session, the Commission had before it a working paper entitled "Survey of International Law" (A/CN.4/245),<sup>266</sup> prepared by the Secretary-General in the light of the Commission's decision mentioned

<sup>262</sup> A/5409 (mimeographed document, 15 April 1963).

<sup>263</sup> United Nations, *Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes than Navigation* (United Nations publication, Sales No.: 63.V.4).

<sup>264</sup> The 1949 list was prepared by the Commission on the basis of a Memorandum submitted by the Secretary-General entitled *Survey of International Law in Relation to the Work of Codification of the International Law Commission* (United Nations publication, Sales No.: 1948.V.1(1)).

<sup>265</sup> *Yearbook of the International Law Commission*, 1970, vol. II, p. 309, document A/8010/Rev.1, para. 87.

<sup>266</sup> To be printed in *Yearbook of the International Law Commission*, 1971, vol. II, part two.

above. At the 1141st meeting, Mr. Constantin A. Stavropoulos, Legal Counsel of the United Nations, introduced the "Survey" in the Commission on behalf of the Secretary-General. The "Survey" contains a preface, an introduction and seventeen chapters, sub-divided in some cases into sections. The chapters are entitled: I. The position of States in international law; II. The law relating to international peace and security; III. The law relating to economic development; IV. State responsibility; V. Succession of States and Governments; VI. Diplomatic and Consular Law; VII. The law of treaties; VIII. Unilateral acts; IX. The law relating to international watercourses; X. The law of the sea; XI. The law of the air; XII. The law of outer space; XIII. The law relating to the environment; XIV. The law relating to international organizations; XV. International law relating to individuals; XVI. The law relating to armed conflicts; XVII. International criminal law.

125. A preliminary discussion on the review of the Commission's long-term programme of work took place at the 1141st, 1143rd and 1144th meetings held on 21, 22 and 26 July 1971. During the discussion, several members of the Commission advanced general observations on the "Survey" as well as more detailed comments on particular points or subjects referred to therein. The Commission as a whole agreed that the "Survey" was a comprehensive and, at the same time, concise and realistic document based on a thorough analysis of the achievements, trends and needs in the field of the codification and progressive development of international law as they appeared at the present time. As such it constituted not only an excellent basis for the review by the Commission of its long-term programme of work, but also a document of high interest for Governments, the Sixth Committee of the General Assembly and other bodies engaged in the codification process as well as for professional and academic circles. The Commission, unanimously, expressed its great appreciation to the Codification Division for the outstanding work done in producing the "Survey", which was a milestone in the history of the Commission.

126. Reference was made by some members to specific subjects which they considered particularly suitable for inclusion in a revised list of topics selected for codification and to a certain number of general questions involved in any review of the Commission's long-term programme of work, such as, for instance, the criteria to be taken into consideration for the selection, the kind of topics to be selected, the relationship between the current programme of work of the Commission and the long-term programme, the number of topics which it would be advisable to select, the possible priorities among the selected topics, the need to choose the most appropriate codification method for the study of a particular topic and the period of time required for its study and codification.

127. Conscious of the need for further reflection on a question which may influence the codification and progressive development of international law in the years to come, and in view of the fact that the present members of the Commission were at the end of their term of office, the Commission concluded that the definitive task of reviewing its long-term programme of work should be

left to the Commission in its new composition. The records of the preliminary exchange of views at the present session would, it was thought, be helpful to the new membership in undertaking that task on the basis of the "Survey" prepared by the Secretary-General.

128. In the light of the foregoing, the Commission took the following decisions:

(a) To place on the provisional agenda of its twenty-fourth session an item entitled "Review of the Commission's long-term programme of work: 'Survey of International Law' prepared by the Secretary-General (A/CN.4/245)";

(b) To invite members of the Commission to submit written statements on the review of the Commission's long-term programme of work to be circulated at the beginning of the twenty-fourth session of the Commission;

(c) To request the Secretariat to give, as appropriate, to the "Survey of International Law" (A/CN.4/245) a circulation and distribution as wide as possible by issuing it as a separate publication, in addition to its printing in the Commission's *Yearbook*, 1971.

### C. Organization of future work

129. As a permanent body, and without wishing to prejudice the freedom of action of its membership in 1972, the Commission made the arrangements indicated below to ensure the continuation of the work on the topics for codification and progressive development currently under consideration.<sup>267</sup> In making these arrangements the Commission took into account recommendations of the General Assembly [resolution 2634 (XXV) of 12 November 1970], conclusions reached on the matter by the Commission at its twenty-second session and the fact that, at its present session, its draft articles on the representation of States in their relations with international organizations had been completed together with an annex on observer delegations to organs and to conferences.

130. The Commission agreed that the provisional agenda of its twenty-fourth session in 1972 should include items on succession of States in respect of treaties, succession of States in respect of matters other than treaties, State responsibility, the most-favoured-nation clause and the question of treaties concluded between States and international organizations or between two or more international organizations.

131. At its twenty-fourth session, the Commission intends to complete the first reading of the entire draft of articles on succession of States in respect of treaties. It also intends to make substantial progress in the study of State responsibility. In addition, the Commission wishes to devote some time to the consideration of succession of States in respect of matters other than treaties and the most-favoured-nation clause and, if time permits, to have a preliminary discussion on the question of treaties concluded between States and international organizations or between two or more international organizations.

<sup>267</sup> See chap. III and IV above.

132. The Commission reaffirmed its decisions recorded in its reports of 1953<sup>268</sup> and 1966<sup>269</sup> that a Special Rapporteur who is re-elected as a member should continue his work on his topic if this had not yet been finally disposed of by the Commission, unless and until the Commission as newly constituted decided otherwise. Even if the Special Rapporteur on a topic should not be re-elected, inclusion of the above mentioned items in the provisional agenda would give the newly reconstituted Commission the opportunity of reviewing with respect to each of those items the directions and guidelines previously given to the Special Rapporteurs.

#### **D. The problem of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law**

133. In connexion with the adoption of the Commission's agenda at the 1087th meeting, the suggestion was made that the Commission should consider whether it would be possible to produce draft articles regarding such crimes as the murder, kidnapping and assaults upon diplomats and other persons entitled to special protection under international law. The Commission recognized both the importance and the urgency of the matter, but deferred its decision in view of the priority that had to be given to completion of the draft articles on the representation of States in their relations with international organizations. In the course of the session it became apparent that there would not be sufficient time to deal with any additional subject.

134. In considering its programme of work for 1972, however, the Commission reached the decision that, if the General Assembly requested it to do so, it would prepare at its 1972 session a set of draft articles on this important subject with the view to submitting such articles to the twenty-seventh session of the General Assembly.

#### **E. Co-operation with other bodies**

##### **1. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE**

135. Mr. Elias submitted a report (A/CN.4/248)<sup>270</sup> on the twelfth session of the Asian-African Legal Consultative Committee held in Colombo from 18 to 28 January 1971, which he had attended as an observer for the Commission.

136. The Asian-African Legal Consultative Committee was represented in the Commission by Mr. Fernando and by its Secretary, Mr. Sen. Mr. Fernando addressed the Commission at its 1136th meeting.

<sup>268</sup> *Yearbook of the International Law Commission*, 1953, vol. II, p. 231, document A/2456, para. 172.

<sup>269</sup> *Ibid.*, 1966, vol. II, p. 277, document A/6309/Rev.1, part II, para. 73.

<sup>270</sup> To be printed in *Yearbook of the International Law Commission*, 1971, vol. II, part two.

137. He first stressed that the usefulness of the work accomplished by the Committee had been recognized by the Governments of Asia and Africa which had renewed the mandate of the Committee for successive five-year periods; a new period of five years was due to commence in November 1971. As far as membership was concerned, he indicated that many countries had been attracted to the Committee, which now had 21 members (16 from Asia and 5 from Africa) and that the number was expected to increase. After describing the measures being taken to introduce French, in addition to English, as a working language of the Committee and to increase the staff of the Committee's secretariat, he emphasized that the development of public international law was a means of fostering international co-operation and was therefore necessary for the furtherance of peace. The patient research by the International Law Commission on the subject of the law of treaties had made possible the success of the Vienna Convention on the Law of Treaties (1969). The Committee had itself devoted two of its sessions to the law of treaties, thereby greatly assisting the representatives of the Asian and African countries in shaping their own contributions to the Vienna Conference on the Law of Treaties.

138. He pointed out that international organizations were playing an increasing role in the life of the world community and the Commission's current discussions were evidence of its importance.

139. As far as the future work of the Commission was concerned, the Committee considered its role as that of taking note of the more important subjects to be codified by the Commission, undertaking research work and thereafter submitting to governments a generally agreed view.

140. He concluded by paying tribute to the objective approach displayed by the members of the Commission and to their self-restraint.

141. The Commission was informed that the thirteenth session of the Committee, to which it had a standing invitation to send an observer, would open at Lagos (Nigeria) in 1972. The Commission requested its Chairman, Mr. Senjin Tsuruoka, to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

##### **2. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION**

142. Sir Humphrey Waldock attended the fifteenth session of the European Committee on Legal Co-operation held at Strasbourg from 14 to 18 June 1971 as an observer for the Commission; he made a statement before the Committee.

143. The European Committee on Legal Co-operation was represented by Mr. H. Golsong, Director of Legal Affairs of the Council of Europe, who addressed the Commission at the 1144th meeting.

144. He began by saying that the points at which the interests of the Commission converged with those of the European Committee on Legal Co-operation as well as

other legal bodies of the Council of Europe became more numerous as their work progressed. That was clear from the Commission's documents, from the report submitted to the Committee at its fifteenth session by Sir Humphrey Waldock as observer for the International Law Commission, and from the "Survey of International Law" (A/CN.4/245)<sup>271</sup> prepared by the Secretary-General of the United Nations.

145. Mr. Golsong mentioned as being among the questions of mutual interest the European draft Convention on State Immunity, to which he had referred the previous year.<sup>272</sup> He drew particular attention to its provision on compliance with judgements and said that the draft, now in the final stages of preparation, would probably be opened for signature at the next Conference of European Ministers of Justice, to be held in May 1972.

146. With regard to the draft convention on the prevention of pollution of the major international waterways of western Europe, on which he had commented in 1970,<sup>273</sup> he said that the draft now contained a clause on inter-State responsibility, though its scope was comparatively limited. There were wide differences in the legislation and practice of the member States of the Council of Europe with regard to civil liability for acts of pollution, and Mr. Golsong said that the Committee would accordingly consider the question in 1972 on the basis of a study of comparative law.

147. He referred to the interest shown by the Consultative Assembly and the Governments of the member States of the Council of Europe in the work of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction. On the question of the protection of diplomats, he said that the European Committee on Legal Co-operation was aware that the problem was arising even in Europe. It considered that member States should first review and supplement their penal legislation as a move towards combating the new phenomenon.

148. He also commented on the problem resulting from the simultaneous existence of instruments dealing with the same subject from a different angle, such as the conventions on extradition and judicial assistance in criminal matters and the conventions providing for the recognition and enforcement of foreign criminal judgments. The Committee had, in addition, undertaken studies on assistance between States in matters of administrative law.

149. With regard to the application of international conventions, he said that a highly instructive meeting of government representatives and legal practitioners had taken place at which the subject of discussion had been the problems encountered in the application of international agreements relating to criminal law. It had been found that some difficulties could be solved by bringing into harmony the positions adopted unilaterally by each of the contracting States.

150. On the question of patents, the diplomatic conference for the preparation of a universal version of the European Convention on the International Classification of Patents for Invention had made it possible for non-member States of the Council of Europe to participate in the work of classification. Apart from having thrown light on the process involved in transforming a regional convention into a universal convention, the conference had testified to the political will of the member States of the Council of Europe to go beyond the regional framework when such a course was justified by the common interests of the members of the international community.

151. He announced that on 1 January 1972, as a contribution to the implementation of General Assembly resolution 2099 (XX), a fellowship system would be introduced to enable jurists from developing countries to familiarize themselves with the work of the European Committee on Legal Co-operation.

152. In conclusion, he said that although the Committee itself had adopted a different approach to the question, it was following with the closest attention the Commission's work on relations between States and international organizations of universal character. He hoped that the Committee, as an observer to any diplomatic conference that might be convened for the adoption of a convention on the subject, would be able to assist it in arriving at the necessary compromises.

153. The Commission was informed that the sixteenth session of the Committee, to which it had a standing invitation to send an observer, would be held at Strasbourg (France) in November 1971. The Commission requested its Chairman, Mr. Senjin Tsuruoka to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

### 3. INTER-AMERICAN JURIDICAL COMMITTEE

154. The Inter-American Juridical Committee was represented by Mr. Aja Espil and Mr. Caicedo Castilla. Mr. Aja Espil addressed the Commission at its 1124th meeting.

155. He stressed that the Committee, with its new structure as one of the main organs of OAS and its expanded membership of eleven, had held in the second half of 1970 its first extraordinary session to examine, at the express request of the OAS General Assembly, the question of the formulation of one or more draft inter-American instruments on the subject of kidnappings and other attacks against individuals, when those acts affected international relations. The Committee had taken as its starting point a resolution of the OAS General Assembly condemning all acts of terrorism, in particular kidnappings and related acts of extortion, and characterizing them as grave ordinary crimes. It had had to consider a number of preliminary questions such as whether such acts constituted crimes against municipal law and whether, in the case of the kidnapping of diplomats, the crime was primarily a matter for the international community or for the national community. In that connexion, the Committee had had to consider the problem of international wrong-

<sup>271</sup> *Idem.*

<sup>272</sup> *Yearbook of the International Law Commission, 1970, vol. I, p. 147, 1069th meeting, para. 92.*

<sup>273</sup> *Ibid.*, para. 91.

ful acts, a subject on which it had taken into account the views expressed on the subject by certain members of the Commission. The Committee had noted that the essence of the problem rested in its international aspects: in the case of the kidnapping of diplomats, for example, the offenders created an international conflict of interests by inducing the sending State to bring pressure to bear on the receiving State.

156. He commented that the Committee had taken the view that the two categories of offences dealt with in the draft convention under consideration—namely acts of terrorism and the perpetration of those offences against the representatives of foreign States—affected mainly the international community and therefore fell within the scope of international law. The Committee had therefore described them as ordinary crimes having international repercussions but had not gone so far as to regard them as international crimes proper. The central idea of the Committee's draft was the prevention and punishment of acts of terrorism in so far as those acts constituted attacks against the international community and violations of human rights.

157. He recalled in that connexion that subsequently the member States of OAS had adopted a convention on the subject, though it dealt only with attacks against the life and physical integrity of persons to whom the State had a duty to extend special protection in accordance with international law.

158. With regard to the work of the Committee in 1971, he drew attention to the problem which had arisen in connexion with the Committee's consideration of its own draft statute. Article 2 of the draft statute stated that the members of the Committee served in a personal capacity and specified that they enjoyed the privileges and immunities laid down in article 104 of the Charter of OAS. Since that article referred to the representatives of member States in the organs of OAS the view had been put forward that the members of the Committee did not enjoy those privileges and immunities. The majority however had upheld a constructive interpretation of the rule in question and had held that the members of the Committee represented the member States of OAS as a whole and should therefore enjoy such privileges and immunities.

159. He mentioned that the Committee had also dealt with the review and evaluation of the inter-American conventions on intellectual property. In view of the fact that the Latin American countries lagged behind the more industrialized countries with regard to technology and were essentially importers of products and techniques invented abroad, it was necessary to devise some system for the protection of industrial property which would prevent the creation of certain situations detrimental to the public interest, while promoting the active transfer of technology that was vital to the accelerated development of Latin America. Also, the Committee had examined the question of bills of exchange and cheques, a subject on which it was keeping in close touch with the work of UNCITRAL.

160. Lastly he mentioned that the Committee had commenced the study of the law of the sea. The first problem

it had faced was that of determining whether there existed a Latin American position on the law of the sea. A number of principles and rules had been formulated between 1950 and 1956 but the new economic and social approach to the problem in the Declarations of Montevideo (May 1970) and Lima (August 1970) made it necessary to re-examine the whole question. Work had been initiated on the formulation of a new concept of special sea areas beyond the territorial sea, areas over which jurisdiction would be exercised for certain purposes by the coastal State. The existence of such areas now constituted a reality which was accepted by international law and confirmed by the general practice of States.

161. The Commission was informed that the next session of the Committee, to which it had a standing invitation to send an observer, would open at Rio de Janeiro (Brazil) on 9 August 1971. The Commission requested its Chairman, Mr. Senjin Tsuruoka, to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

#### F. DATE AND PLACE OF THE TWENTY-FOURTH SESSION

162. The Commission decided to hold its next session at the United Nations Office at Geneva from 2 May 1972 to 7 July 1972.

#### G. REPRESENTATION AT THE TWENTY-SIXTH SESSION OF THE GENERAL ASSEMBLY

163. The Commission decided that it would be represented at the twenty-sixth session of the General Assembly by its Chairman, Mr. Senjin Tsuruoka.

#### H. GILBERTO AMADO MEMORIAL LECTURE

164. During the consideration of the Report of the Commission at the twenty-fifth session of the General Assembly it was suggested in the Sixth Committee, in connexion with the discussion on the point concerning the International Law Seminar,<sup>274</sup> that with a view to honouring the memory of Gilberto Amado, the illustrious Brazilian jurist and former member of the International Law Commission, the possibility should be considered of naming a series of sessions after him or of establishing a permanent conference in his name within the Seminar.

165. The Government of Brazil, consulted by Mr. T. O. Elias, Chairman of the twenty-second session of the Commission, through Mr. Sette Câmara, responded favourably to the idea and offered financial assistance, to begin with the sum of US \$3,000 for the next year because budgetary procedure did not allow them to make long-term commitments.

166. The question was considered at the 1146th meeting and the Commission accepted a proposal by Mr. Elias that the memorial lecture should take the form of an annual commemoration to which the members of the

<sup>274</sup> See *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 121.



Commission, the participants in the session of the International Law Seminar and about twenty-five other experts on international law, including the members of the Secretariat of the Commission, would be invited. The first lecture would be given by a past or present member of the Commission.

167. The money offered by the Brazilian Government would be held in the trust fund established for the fellowships given to the Seminar and would be used to defray the cost of the implementation of the programme including the publication in English, French and Spanish of the annual lecture. Travel expenses and a small honorarium would be paid to the lecturer.

168. An advisory committee composed of Mr. Ago, Mr. Elias, Mr. Kearney, Mr. Sette Câmara, Mr. Tabibi, Mr. Ushakov, Sir Humphrey Waldock and Mr. Yasseen was established to consider questions arising out of the organization of the annual lecture.

169. The view was also expressed that at the time of the publication of the first lecture it would be appropriate to recall the contribution of Gilberto Amado in the sphere of codification of international law, *inter alia* in United Nations organs such as the Committee on the Progressive Development of International Law and its Codification, the Sixth Committee and the International Law Commission.

#### I. SEMINAR ON INTERNATIONAL LAW

170. In pursuance of General Assembly resolution 2634 (XXV) of 12 November 1970, the United Nations Office at Geneva organized during the twenty-third session of the Commission a seventh session of the Seminar on International Law intended for advanced students of that discipline and young government officials whose functions habitually include a consideration of questions of international law.

171. Between 10 and 28 May 1971, the Seminar held twelve meetings devoted to lectures followed by discussion, the last meeting being set aside for the evaluation of the Seminar by the participants.

172. Twenty-three students from different countries participated; they also attended meetings of the Commission during that period and had access to the facilities provided by the Library in the Palais des Nations.

173. Nine members of the Commission (Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Elias,

Mr. Kearney, Mr. Reuter, Mr. Ustor and Mr. Yasseen), the Legal Adviser of the International Labour Office (Mr. Wolf) and a member of the Secretariat (Mr. Raton, Senior Officer, Office of the Director-General of the United Nations Office at Geneva) generously gave their services as lecturers. The lectures were given on various subjects connected with the past and present work of the International Law Commission, including the questions of State responsibility, special missions, the succession of States, agreements between States and international organizations, and recent legal aspects of the law of the sea. Other lectures dealt with the question of Namibia before the International Court of Justice and with the problem of revision of the Charter before the General Assembly. Lastly, international trade law formed the subject of two lectures, one on the work of UNCITRAL and the other on CMEA. The Legal Adviser of the International Labour Office spoke about the ILO and International Labour Conventions.

174. The Seminar was held without cost to the United Nations, which assumed no responsibility for the travel or living expenses of the participants. As at previous sessions, the Governments of Denmark, the Federal Republic of Germany, Finland, Israel, the Netherlands, Norway and Sweden and, for the first time, Switzerland offered scholarships for participants from developing countries. Ten candidates were chosen to be beneficiaries of the scholarships, and three students holding scholarships granted by UNITAR were also admitted to the Seminar. The grant of scholarships is making it possible to achieve a much better geographical distribution of participants and to bring deserving candidates from distant countries who would otherwise be unable to attend the session solely for pecuniary reasons. It is therefore desirable to be able to rely on the continuing generosity of the above-mentioned Governments.

175. In application of General Assembly resolution 2634 (XXV), Spanish was used as a working language during the session. In accordance with the wishes expressed during the debates of the Sixth Committee, three young diplomats who had participated in the work of the Committee were admitted to this session of the Seminar.

176. The Commission expressed appreciation, in particular to Mr. Raton, for the manner in which the Seminar was organized, the high level of discussion and the results achieved. The Commission recommended that seminars should continue to be held in conjunction with its sessions.

## ANNEXES

## ANNEX I

**Observations of Member States, Switzerland and the secretariats of the United Nations, the specialized agencies and the International Atomic Energy Agency on the draft articles on representatives of States to international organizations, adopted by the International Law Commission at its twentieth, twenty-first and twenty-second sessions \***

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## A. OBSERVATIONS OF MEMBER STATES

## Australia

OBSERVATIONS COMMUNICATED BY LETTER DATED 19 JANUARY 1971  
FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

*[Original text: English]*

1. The Australian Government expresses its appreciation of the work of the International Law Commission in drawing up the draft articles on relations between States and international organizations.<sup>1</sup>

\* The observations contained in this annex were originally distributed in documents A/CN.4/221 and Corr.1 and Add.1, A/CN.4/238 and Add.1 and 2, A/CN.4/239 and Add.1-3 and A/CN.4/240 and Add.1-7.

<sup>1</sup> The texts of the draft articles on representatives of States to international organizations, together with the commentaries, have been published as follows:

It has studied the draft articles with interest and wishes at this stage to make the following comments.

## General comments

2. The Australian Government considers that the draft is too long and in places unnecessarily repetitive: perhaps greater use could be

*Articles 1-21: Yearbook of the International Law Commission, 1968, vol. II, pp. 196 et seq., document A/7209/Rev.1.*

*Articles 22-50: Ibid., 1969, vol. II, pp. 207 et seq., document A/7610/Rev.1.*

*Articles 51-116: Ibid., 1970, vol. II, pp. 276 et seq., document A/8010/Rev.1.*

made of drafting by reference. Further study might also be given by the Commission to the definition in articles 1, 51 and 78 with the object of consolidating them where possible.

3. A considerable body of practice already exists, including a large number of international agreements, dealing with relations between States and international organizations: the two Conventions on Privileges and Immunities of the United Nations and of the Specialized Agencies<sup>2</sup> are of considerable significance as precedents in the matter because of their wide and long-standing acceptance as appropriate standards for international organizations. Due regard should be had to this body of practice. The Australian Government is pleased to note that articles 3 and 5 preserve this and acknowledge the possible need to conclude future agreements on the subject in relation to particular organizations. The varied character of international organizations had led to a diversity of rules regarding their functions and status: nevertheless these rules have been generally founded on the principle of functional necessity, a principle which is embodied in Article 105 of the Charter of the United Nations. The Australian Government has always regarded this important principle as fundamental to a consideration of the levels of privileges and immunities in the international field and emphasizes that, in its view, the present draft articles should not attempt to depart from it. If they do, the possibility of wide acceptance of the articles will be greatly prejudiced. There is already in many countries both a public and a parliamentary resistance to the proliferation of organizations and individuals who are entitled to special privileges, even on the more modest scale accepted hitherto.

4. The Australian Government notes with approval that the articles are confined to international organizations of universal character, although, as mentioned subsequently in relation to delegations of States to international organizations and conferences, even this restriction does not prevent the articles having application to a very large number of international conferences.

5. Paragraph 2 of the Commission's commentary on article 22 states that the question of international organizations becoming parties to the draft articles is a separate one to be considered at a later stage. It seems to the Australian Government that this is an important question of principle which should be decided now, since the final shape of the draft articles will be dependent to a considerable degree on whether or not international organizations are to become parties to them and whether or not they are to assume obligations under them—and indeed to obtain rights under them.

***Permanent missions to international organizations:  
Articles 6-50***

6. Bearing in mind the principle of functional necessity referred to earlier in these comments, the Australian Government considers that, in general, these articles are satisfactory. They broadly equate permanent missions to international organizations with permanent diplomatic missions: this seems a reasonable approach.

7. One important difference, however, between permanent missions to international organizations and permanent diplomatic missions is that, in the case of the former, three entities are involved (the organization, the host State and the sending State), whereas in the latter only two are involved (the receiving State and the sending State). The present draft tends to underestimate the difficult position of the host State and the Australian Government suggests that this aspect might be considered further by the Commission. An example arises in article 45. Under that article, persons enjoying privileges and immunities under the articles have a duty to respect the laws and regulations of the host State and a duty not to interfere in the

internal affairs of that State. The draft articles contain no provision for the declaration by the host State of an unwelcome representative to the international organizations as *persona non grata*. This omission is apparently intended to safeguard the independent exercise of their functions by representatives to the international organizations and to isolate them from the exercise of pressures by the host State. This, of course, must be a primary object: but the ambit of the functions of a representative to an international organization is defined to a large extent by the terms of the draft articles themselves and a question arises whether the sending State ought not be obliged to recall a representative (or whether indeed a host State, after consultation with the organization, should not have the right to expel a representative) in the case of a gross breach by the representative of the obligations imposed on him by the articles—for example, in the case of breach by a representative to an international organizational organization of his duty not to interfere in the internal affairs of the host State. The draft articles do not adopt this approach but oblige the sending State to recall a representative or otherwise deal with him only in the case of a grave and manifest violation of the criminal law of the host State. Furthermore, what is a grave violation of the criminal law may be the subject of general agreement; but whether in any particular case, a violation of that law is manifest may be the subject of real dispute. Accordingly, if this provision is to be retained, perhaps some other formula should be chosen.

8. In relation to the position of the host State, the Australian Government refers to the difficulty felt by members of the Commission in relation to accidents arising out of the use of motor cars. This difficulty appears, *inter alia*, in the Commission's commentary on article 32 where it is indicated that some members of the Commission took the view that members of the permanent mission should not enjoy immunity from the civil jurisdiction of the host State in the case of an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person in question. The advent of the motor car and the frequency of accidents caused by its use have required modifications in traditional legal notions all over the world. In some places, States have gone so far as to exclude all notions of fault in relation to the recovery of compensation for injury caused in such accidents. In other States, modification of traditional notions has not gone so far but various forms of insurance are compulsory, it being a criminal or quasi-criminal offence not to insure against liability for injury caused in such an accident. It may be that a solution to the differences of opinion within the Commission on this matter could be found by resort to provisions requiring representatives to international organizations to be insured against liability for accidents caused by vehicles used by them. If such a solution were adopted, it would of course be necessary also to make provision to ensure that insurance companies would not be free in the exercise of their rights of subrogation to rely on the diplomatic immunity of the insured.

***Permanent observer missions: Articles 51-77***

9. The comments of the Commission and of other States indicate that article 52 has already been construed as conferring on a non-member State the right to send an observer mission to an international organization. In the view of the Australian Government, international practice has established no such right: on the contrary the members of an organization maintain control over the establishment of observer missions. How this should be codified is a matter which should be given further consideration by the Commission; but it is essential that the Commission should examine from this standpoint both the efficacy of, and indeed the need for, article 52.

10. The provisions regarding permanent observer missions have evidently been based on the premise that these missions perform functions virtually identical to the functions performed by permanent missions. They have therefore been accorded similar status, privileges and immunities. The Australian Government is of the view that this premise is not valid and that the description of a

<sup>2</sup> For the Convention on the Privileges and Immunities of the United Nations, see United Nations, *Treaty Series*, vol. 1, p. 15. For the Convention on the privileges and Immunities of the Specialized Agencies, *ibid.*, vol. 33, p. 261.

permanent observer mission in *articles 51 and 53* does not accurately reflect the role of a permanent observer mission. The phrase "representative [. . .] character" in article 51 is accurate to the extent that a permanent observer mission is "representative" of the sending State, but in the Australian Government's view it is not accurate to the extent that the mission "represents" the sending State in the organization itself. The function of an observer mission is to observe and maintain liaison with the organization: it does not, in the active sense, "represent" the sending State.

11. The draft articles virtually equate permanent observer missions with permanent missions for the purposes of determining the facilities, privileges and immunities to be accorded to them. In the Australian Government's view, the Commission should review the parallel it has drawn, taking into account the functions of permanent observer missions and the fact that, since they do not belong to the organization, they are not subject to its rules. On the basis of a proper relationship between permanent missions and permanent observer missions the status, privileges and immunities of the latter would be considerably reduced from those shown in the present draft articles. They might appropriately be similar to those proposed in the following paragraphs of these comments for delegations to organs and conferences.

***Delegations of States to organs and to conferences:  
Articles 78-116***

12. The Australian Government agrees with those States which consider that the draft articles on the delegations of States to organs and conferences go well beyond the level required for effective performance of their functions. The magnitude of the problem might well be emphasized by considering also the number of conferences to which these articles are intended to apply. Although they concern only international organizations of a universal character, they apply to all meetings convened under the aegis of such organizations. Very many of these meetings are regional in their composition or are narrowly technical in their range of interests. As an example, FAO during 1970 scheduled some 120 conferences involving more than twenty host States. The calendar of conferences of other agencies is probably no less extensive or less diverse in its range of technical interest. There are therefore literally hundreds of conferences each year to which the broad range of privileges and immunities envisaged in the draft articles will apply.

13. The Australian Government finds particularly disturbing the degree to which the present articles go beyond the level of the privileges and immunities accepted in the past in relation to most international organizations. Of some thirty such organizations which the Australian Government has had reason to consider in relation to its own legislation on the matter, the highest level of privileges and immunities for a representative accredited to, or attending a conference convened by an international organization is as follows:

- (1) Immunity from personal arrest or detention;
- (2) Immunity from suit and from other legal process in respect of acts and things done in his capacity as a representative;
- (3) Inviolability of papers and documents;
- (4) The right to use codes and to send and receive correspondence and other papers and documents by couriers or in sealed bags;
- (5) Exemption (including exemption of the spouse of the representative) from the application of laws relating to immigration, the registration of aliens and the obligation to perform national service;
- (6) Exemption from currency or exchange restrictions to such an extent as is accorded to a representative of a foreign Government on a temporary mission on behalf of that Government;
- (7) The like privileges and immunities, not being privileges and immunities of a kind referred to in any of the preceding paragraphs, as are accorded to an envoy, other than exemption from:

- (a) excise duties;
- (b) sales taxes; and
- (c) duties on importation or exportation of goods not forming part of personal baggage.

The Australian Government is of the view that such a scale is adequate on the basis of functional necessity: furthermore it is consistent with that applied to other international organizations in the past.

**Austria**

**PART I AND SECTION 1 OF PART II OF THE PROVISIONAL DRAFT**

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED  
30 AUGUST 1969 FROM THE PERMANENT REPRESENTATIVE TO  
THE UNITED NATIONS

[Original text: English]

It can be said that the present twenty-one draft articles on representatives of States to international organizations achieve the aim—as expressed in paragraph 1 of the International Law Commission's commentary to article 3—of detecting the common denominator and laying down the general pattern which regulates the diplomatic law of relations between States and international organizations. Apart from that, it is to be noted favourably that the articles, especially *articles 11, 16 and 17, paragraph 3*, correspond to the interests of the host State, and it may be hoped that the Commission will continue to pay due attention to these interests when drafting the remaining articles.

With respect to *article 4* the following may be pointed out: if the status of permanent missions to an international organization is defined bilaterally by a headquarters agreement between the host State and the organization concerned, the entry into force of the envisaged convention on representatives of States to international organizations between the host State and the sending State of a permanent mission, would establish treaty relations between these two States on a subject already covered by the headquarters agreement in force between the host State and the organization. For the sake of clarity, it would seem advisable to mention that the status of the permanent missions concerned (as defined in the headquarters agreement) would in such a case not be altered by the convention.

*Article 17* requires the organization to transmit to the host State certain notifications received from the sending States. In this context, the question arises whether the possibility should not be provided, for the organizations concerned, to become parties to the convention.

Apart from that, it would seem advisable to have a somewhat more precise definition of the expression "international organization of universal character" [*article 1 (b)*].

**Belgium**

**PARTS I AND II OF THE PROVISIONAL DRAFT**

OBSERVATIONS COMMUNICATED BY LETTER DATED  
13 NOVEMBER 1970 FROM THE PERMANENT REPRESENTATIVE  
TO THE UNITED NATIONS

[Original text: French]

**General observations**

The part of the draft articles dealing with permanent missions to international organizations proceed from two somewhat debatable starting-points, in that, firstly, such missions are divorced from the at once more general and more diversified context of international organizations, and, secondly, it is assumed that because they are

accredited to international organizations, their establishment and status are not subject to the *agrément* of the host country.

In a way, this abstract approach runs counter to actual international practice with respect to the establishment of permanent missions. An international organization is a functional whole, its purpose being to institutionalize collaboration among a larger or smaller group of States in a broader or narrower field. The main instruments of this institutionalization are one or more decision-making organs, in which representatives of the States deliberate together, and an executive organ composed of international officials; in some cases there is, in addition to these basic institutions, a parliamentary-type assembly and a judicial body.

As a rule, only the corps of officials is of a permanent nature, and it is for this reason that most of the legal instruments concerning privileges and immunities of international organizations refer to representatives of States only from the standpoint of such facilities as are required to enable them and their staffs to attend sessions of deliberative bodies at the most varied levels.

There is a considerable lack of uniformity with regard to these facilities. For instance, article IV of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 and article V of the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947 grant representatives of States immunity from legal process only in respect of words spoken or written by them in their official capacity. Other instruments go further and refer to the privileges and immunities enjoyed by diplomatic envoys of comparable rank (part IV, article 9, of Supplementary Protocol No. 1 to the Convention for European Economic Co-operation of 16 April 1948);<sup>1</sup> others again simply speak of the customary privileges and immunities (cf. the Protocol on the Privileges and Immunities of the European Communities, of 8 April 1965).<sup>2</sup>

Furthermore, in the case of organizations having a particularly important role in various spheres (political, economic, technical, etc.), representatives of States may have such extensive duties to perform that travelling to attend meetings from time to time no longer suffices.

Although this does not mean that travelling delegations are eliminated, it does as a matter of practical necessity call for the establishment of a permanent unit to provide representation. However, since this situation is *sui generis* and is not covered by most statutory protocols, it is essential to make provision for it, and this is done through supplementary protocols, through headquarters agreements between the organization concerned and the host State—especially if the latter is not a member of the organization—or through the application of customary rules or even of regulations laid down unilaterally by the host State. Another factor which emerges at this stage is that a State establishing a permanent mission regards the mission as performing on a multilateral basis representational functions equivalent to those performed by a diplomatic mission on a bilateral basis. This, in fact, is reflected in the internal legislation of States relating to foreign service careers and the classification of posts. It has accordingly become common practice, by an express or tacit consensus arrived at between the host State and the member States through the organization, to accord diplomatic status to the permanent missions of States to international organizations.

Inasmuch as a permanent mission is part and parcel of the over-all functioning of an international organization, it would have been conceivable that its status and the status of its staff should be determined in accordance with objective criteria peculiar to the organization concerned. However, once it is decided to grant diplomatic status, there exists at present only one possible guide to such status,

namely, the Vienna Convention on Diplomatic Relations of 18 April 1961.<sup>3</sup>

It therefore seems inconsistent with international law to decide that the host State would have no authority with regard to *agrément*, declarations of *persona non grata* and reciprocity, as a result of which permanent missions would enjoy all the advantages of the diplomatic régime without being subject to the safeguarding measures associated therewith. This would run counter to the headquarters agreements and conventions dealing with the subject (e.g., article V of the Agreement between the United Nations and the United States of America of 26 June 1947<sup>4</sup> and article 11 of the Agreement on the status of Western European Union, National Representatives and International Staff, 11 May 1955).<sup>5</sup> In the final analysis, it is the host State that grants privileges, and ways must therefore be found to reconcile the two aspects which an objective analysis of the *sui generis* situation described above discloses, the first being the representative nature of a permanent mission to an international organization and the second the granting of diplomatic status by the host State, although, perhaps, in accordance with a multilateral decision.

It should be noted that such status is often accorded to the executive head of an international organization but that, in this case, the host State has an opportunity to express its views through institutional procedures as regards both his appointment and the waiver of his immunity.

In view of the diversity of the statutes of international organizations, the ideal course would be to try to synthesize them in a model statute which, besides dealing with questions relating to observers for the missions of third States, representatives to sessions and conferences, and so forth, would lay down procedures for the establishment of permanent missions that would preclude any automaticity.

The draft articles will be reviewed below in the light of the foregoing.

### Observations on the draft articles

#### Title and scope

"Representatives of States" is a general term—a fact which, incidentally, shows clearly that permanent missions are functionally part of a broader framework and that an approach extrinsic to their status is unjustified.

#### PART I.—General Provisions

##### Article 1

Subparagraphs (g) and (h). The use of the term "diplomatic staff" is a clear indication of how it has become customary in international and domestic law to assimilate the status of a permanent mission to that of a diplomatic mission. In effect, this is an explicit cross reference to the Convention on Diplomatic Relations of 18 April 1961.

Assuming that it does not simply follow from this that the régime laid down in the Vienna Convention is accorded to the persons concerned, confusion in the use of terms should be avoided, and the fact that the experts and advisers are included makes no difference.

##### Article 2

1. The draft articles would apply only to "international organizations of universal character", which, according to article 1 (b),

<sup>1</sup> *British and Foreign State Papers*, vol. 151, p. 289.

<sup>2</sup> *Traité instituant les Communautés européennes: Traités portant révision de ces traités, Documents annexes* (Office des publications officielles des Communautés européennes, 1971), p. 769.

<sup>3</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

<sup>4</sup> *Ibid.*, vol. 11, p. 11.

<sup>5</sup> United Nations, *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations*, vol. II (United Nations publication, Sales No.: 61.V.3), p. 421.

would mean organizations whose membership and responsibilities are on a world-wide scale. This is both too restrictive and too vague.

It may very well be that a world organization does not necessitate permanent representation, whereas a regional organization may render it indispensable. Thus, universality of character is totally irrelevant, and the only decisive factors should be the functional criterion and a consensus among the States concerned.

Furthermore, if the scope of the articles is in practice limited to the United Nations and the organizations referred to in Article 57 of its Charter, the question of permanent missions could be settled simply by drawing up supplementary protocols to the instruments relating to the privileges and immunities of those organizations.

2. Once the scope of the draft articles is restricted to world organizations, it is quite obvious that they do not cover regional organizations at all. Paragraph 1 of article 2 is therefore unnecessary and merely points up the difficulty, as demonstrated by articles 3, 4 and 5, of reconciling the draft with the actual state of international relations in this field.

#### Article 3

Every international organization is governed by its constituent instrument or by protocols annexed thereto. The diversity of their statutes makes it difficult to formulate rules in the abstract, without any functional criteria. Another significant point is that, as mentioned in paragraph 5 of the commentary on this article, the "relevant rules of the Organization" include not only constituent instruments but also resolutions of the organization or the practice prevailing in it.

The question of "association membership" or of delegates who are not representatives of States (e.g., employers and workers) appears somewhat irrelevant to the establishment of a permanent mission.

#### Articles 4 and 5

The fact that existing agreements will remain in force and the possibility of different provisions, will deprive the draft articles of any binding effect at all. A convention on permanent missions would, at best, be only of an indicative or supplementary nature—a fact which argues in favour of a model statute or a model code for international organizations.

### PART II.—Section 1: Permanent missions in general

#### Article 6

As drafted, this article on the establishment of permanent missions subjects the host State to automaticity. Also implicit in it is a rule that such missions will proliferate far beyond the actual need. The establishment of permanent missions should derive from the statutes of the organization or a decision taken in accordance with a functional procedure that enables the host State to express its views, or from an agreement with the host State. This is borne out by a statement quoted in paragraph 4 of the commentary, to the effect that the status of permanent delegations derives from internal legislative texts, international treaties such as headquarters agreements, and from customary rules.

It should also be noted that the article makes no reference to permanent missions of third States.

#### Article 7

Although the functions listed certainly belong to permanent missions, they belong equally to the broader category of representatives of States; for, while permanent missions are involved in what has come by general agreement to be termed "multilateral diplomacy", they have no monopoly of it.

#### Articles 8 and 9

The possibility of a permanent representative's being assigned as a member of another mission, or of a member of a permanent mission's being assigned as head of a diplomatic mission to the host State, hardly seems compatible with the rules governing precedence and rank.

#### Article 10

In diplomacy, the receiving State is entitled to refuse its *agrément* to the appointment of a head of mission and to declare certain persons unacceptable. Control by the host State should be exercisable with regard to permanent missions, in accordance with certain procedures appropriate to the structure of international organizations. Thus, it should be clear that this is a case, not of accreditation *stricto sensu* to the international organization, but of a designation which the organization would notify to the host State, and to which the latter could then object.

#### Article 11

Once it is accepted that diplomatic status should be granted to permanent missions, there is no compelling reason to diverge from the provisions of the Convention on Diplomatic Relations of 18 April 1961.

#### Articles 12, 13 and 14

The question of credentials is by no means confined to permanent missions. Moreover, the reference to the practice followed in the organization makes it clear that this is a matter which depends essentially on the statute of the organization concerned. It also seems too restrictive to cover only treaties between member States and the organization; treaties concluded under the auspices of the organization may constitute a much more far-reaching and important category.

#### Article 15

Since the composition of a permanent mission is the same as that of a diplomatic mission, it might surely have been more expedient to annex a few specific articles on permanent missions to the Convention on Diplomatic Relations.

#### Article 16

The right of the host State to intervene in matters relating to the size of the permanent mission should be recognized and should be exercisable in accordance with specific procedures.

#### Articles 17 and 18

These articles correspond *mutatis mutandis* to the equivalent articles of the Convention on Diplomatic Relations.

#### Article 19

With regard to the reference to the practice established in the organization, see the observations on articles 12, 13 and 14 above.

#### Article 20

This article is unnecessary and might give rise to difficulties. Obviously, a permanent mission should normally be established only in the vicinity of the seat of the organization. Cases in which the functions of representation to the organization concerned devolve upon a diplomatic mission, or upon a permanent mission to another organization in the host country or in a third country, are covered by draft articles 8 and 9.

*Article 21*

This article is, in substance, a repetition of the corresponding article of the Convention on Diplomatic Relations regarding the use of the national emblem. One may suspect that the addition of material that had been omitted from the articles of the Vienna Convention was not necessitated by the nature of permanent missions but should, rather, be interpreted as an attempt—valid enough in itself—to make good certain deficiencies or fill certain gaps in the Convention.

*Article 22*

It seems inconsistent with international practice to involve the organization in the granting of facilities and privileges that are not determined by the relevant rules of the organization but derive from the diplomatic status which the host State has undertaken to grant.

*Articles 23 and 24*

As stated above, the role of the organization should be limited to the strict application of its own statutory, budgetary and administrative rules. The consequences of the granting of diplomatic status should continue to be of a bilateral nature.

*Articles 25 to 33*

These articles merely repeat the substance of the corresponding articles of the Convention on Diplomatic Relations. As noted above, new material of the kind contained in article 25, paragraph 1, regarding the presumed consent of the permanent representative in case of disaster, could quite well have been included in the Convention, as it in fact was in the Vienna Convention on Consular Relations of 24 April 1963.<sup>6</sup>

Furthermore, the wording of article 31, paragraph 2, of the latter Convention is preferable by far to that proposed in the present draft, inasmuch as the term "public safety" can be very broadly interpreted.

A similar comment applies to draft article 32, paragraph 1 (*d*), which provides that there shall be no immunity from jurisdiction in the case of damages arising out of a traffic accident. Such a clause is certainly very much to the point, but here again the question is whether it should not have been included in the Convention on Diplomatic Relations; for, while it would be wrong to give permanent missions more privileges than are prescribed for diplomatic missions, it is surely unfair to adapt the status which the latter enjoy by means of accretions that would only operate to the detriment of the former. Moreover, the term "official functions" can be broadly interpreted and ought to be clarified.

*Article 34*

This article, which reproduces the operative part of resolution II (Consideration of civil claims) annexed to the Convention on Diplomatic Relations,<sup>7</sup> adds nothing more than the recommendation itself, since in the final analysis it rests on the discretion and goodwill of the sending State.

*Articles 35 to 43*

These articles are simply copied from the corresponding provisions of the Convention on Diplomatic Relations, or, in the case of article 39, the Optional Protocol concerning Acquisition of Nationality.

Article 41, paragraph 1, perpetuates a drafting error which occurred in the French text of that Convention but which was cor-

rected in article 71 of the Convention on Consular Relations; the paragraph in question should accordingly read: "... shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts ...".

*Article 44*

This article on non-discrimination is unacceptable, unless provision is made for the principle of reciprocity. It is hardly admissible that the permanent mission of a sending State should be able to enjoy a more favourable status than the same State's diplomatic mission although, of course, the advantages deriving from the status of representative of a State under the statutory rules of the organization must in any event be safeguarded.

However, while the status of representative of a State as such must be determined in accordance with those rules, diplomatic status is a matter involving relations between the host State and the sending State.

*Article 45*

Paragraph 2 of this article, relating to recall by the sending State of a person enjoying privileges in case of a grave violation, does not go far enough. The host State should be able to declare him *persona non grata*.

The last sentence of paragraph 2 reintroduces the principle of extritoriality, although this had been dropped in the Convention on Diplomatic Relations.

*Articles 46 to 49*

These articles add nothing to the analogous provisions of the Convention on Diplomatic Relations.

*Article 50*

This article, which provides only for consultations with a view to the solution of questions in dispute, is imperfect and should be incorporated in a more detailed provision or in a protocol on the settlement of disputes, as may be appropriate.

**Canada****(a) PART I AND SECTION I OF PART II OF THE PROVISIONAL DRAFT**

OBSERVATIONS COMMUNICATED BY LETTER DATED 15 JANUARY 1970 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

It is noted that the Commission has sought, in these articles, to lay down certain general principles, while ensuring that appropriate recognition is given to both existing and future agreements concluded between States and international organizations. In the Canadian view, the provisional draft articles appear to be generally satisfactory. However, there are certain articles, dealing mainly with the position of the host State, on which we wish to make a few specific comments.

We have studied with particular interest *articles 10 and 11* which relate to the appointment of members of the permanent mission. Article 11 requires a sending State to obtain the consent of the host State before appointing as a permanent representative or member of the diplomatic staff of the permanent mission a person who is a national of the host State. It is suggested that further study might be given to the adoption of a provision whereby the sending State's freedom to appoint nationals of the host State, as members of the permanent mission, would be recognized; however, the host country would have the right to decide which privileges and immunities it should grant to its own nationals. In this connexion, it might also be useful to give some consideration to the position of landed

<sup>6</sup> United Nations, *Treaty Series*, vol. 596, p. 261.

<sup>7</sup> *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No.: 62.XI.1), p. 90.



immigrants or permanent residents of the host State whose position might be assimilated to that of nationals.

The present draft articles do not provide a formula whereby the host State can require a member of the permanent mission to leave its territory. In our opinion, consideration should be given to the desirability of introducing a provision similar to the one contained in article IV, section 13 (b) (1)-(3), of the Agreement signed between the United Nations and the United States of America on 26 June 1947.

In its present form, *article 15* does not specifically recognize the practice which has been adopted by an increasing number of States of appointing Deputy Permanent Representatives or Associate Permanent Representatives. We would suggest that a provision, to the effect that the "Deputy or Associate Permanent Representative" shall enjoy the status of Permanent Representative when the latter is absent, be included.

*Article 16*, which is concerned with the size of the permanent mission, seeks to take into account the interests of the mission, of the international organization and of the host State. Canada fully endorses the suggestion that consideration be given to the inclusion of a provision for consultation between the host State, the sending State and the international organization concerning the application of this and other articles. Canada notes and welcomes the indication by the Commission that it will consider a general article relating to the settlement of disputes.

Finally, we would recommend that *article 19* be revised so as to specify the language of the alphabetical order to which the article refers. This would remove the possibility of confusion which might otherwise result from the present wording.

(b) SECTION 2 OF PART II AND PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY A LETTER DATED 20 JANUARY 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

PART II.—Facilities, privileges and immunities of permanent missions

*General remarks*

Draft articles 22 to 50 generally provide for permanent missions a status approximating that of diplomatic missions. This appears generally satisfactory to Canada. However, there are certain articles dealing mainly with the position of the host State on which Canada would like to comment on the basis of its experience as host State to one of the United Nations specialized agencies.

*Observations on particular articles in the draft*

*Article 25*

Article 25, paragraph 1, sanctions the inviolability of the premises of the mission, and provides that agents of the host State are permitted to enter the mission only after obtaining the consent of the permanent representative.

Such consent may be assumed in case of fire or other disaster that seriously endangers public safety "only in the event that it has not been possible to obtain the express consent of the permanent representative". In situations involving serious danger to public safety, the provision that agents of the host State are prohibited from entering the premises of the mission to eliminate or contain that danger without the express consent of the permanent representative unless it has not been possible to obtain that consent is perhaps too

restrictive and might instead be based on the reasonableness of efforts to obtain the consent of the permanent representative.

*Article 26*

This article appears to be acceptable to Canada in its present form now that a definition of the term "premises of the permanent mission" has been added to article 1 as indicated in the report of the Commission on the work of its twenty-first session.<sup>1</sup>

The inclusion of paragraph 2 of the article continues to be important. It is believed that residents of the host State should be subject to real property taxes, such as those levied by municipalities, on real property they own, even when they lease it to members of permanent missions.

*Article 30*

Consideration should be given to the insertion of a second paragraph in draft article 30 which would read as follows: "This principle does not exclude, in respect of the permanent representative, either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing serious crimes or offences".

*Article 35*

This article would seem to be satisfactory. However, it might be necessary to make it clear that the exemption from the social security legislation of the receiving State conferred by the article does not include an exemption from social security taxes of an indirect nature and is thus not in conflict with the intent of subparagraph (a) of article 36 which permits the receiving State to impose indirect taxes.

*Article 36*

It is suggested that the drafting committee might wish to rephrase the opening sentence so as to make it clear that the phrase "personal or real, national, regional or municipal" applies to "dues" as well as to "taxes".

Subparagraph (a) is acceptable, although it is suggested that the phrase "Indirect taxes incorporated in the price of goods or services, whether invoiced separately or not" could be used as an alternative.

In subparagraph (b), it is considered that the phrase "unless the person concerned holds it on behalf of the sending State for the purposes of the permanent mission" could, to avoid any undesirable extension of the exemption, be deleted and replaced by the words "subject to the provisions of article 26".

In subparagraph (d), it is suggested that the phrase "and capital taxes on investments made in commercial undertakings in the host State", which is almost identical to the corresponding provision in subparagraph (d) of article 34 of the Convention on Diplomatic Relations, is less satisfactory than the wording of subparagraph (d) of article 49 of the Convention on Consular Relations which reads, "dues and taxes on private income, including capital gains, having its source in the receiving [host] State and capital taxes relating to investments made in commercial or financial undertakings in the receiving [host] State;".

Subparagraph (f) contains the phrase "with respect to immovable property" which Canada would prefer to have deleted.

*Article 38*

In paragraph 1, subparagraph (b), it is presumed that the word "his" refers both to the permanent representative and to any member of the diplomatic staff.

<sup>1</sup> *Yearbook of the International Law Commission, 1969*, vol. II, p. 206, document A/7610/Rev.1, para. 14.

*Article 40*

It is noted that in paragraph 1 of article 40 the phrase "or permanently resident in the host State" does not appear. It is recommended that the words "or permanently resident in" be inserted after the words "if they are not nationals of".

*Article 42*

Article 42, paragraph 1 should be amended; according to the present text, a person could be entitled to privileges and immunities from the moment his appointment is notified to the host State by either the organization or the sending State. This paragraph creates an artificial relationship between the host State and the sending State. Consequently, we consider that only notification by the organization should be relevant.

It is understood that the movable property of a member of the permanent mission or a member of his family referred to in paragraph 4 does not include "property of an investment nature".

*Article 48*

The last sentence of article 48 by requiring the host State to place at the disposal of persons enjoying privileges and immunities the necessary means of transport for their property would appear to be imposing an unrealistic duty on the host State. The last sentence of article 48 should, therefore, be replaced by the following provision: "It shall, in case of emergency, facilitate in every possible way the obtaining of means of transport for them, and for such of their personal effects as is reasonable under the circumstances."

*Article 50*

The first part of this article should be amended to read: "If any question arises among a sending State, the host State and the Organization. . .". In this way, all possible questions that may arise will be covered by article 50. As it is presently drafted, only questions arising between the host State and a sending State can be the subject of consultations under article 50.

## PART III.—Permanent observer missions

*General remarks*

Canada appreciates that these articles must of necessity contain new elements of international law as opposed to the codification of existing rules. However, since observer missions do not, as such, represent, but observe, it is the opinion of Canada that a permanent observer mission should not be placed on the same footing as that of a permanent mission. Reference made in draft articles 65 to 77 to the draft articles on permanent missions should be more restrictive. Privileges and immunities granted to permanent observer missions should only be those which are essential to the execution of their functions.

*Observations on particular articles in the draft**Article 51*

Canada considers that the contents of article 51 are generally acceptable. It is, however, suggested that the elimination of the overlapping of article 51 with article 1 should receive careful attention.

As to subparagraph (a) of article 51, Canada is of the opinion that the definition of the "permanent observer mission" should make it clear that the function of this type of mission is to "observe"

not "represent", and therefore the role of the "permanent observer" referred to in subparagraph (b) of the same article would clearly be to "observe" not "represent".

*Article 52*

Article 52 is generally acceptable to Canada. However, it is understood that this article does not give an automatic right to establish a permanent observer mission. In cases where there is no generally recognized practice regarding establishment of observer missions, it would be a matter for arrangement between the sending State, the organization and the host State.

*Article 53*

In conformity with the comments made on subparagraphs (a) and (b) of article 51, Canada is of the view that the phrase "negotiating with the Organization when required and representing the sending State at the Organization" be rephrased or deleted in order to make it clear that an observer mission does not represent.

*Article 56*

It is suggested that the last sentence of the article be redrafted to read, "They may be appointed from among persons having the nationality or persons being permanent residents of the host State, with the consent of that State which may be withdrawn at any time."

*Article 57*

Taking into account the position of an observer mission in comparison with that of a permanent mission, paragraph 1 of article 57 could be less rigid in its formulation and redrafted as follows: "The credentials of the permanent observer may be issued either by the Head of Government or the Minister for Foreign Affairs or by another competent minister . . .".

In paragraph 2 of the same article, the phrase after the words "permanent observer" should read: "shall act as its observer in one or more organs of the Organization when such role is permitted".

*Article 58*

In the context of the role of an observer mission, it is suggested that in paragraph 1 of this article the word "representing" be deleted and replaced by the words "being authorized by".

The title of this article should read: "Full powers with respect to the conclusion of treaties".

*Article 59*

Article 59 should include in paragraph 1 a provision to the effect that the "deputy or associate permanent observer" shall enjoy the status of permanent observer when the latter is absent.

As to paragraph 2, Canada is satisfied as to the recognition of the differences in privileges and immunities enjoyed by different types of delegates.

*Article 60*

Canada would welcome the relocation of the present article 50 so that it would apply to article 60 as well as to article 16, i.e. to a permanent observer mission as well as to a permanent mission.

*Article 62*

In view of the fact that "*Chargé d'affaires ad interim*" is a well established title, its use here might be somewhat confusing. Accordingly, Canada would prefer the use of the words "Acting permanent observer" rather than "*Chargé d'affaires ad interim*" for the replacement of permanent observers.

## Article 64

Canada is of the general opinion that the words "Use of emblem" would be sufficient.

## Article 65

Canada welcomes and supports the statement made by the Chairman of the International Law Commission in the Sixth Committee that "The Commission would [...] also bear in mind [...] the suggestion of various delegations that articles 65 to 75 should be reconsidered in the light of the functional theory of privileges and immunities".<sup>2</sup> The comments of Canada on articles 66 to 75 are therefore of a tentative nature, taking into account the possibility of a redraft of these articles which would give further emphasis to the difference between a permanent mission and a permanent observer mission.

## Article 67

Canada believes that since the task of an observer mission differs in certain aspects from that of a permanent mission, article 67 should be more explicit regarding this distinction.

It is therefore suggested that this article, instead of referring to articles 25, 26, 27, 29 and 38, paragraph 1 (a), of the present draft articles, should, *mutatis mutandis*, follow articles 31, 32, 33, 35 and 50, paragraph 1 (a) of the Vienna Convention on Consular Relations.

## Article 68

It is suggested that article 68 should follow article 34 of the Vienna Convention on Consular Relations instead of article 28 of this draft convention.

## Article 69

Along the line of the comments made on article 68, it is suggested that article 69, paragraph 1, instead of referring to article 30 of the present draft articles, follow article 40 of the Convention on Consular Relations and that the following be added in article 69 to the text of article 40 of the Convention on Consular Relations: "This principle does not exclude, in respect of the permanent observer, either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing serious crimes or offences."

Also in paragraph 1, no reference should be made to article 31. Instead of referring to articles 32, 35, 36, 37 and 38, paragraphs 1 (b) and 2 of the present draft articles, paragraph 1 of article 69 should, in our view, refer to articles 41, 48, 49, 52 and 50, paragraphs 1 (b) and 2 of the Convention on Consular Relations.

In paragraphs 2, 3, 4 and 5, the provisions contemplated for the different categories of persons should be determined along the lines of the status of such categories of persons at a consular post.

## Article 71

Instead of referring to articles 33 and 34 of the present draft articles, article 71 should follow *mutatis mutandis* articles 44 and 45 of the Convention on Consular Relations.

## Article 73

This article should follow article 53 of the Convention on Consular Relations; only notification by the organization to the host State should be relevant.

## Article 75

In article 75, reference could be made to article 72 of the Convention on Consular Relations.

<sup>2</sup> See *Official Records of the General Assembly, Twenty-fifth Session, Sixth Committee, 1193rd meeting.*

## Article 76

It is suggested that article 76 should follow in substance articles 55, 56 and 57 of the Convention on Consular Relations.

## Article 77

Article 77 should follow articles 25, 26 and 27 of the Convention on Consular Relations.

## PART IV. Delegations of States to organs and to conferences

## General remarks

It is the opinion of Canada that in the drafting of articles 78 to 116 a functional approach should be taken. The extent of privileges and immunities to be granted should be based on the actual needs of the delegations in respect of the performance of their duties. It is therefore suggested that, *mutatis mutandis*, taking into account comments made on particular articles, the Convention on the Privileges and Immunities of the Specialized Agencies be used as the main point of reference in the redrafting of part IV.

## Comments on specific articles

Set out below are some comments on specific articles. However, in view of the likelihood (which Canada deems desirable) that part IV will be completely redrafted, Canada reserves the right to present further comments in the future.

## Article 83

Article 83 could be redrafted so as not to exclude double representation when permitted by the organ or the organization concerned.

## Article 85

It is suggested that consideration be given to including in the category of persons that cannot be appointed without the consent of the host State the persons having permanent residence in the host State; to that effect, the words "or persons having permanent residence in the host State" should be included after the words "persons having the nationality of the host State".

## Article 94

Article 94 should be redrafted keeping in mind that delegations are often located in commercial buildings.

## Articles 95, 98, 99 and 102

Articles 95, 98, 99 and 102 offer other examples, in Canada's opinion, of practical administrative problems that would arise for a country subscribing to the text of these articles as they now stand. The redrafting should be guided by the functional approach.

## Article 100

Canada would prefer alternative B.

## Article 103

Article 103 could be summarized by stating that: "The host State shall do all that is necessary to facilitate the entry of and to grant exemption from all customs duties [...] on articles for the official use of a delegation including the personal baggage of a representative in a delegation."

*Article 104*

Instead of referring to articles 35, 37 and 33, article 104 could simply state that members of delegations shall be exempted from social security legislation, personal services and laws concerning acquisition of nationality.

*Cyprus**(a) PART I AND SECTION 1 OF PART II OF THE PROVISIONAL DRAFT*

OBSERVATIONS COMMUNICATED BY LETTER DATED 22 OCTOBER 1969  
FROM THE MINISTRY OF FOREIGN AFFAIRS

[Original text: English]

The Cyprus Government heartily welcomes the set of twenty-one draft articles on representatives of States to international organizations, and wishes to record once again its appreciation for the work of the Special Rapporteur, Ambassador El-Erian. The draft articles on permanent missions to international organizations are of particular interest to the Cyprus Government. While the Cyprus Government will carefully study the implications arising therefrom in detail, it simply wishes, at this stage, to say that the draft articles in question seem to achieve a proper balance between the legitimate interests of the three parties concerned, i.e., the sending State, the receiving State and the organization itself.

*(b) SECTION 2 OF PART II OF THE PROVISIONAL DRAFT*

OBSERVATIONS COMMUNICATED BY LETTER DATED 14 NOVEMBER 1969  
FROM THE MINISTRY OF FOREIGN AFFAIRS

[Original text: English]

The following general observations of the [Cyprus] Government are a reiteration of the views expressed by its representative [at the 1109th meeting of the Sixth Committee, on 30 September 1969].<sup>1</sup>

The Cyprus Government welcomes the twenty-nine new draft articles on the subject, which, together with the twenty-one draft articles adopted in 1968, were the work of Mr. El-Erian. While the Cyprus Government leaves detailed comments to be submitted at a later stage, it wishes to express its general approval of these articles, which are aimed . . . at achieving a proper balance between the legitimate interests of the three parties concerned, viz., the sending State, the receiving State and the Organization itself. The topics dealt with in these draft articles (facilities, privileges and immunities, conduct of the permanent missions and their members, and end of the functions), are topics of particular interest and with the ever increasing importance of representation to international organizations, especially as far as newly independent and small States not having extensive embassy networks are concerned, are also of particular importance.

On the substance of the draft articles, the Cyprus Government would like to offer a few comments at this stage.

While agreeing with the substance of *article 25*, it should be stressed that only in the most extreme cases of fire or other disaster can the exemption from the principle of inviolability of the permanent mission premises be invoked, and that the host State would have the burden of proving that the circumstances justified the action taken.

Again, with regard to *article 26* on exemption of the premises of the permanent mission from taxation, the Cyprus Government would like to see a formulation exempting such premises from taxation, not only in cases where the premises are owned by the mission, but also when such property is leased or rented. While

appreciating the practical difficulties that may exist in certain cases, it is nevertheless of the opinion that a system should be devised to enable missions, the Governments of which are unable to purchase premises, to enjoy the same benefit of exemption as missions whose Governments can afford to own their premises. In the nature of things, it is the less well-off States, that would be obliged to content themselves with rented premises, and it is both paradoxical and unfair that the wealthy States, which can afford to own their premises should take advantage of the exemption, while the former would not.

The Cyprus Government would likewise wish to stress the significance it attaches to such other topics, as the assistance to be furnished by the Organization in respect of privileges and immunities (*article 24*), the inviolability of the archives and documents of the mission (*article 27*), freedom of communication (*article 29*), personal inviolability (*article 30*), inviolability of residence and property (*article 31*) and immunity from jurisdiction (*article 32*).

The Cyprus Government looks forward to receiving the draft articles on permanent observers of non-member States and on delegations to sessions of organs of international organizations and to conferences convened by such organizations. Once this piece of work is ripe for codification, and in relation to the Convention on Special Missions, this will have completed the codification and progressive development of the whole field of diplomatic law, and it will finally be a source of particular satisfaction to all concerned with the codification and development of this important branch of law.

*Denmark**PART I AND SECTION 1 OF PART II OF THE PROVISIONAL DRAFT*

OBSERVATIONS COMMUNICATED BY LETTER DATED 9 JANUARY 1970  
FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

The Danish Government has studied with interest the International Law Commission's report on the work of its twentieth session containing a provisional draft of twenty-one articles on representatives of States to international organizations. The Danish Government has no comments on the proposed articles. It is suggested, however, that the Commission reconsider whether the interests of the host State are adequately safeguarded by the provisions of *article 11* on the nationality of the members of the permanent mission, and *article 16* on the size of the permanent mission.

*Ecuador**PART I AND SECTION 1 OF PART II OF THE PROVISIONAL DRAFT*

OBSERVATIONS COMMUNICATED BY LETTER DATED 6 JUNE 1969  
FROM THE MINISTRY OF FOREIGN AFFAIRS

[Original text: Spanish]

*Article 1*

The Government of Ecuador fully subscribes to the view expressed by the Sixth Committee of the General Assembly with regard to article 1 (Use of Terms), namely, that the definition of "an international organization" is inadequate in that the statement that it means any intergovernmental organization does little to improve it. The definition suggested by the Special Rapporteur in his third report<sup>1</sup> would obviously have been preferable. Nevertheless, given the fact that the Vienna Convention on the Law of Treaties<sup>2</sup> contains a definition identical to that proposed in draft article 1 (a)

<sup>1</sup> *Yearbook of the International Law Commission, 1968*, vol. II, p. 124, document A/CN.4/203 and Add.1-5, chap. II, part I, article 1.

<sup>2</sup> For the text of this Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 289.

<sup>1</sup> *Official Records of the General Assembly, Twenty-fourth Session, Sixth Committee, 1109th meeting, paras. 23-27.*

and as the terms used in treaties sponsored by the United Nations should be consistent, this definition is acceptable.

It would be advisable to expand the definition of "an international organization of universal character" in subparagraph (b) of the same article by stating that such an organization should be open to all States which accept the rights and obligations established in its constitutive document, as was suggested in the Sixth Committee.<sup>3</sup>

In the definition of a "permanent mission" in subparagraph (d), the word "permanent" is repeated and this does not clarify the term as it ought to be clarified in a definition. The same comment applies to the definition of "organ" in subparagraph (m).

The remaining definitions are based on corresponding definitions in the Vienna Convention on Diplomatic Relations and are acceptable. They are consonant with the provisions of the *Ley Orgánica del Servicio Exterior Ecuatoriano* (Organic Law of the Ecuadorian Foreign Service).

#### Article 2

The draft articles should logically be applicable only to international organizations of universal character because their obvious connexion, in the context of the United Nations system, with the provisions of Articles 57 and 63 of the United Nations Charter is thereby preserved and because a convention of this kind cannot seek to standardize existing or future rules applicable in a regional context. It must be borne in mind that, even in the case of international organizations, these rules are supplementary, as is clear from draft article 3 which states that: "The application of the present articles is without prejudice to any relevant rules of the Organization". The approach of the International Law Commission to the drafting of article 2, namely, that the present text, which excludes regional organizations, should be retained, is preferable to that suggested in the Sixth Committee's commentary on this article<sup>4</sup> whereby these provisions would be applicable even to regional organizations, which could adopt other rules for themselves only by mutual agreement. This latter approach is diametrically opposed to that taken in the draft.

#### Articles 3 and 4

Article 3 regulates the application of the draft provisions and is, by any standard, a necessary rule. The same may be said of article 4, which safeguards provisions already in force as the result of other international agreements between States and an international organization.

#### Article 5

The provision in this article makes the draft articles considerably more flexible because it does not preclude the possible conclusion of other international agreements "having different provisions concerning the representatives of States to an international organization".

#### Article 6

This provision would allow Member States to establish permanent missions to the Organization for the performance of the functions set forth in article 7 of the draft articles.

This article would be of doubtful value if the International Law Commission had not made clear that it was to be interpreted subject to the general reservations laid down in draft articles 3, 4 and 5. Otherwise, this rule would oblige international organizations to agree to accept permanent missions established by States, even in violation of their own rules. The present wording taken by itself, therefore, does not make matters clear and to understand the rule properly it would always be necessary to have the interpretation based on the clarification given by the International Law Commission.

The article should be so drafted as to make its meaning clear. In addition, the commentary on article 13 is relevant to this rule.

#### Article 7

The enumeration in this article of the functions of a permanent mission is perfectly clear.

The Sixth Committee's suggestion for the addition of a rule concerning the commencement of the functions of the permanent representative and staff of a mission in order to determine when their privileges and immunities begin, could be adopted.<sup>5</sup>

#### Articles 8 and 9

Despite the fact that, in a regional context, Ecuador has contended that representatives should be appointed to international bodies on an *ad hoc* basis—in other words, that they should not simultaneously be representatives of their country to the body in question and to the State in which it has its headquarters—articles 8 and 9, being designed to meet needs at the global as opposed to the regional level, are clear and could be accepted, on the understanding that draft articles 3, 4 and 5 would allow certain bodies to lay down rules departing from this general pattern.

#### Articles 10 to 12

The various relevant provisions are rather descriptive and refer, respectively, to the appointment of the members of a permanent mission, to the nationality of its members and the manner in which the credentials of permanent representatives should be issued. These articles occasion no difficulty whatsoever. They follow current practice and would make it a rule of international law that, as stated in article 11, the diplomatic staff of permanent missions may not be appointed from among persons having the nationality of the host State, except with the consent of that State, which may be withdrawn at any time. This provision is appropriate, in view primarily of the problems which a citizen would create for his own country in respect of privileges and immunities.

#### Article 13

This article establishes clearly the field of action of the permanent representative but it is not logical to presume that, if the permanent representative acts as such only in relation to certain organs (or, in the event that there are no special requirements as regards representation in other organs of the organization and the sending State does not decide otherwise, if he is also permanent representative to the latter organs), the permanent mission, as such, could assume representative functions in relation to the organization as a whole—as draft articles 6 and 7 apparently provide. It would not be proper for permanent missions to be accredited to an organization as a whole while permanent representatives were accredited solely to certain organs of that organization. There should be a parallelism between the scope of representative functions of permanent missions and that of permanent representatives so that the missions would not appear juridically to discharge representative functions wider in scope than those exercised by the heads of such missions.

It would not be difficult to embody this principle of parallelism juridically in an instrument sponsored by the United Nations, even though this dual principle has more or less been established in current practice. If the present texts of articles 6 and 13 are to be reconciled, they will need to be interpreted in the sense that a permanent mission accredited to an organization in accordance with article 6 is the one which represents the sending State in the organs of the organization in accordance with article 13. The commentary on this rule could well be drafted to indicate that the apparent duality in articles 6 and 13 should be construed in the light of the foregoing interpretation.

<sup>3</sup> *Official Records of the General Assembly, Twenty-third Session, Annexes, agenda item 84, document A/7370, para. 23.*

<sup>4</sup> *Ibid.*, para. 25.

<sup>5</sup> *Ibid.*, para. 29.

*Article 14*

While the subject-matter of this article belongs rather in the Vienna Convention on the Law of Treaties, it is acceptable as part of these draft articles although, as the Sixth Committee has pointed out,<sup>6</sup> it would be wiser here again to take the rules of the said Vienna Convention as the model.

*Article 15*

This article presents no problem; its text reflects current practice.

*Article 16*

The size of the permanent mission as laid down in this article is acceptable.

*Article 17*

This article presents no problem whatsoever; it is right and proper to state that the members of the permanent mission are not accredited to the organization in question but are simply appointed by the sending State to assume such functions.

*Article 18*

This article calls for no comment. It merely confirms customary diplomatic practice by stipulating that a *Chargé d'affaires ad interim* shall be appointed in the absence of the head of the mission.

*Article 19*

This rule is acceptable in that it establishes the order of precedence among permanent representatives and thereby ratifies the principle of the sovereign equality of States.

*Articles 20 and 21*

The Government of Ecuador has no comment to make on these rules, which are fully acceptable.

**Finland***(a) SECTION 2 OF PART II OF THE PROVISIONAL DRAFT*

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 16 FEBRUARY 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

It is noted that the provisions contained in the draft articles 22 to 50 are closely related to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations and to the Convention on Special Missions<sup>1</sup> and are often variants of these, adapted to the special circumstances related to international organizations.

The Government of Finland has no special observations to make about the main principles as embodied in the draft articles, provided there are no inconsistencies between the draft articles and the aforementioned Conventions. Draft articles 26 and 36 deal with exemption from taxation of the premises of the permanent mission of (a) the sending State, (b) the permanent representative and (c) another member of the permanent mission acting on behalf of the mission. Article 26 seems to refer to direct taxes but leaves room for the interpretation that also indirect taxes (sales tax and other similar taxes) are covered. According to the view of the Finnish Government indirect taxes, levied for the building elements and for services in connexion with construction, although buildings or parts thereof are

in themselves tax exempt, should be excluded from the exemption. Difficulties may also arise in obtaining tax exemption especially in a federal State, with regard to the implementation of tax laws imposed by a State or some other non-federal authority.

Similarly there have been difficulties in interpretation with regard to taxation of apartments of diplomatic missions in Finland, held by virtue of the shares of the title-holder in housing corporations. Article 26 should be altered to take the ownership of these shares into consideration. The words "in respect of the premises" cannot be interpreted so broadly as to include the exemption of such shares. Article 36 (b) should also provide that its provision shall apply to the aforementioned shares which cannot be considered as real property.

Article 32 deals with the immunity of the diplomatic staff of the permanent mission from the jurisdiction of the host State. This immunity is complete as to criminal jurisdiction, but there are exceptions as to civil and administrative jurisdiction. Different opinions were expressed in the Commission, whether traffic accidents having occurred outside official functions were to be expressly mentioned among the exceptions as has been done in the Convention on Special Missions, or whether they should be left without special mentioning, as in the Convention on Diplomatic Relations. Although valid reasons have been given in favour of both alternatives the former one seems to be more pertinent for the sake of clarity.

With regard to article 42 it would perhaps be well-founded to include also provisions regarding the commencement and termination of privileges and immunities received on other grounds than the official post, for example through family membership, in the same way as has been done in the Convention on Consular Relations.

The Government of Finland considers that part II of the draft articles on representatives of States to international organizations submitted by the International Law Commission are suited as a basis for the final draft.

*(b) PARTS III AND IV OF THE PROVISIONAL DRAFT*

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 23 FEBRUARY 1971 FROM THE ACTING PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

The Government of Finland has noted with satisfaction articles 51-116 concerning permanent observer missions and delegations to organs and to conferences and consider them to be a valuable basis for the preparation of a convention on the subject.

With respect to individual articles the Government of Finland makes the following observations:

*Article 52*

The wording of article 52 seems to be quite appropriate. Given the character of international organizations, granting States an unreserved and unconditional right to establish a permanent observer mission to any international organization whatsoever would be inappropriate. On the other hand, requiring the consent of every Member State would perhaps be too strict.

*Article 53*

It is not necessary to mention the promotion of co-operation between the sending State and the Organization in the enumeration of the functions of a permanent observer mission.

*Articles 54 and 56*

Among other reasons, regulating the status and rights of permanent observer missions is of importance because the possibility to establish such missions as described in these articles could constitute a suitable solution to the problems of the representation of small

<sup>6</sup> *Ibid.*, para. 33.

<sup>1</sup> See resolution 2530 (XXIV) of the General Assembly, annex.

States including so-called micro-States. Consequently, States should have the right to appoint a joint permanent observer and to be represented at two or more organizations or organs by the same representative. The provisions should therefore be flexible enough in this respect.

#### Article 57

In this article and in the commentary thereto, the presentation of credentials is described in varying terms. Terminology should be harmonized. (Reference is made to article 87).

#### Article 58

The wording of paragraph 1 is appropriate as it limits the powers of a permanent observer to adopt treaties in virtue of his functions to the treaties concluded between the sending State and the organization.

#### Article 64

The right to use the flag of the sending State is not necessary for a permanent observer mission but there is no reason to exclude it.

#### Articles 65-75

In principle the permanent observer missions should have the same status as the permanent missions.

#### Article 82

Delegations often have functional difficulties due to the insufficient number of delegates appointed to them. However, some kind of limitation could at times be appropriate as regards the size of a delegation.

#### Articles 83 and 85

A delegation should be entitled to represent two or more States if necessary and it should be possible to compose a delegation of persons of different nationality. The functions of a delegation often require special knowledge and expertise which all States do not have at their disposal. Even a conference of short duration can cause great costs which could be shared by appointing a joint delegation and thus a greater participation could also be obtained. In this way the representation at, and dissemination of information from the meetings of organs having limited membership on grounds of equitable geographical distribution, such as UNCITRAL, could be more easily arranged.

#### Article 90

It remains to some extent unclear by what alphabetical order the precedence among delegations shall be determined in countries which have several official languages.

#### Article 91

The status of the persons of high rank mentioned in this article should be defined in the draft articles but it is doubtful whether the references to official visits and international law are enough in this respect.

#### Article 98

The provisions of this article have gained additional significance as a result of the recent kidnappings of diplomats.

#### Article 100

Because delegations are usually composed of various categories of persons and because ensuring the proper performance of their functions is the purpose of provisions in several other articles (reference is made to articles 82, 95 and 96), the Government of

Finland is in favour of alternative B. The acceptance of this alternative will entail consequential changes at least in article 105.

#### Article 103

The status of a representative should be stated in his passport or in an additional document given to him, as the implementation of the provision could otherwise be difficult.

#### Article 113

If this article purports to prohibit all professional or economic activities of both diplomatic and non-diplomatic members of a delegation, it seems to go too far.

#### Article 114

In the view of the Government of Finland, the wording of this article should be reconsidered to the effect that the functions of a member of a delegation shall come to an end *inter alia* upon the conclusion of the meeting of the organ or the conference and of all measures arising directly therefrom. The provisions could perhaps be enlarged by reviewing the language used.

#### France

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 8 APRIL 1971 FROM THE PERMANENT MISSION TO THE UNITED NATIONS

[Original text: French]

The Government of the French Republic has studied the draft articles on relations between States and international organizations adopted on first reading by the International Law Commission at its twentieth, twenty-first and twenty-second sessions.

The French Government would like first to pay tribute to the work already accomplished by the Commission. Undertaken as it has been with great meticulousness and care, this work will certainly represent a positive contribution to the development of international law and States will usefully be able to refer to it in defining their relations with the international organizations they have created or may decide to create.

The French Government wishes, however, to make some general observations and some specific comments on the articles provisionally adopted, in the hope that the International Law Commission may take them into consideration during its second reading of the draft.

#### General observations

1. As the French delegation has stated at recent sessions of the General Assembly, the draft prepared by the International Law Commission should be applicable only to major universal organizations.

It must be remembered that international organizations, even those which are similar in their geographical scope, differ widely in character. However, since the International Law Commission has wisely adopted the criterion of "functional necessity" for determining the privileges and immunities provided for in its draft, it is essential that the organizations to which the draft relates should, by the very nature of their activities, present a certain similarity.

The definition given in article 1, paragraph (b) ("an 'international organization of universal character' means an organization whose membership and responsibilities are on a world-wide scale") does not seem to be sufficiently specific on this point.

The French Government believes that the Commission should try to find a formulation which would make it clear that the draft will apply only in the case of organisations of universal character



whose activities are of major importance to the world community and are such that the functions of representatives of States to the organizations justify the status proposed.

In this connexion, the French Government still believes that it would have been easier to consider, first, what status should be accorded to organizations of the type under consideration, and then to determine what privileges and immunities should be accorded to persons taking part in their activities.

2. The French Government considers that, in its further work, the Commission should take due account of existing agreements on the subject and should use them as a basis for its work of codification. It should examine very carefully the practice of States, as it appears from these agreements, and should not adopt too doctrinal an approach. It should, accordingly, refrain from applying the solutions of the 1961 Vienna Convention on Diplomatic Relations systematically to different situations for which States have already found solutions of their own.

3. In the French Government's view, it is equally essential that the convention should not be applied in the face of an established practice. Article 4, which states that "the provisions of the present articles are without prejudice to other international agreements in force between States or between States and international organizations" is particularly important in this connexion. Organizations which are the subject of an agreement already concluded should continue to be governed by this agreement, and by it alone.

The French Government also strongly supports the principle expressed in article 5, which preserves the freedom of negotiation of States which become parties to the proposed convention.

### *Observations on the various parts of the draft articles*

#### **PART I.—General provisions**

and

#### **PART II.—Permanent missions to international organisations**

##### *Article 1 and article 15*

(this observation applies to all the draft articles)

The French Government has already had occasion to state that it regrets the use of the words "diplomatic staff" in a context other than that of diplomatic relations, which are the subject of the Conventions on Diplomatic Relations.

##### *Article 6*

It would be better for the Commission to include, in the actual text of this provision, the principles to which it refers in paragraphs (4) and (5) of its commentary—namely, that:

- the legal basis of permanent missions is to be found in the constituent instruments of international organizations, in the conventions on the privileges and immunities of the organizations, in headquarters agreements or, possibly, in recognized practice;
- the establishment of permanent missions is subject to certain reservations.

##### *Articles 10, 34 and 45*

The French Government notes that the International Law Commission's draft does not contain any provision similar to that expressed in article 9 of the 1961 Vienna Convention, to the effect that a member of the staff of a mission may be declared *persona non grata*.

It believes that the International Law Commission should try to find formulations which would enable the host State to take measures necessary for its security and maintenance of public order, without prejudice to the independence of the organization.

It is true that in two articles—articles 34 and 45 which are referred to in articles 71, 76 and 112—the Commission has provided that the sending State should, in certain cases, waive the immunity from jurisdiction of its representative.

However, these provisions seem to be more limited in their scope than article IV, section 14 of the Convention on the Privileges and Immunities of the United Nations which is quoted in the commentary to article 33 and states that:

"Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connexion with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded."

Moreover, article 45 provides that, in case of grave and manifest violation of the criminal law of the host State, the sending State must waive the immunity of its representative or recall him, unless the act in question was performed by the person in carrying out the functions of the permanent mission within either the organization or the premises of a permanent mission.

These exceptions seem to be difficult to explain in law, since they are apparently based on a principle of extraterritoriality which is no longer recognized; an offence committed on the premises of an organization or of a permanent mission is committed on the territory of the host State and, subject to the privileges and immunities applicable, falls within the jurisdiction of the host State. Article 45, as it is at present drafted, could have the effect that, if a crime were committed in a permanent mission, for instance, by a person enjoying immunity from jurisdiction, the host State would not be able even to request his recall; and this would obviously be unacceptable. The same remarks apply to similar provisions in the Commission's draft.

For the foregoing reasons, the French Government wishes to express the hope that the International Law Commission will reconsider the matter, and to point out once again that there is one serious omission in the draft as it now stands: it does not contain any provision concerning the possible expulsion of the persons whose immunities it defines. Yet a provision to this effect is essential in order to strike a fair balance between the interest of the host State and those of the sending State.

##### *Article 14*

The French Government is not convinced that provisions concerning powers to represent a State in the conclusion of treaties between that State and an international organization should be included in the draft now being prepared.

##### *Article 17*

The French Government considers that prior notification of the arrival and final departure of members of a permanent mission should be given in every case.

##### *Articles 24 and 50*

The attention of the French Government has been drawn to articles 24 and 50.

Article 24 provides that: "The Organization shall, where necessary, assist the sending State, its permanent mission and the members of the permanent mission in securing the enjoyment of the privileges and immunities provided for by the present articles."

Articles 50 provides that: "If any question arises between a sending State and the host State concerning the application of the present articles, consultations between the host State, the sending

State and the Organization shall be held upon the request of either State or the Organization itself."

The French Government does not dispute the fact that an international organization has an interest in the fulfilment by the host State of the obligations assumed by the host State in regard to sending States. However, it does not consider that the precise forms which this interest may take are reflected altogether satisfactorily in the above-mentioned provisions.

Article 24 might induce the organization to intervene in relations between sending States and the host State in cases where no genuine problems concerning the enjoyment of privileges and immunities had arisen.

Article 50—notwithstanding the observations to the contrary which appear in the commentary—might well prejudice a solution of the problem of the settlement of disputes. Like article 24, it might also prejudice the answer to the question which organ of the organization would be entitled to concern itself with respect for the privileges and immunities accorded to missions of member States. It would in all probability be difficult in practice to get the political organs of the organization to intervene on problems which arise in the day-to-day life of a permanent mission. The secretariat of the organization concerned might, as a result of the approach adopted in this provision, find itself invested with powers which it should be accorded only by the constituent instruments of the organization.

The French Government takes this opportunity to state that it does not subscribe to the principle expressed by the Legal Counsel of the United Nations in a statement made to the Sixth Committee at the twenty-second session of the General Assembly, and reproduced in the commentary to article 24, to the effect that the Organization itself is a party to the Convention on the Privileges and Immunities of the United Nations. In this connexion, a distinction should be made between multilateral conventions, to which only States are parties, and headquarters agreements to which organizations as such may become parties.

#### Article 25

Though the French Government is not formally opposed to the wording of paragraph 1 of this provision, it would prefer the wording of article 31, paragraph 2 of the Vienna Convention on Consular Relations to be used in the last sentence.

It also expresses the hope that the reference to means of transport in paragraph 3 of this provision will for practical reasons be deleted.

#### Article 26

The French Government considers that exemption from taxation, in respect of the mission premises, of a member of the permanent mission other than the permanent representative might be a source of confusion. A provision of this kind which might be required in the case of special missions, is unnecessary in the case of missions of a permanent character.

The French Government could not, moreover, agree to any extension of the privileges provided for by this article.

#### Article 28

The French Government takes the view that the principle on which this provision is based does not satisfy the criterion of functional necessity which the Commission has adopted. Representatives to an international organization do not require, for the performance of their functions, as great a freedom of movement as diplomats. *A fortiori*, there is no reason to go beyond the Convention on Diplomatic Relations with regard to the families of the persons concerned.

The French Government suggests, therefore, that the Commission might adopt the rule expressed in article 27 of the Convention on Special Missions, to the effect that freedom of movement and travel should be ensured to the extent necessary for the performance of the functions of the mission.

#### Article 29

The French Government feels that it would be desirable to insert in this article a provision similar to that of article 28, paragraph 3 of the Convention on Special Missions, to the effect that communications between the permanent mission and its Government or other missions should, as far as possible, be conducted through the permanent diplomatic mission of the sending State.

#### Article 32

If the principle that diplomatic status should be accorded to certain members of permanent missions is accepted, the idea that such persons should enjoy immunity from civil jurisdiction for road accidents caused by a vehicle used outside their official functions is also acceptable. If it is so decided and if subparagraph (d) of paragraph 1 is accordingly omitted, the French Government would like to see it expressly stated that persons benefiting from the provisions of the article should at all times be covered by a motor vehicle accident insurance policy taken out under the laws of the host State.

#### Article 35

The French Government has no objection to this provision. It notes, however, that it relates to social security legislation only. The French Government believes that the Commission should include in its draft a provision relating to labour law in connexion with contracts concluded by permanent missions with locally recruited staff.

#### Article 36

The French Government expresses the hope that paragraph (f) of this article will be brought into line with the corresponding provisions of the Convention on Consular Relations and the Convention on Special Missions, by deleting the words "with respect to immovable property".

#### Article 38

It would seem to be unnecessary to refer to members of the family in this provision, since article 38 is mentioned in article 40, paragraph 1. It would also seem to be preferable to have the entire status of these persons defined in one single provision.

#### Article 39

The French Government believes that this provision might be incompatible with legislations which enable persons, by an act of personal choice (option or repudiation), to avoid the application of the law concerning acquisition of nationality. It would therefore be better to make this provision optional, as in the case of the Vienna Conventions of 1961 and 1963.

#### Article 41

Paragraph 1 of this provision contains a drafting error which appeared in the French text of the 1961 Vienna Convention and which was corrected in the Vienna Convention of 1963 and in the Convention on Special Missions. In the French text, the last part of the paragraph should read: "... ne bénéficient que de l'immunité de juridiction et de l'inviolabilité pour les actes officiels accomplis dans l'exercice de leurs fonctions."

#### Articles 42 and 43

The French Government hopes that the International Law Commission will be able to find some way of making these articles more specific.

The French Government made this point in connexion with the corresponding provisions in the Convention on Special Missions.

It would seem that some attempt to make these articles more explicit is essential, in order to avoid possible disputes on the interpretation of the provisions.

In this connexion, the French Government wishes to state that—differing, perhaps, from the opinion of Legal Counsel of the United Nations which is reproduced in paragraph 3 of the commentary on article 42—it does not consider that the provisions of a convention relating to the granting of privileges and immunities should be given a broad interpretation, save in exceptional cases.

In any case, with regard to paragraph 1 of article 42, it would be better to find a formulation which would rule out any possibility that the appointment as a member of a permanent mission of a person already in the territory of the host State may be invoked as grounds for granting privileges and immunities even in cases when the appointment is made some time before the person actually takes up his post.

Similarly, with respect to article 43, the State of transit should not be obliged to grant the privileges and immunities provided for unless it has been notified of the transit and status of the person concerned, and has given its consent. This principle should be applied to all categories of representative covered by the convention.

#### Article 44

It is stated in this draft article that: "In the application of the provisions of the present articles, no discrimination shall be made as between States". In its commentary, the Commission states that this article is placed provisionally. If at its next session the Commission should decide to consider certain exceptional circumstances, such as participation in the organization by non-recognized States, it will find, on examining existing agreements, that some variations have from time to time been introduced into the rule which it states in this article. At present, too, by omitting the reference to the concept of reciprocity, the Commission has made the rule more absolute than the principle established by the Vienna Convention of 1961.

#### PART III.—Permanent observer missions to international organizations

On this part of the draft, the French Government will confine itself to making some fairly general remarks, since it believes that the Commission should reconsider the very principles underlying the articles which it has provisionally adopted.

The French Government wishes to state, first, that it shares the views of those members of the Commission who believe—as stated in paragraph 3 of the commentary on article 52—that no State is entitled to send an observer mission to an organization when the rules or practice of the organization do not provide for such a possibility.

The International Law Commission has, in its draft, created an entirely new international status of "permanent observer" and even of a permanent observer mission patterned exactly on the status of diplomatic missions.

The French Government cannot fail to note that the Commission itself states in its commentary (part III, section 1, paragraph 2 of the "General comments") that:

"There are no provisions relating to permanent observer missions of non-member States in the United Nations Charter or the Headquarters Agreements or in General Assembly resolution 257 (III) of 3 December 1948 which deals with permanent missions of Member States".

The Commission goes on to say that, as regards the United Nations, the problem has been determined—satisfactorily, it would seem—by practice. The French Government is therefore by no means

convinced that it is necessary or advisable to establish a rigid and comprehensive body of legal rules such as that contained in the Commission's draft. It considers that, if the presence of observers and the régime applicable to them are not based on the constituent instruments of an organization, or on its practice or on decisions taken by the competent organs, then observers should not be admitted and should not in any case enjoy a particular legal status unless such a status is expressly provided for either by the multi-lateral conventions applicable to the organization itself or by a special agreement between the organization and the host State. In the French Government's view, such an agreement should define a uniform status for all observer missions to the same organization. However, the Commission should reconsider the question whether there is any justification for giving "observer missions" the same status as the permanent missions of States to international organizations, having regard both to the role played by observer missions and to the fact that the States which appoint them are not members of the organization and are therefore not subject to its rules. The French Government has some very serious doubts on this point.

#### PART IV.—Delegations of States to organs and to conferences

With regard to this part of the draft, the French Government must again urge the Commission to take account of established practice.

As the Commission itself has noted (part IV, section 2, paragraph 1 of the "General comments"):

"A substantial body of rules has developed in relation to privileges and immunities of representatives to organs of international organizations and to conferences convened by international organizations".

After analysing these rules, however, the Commission then departs from them and grants diplomatic status to all the persons referred to in its draft, although it admits that this is not in keeping with the usual practice of States, as it appears from the conventions at present in force, including the Convention on the Privileges and Immunities of the United Nations. The Commission has preferred to assimilate delegations of this kind to special missions rather than follow the line laid down by the Committee on Legal Questions of the San Francisco Conference which, as the Commission itself has noted (*ibid.*, para. 12), stated that it had

"seen fit to avoid the term 'diplomatic' in describing the nature of the privileges and immunities conferred under Article 105" of the Charter and that it had "preferred to substitute a more appropriate standard, based . . . in the case of . . . representatives . . . on providing for the independent exercise of their functions".

The French Government is of the opinion that the Commission should reconsider the question in the light of that comment.

It is not self-evident that delegations to organs of international organizations or to conferences convened under the auspices of international organizations should have exactly the same status in the host State as missions sent directly to the host State by a foreign State.

The French Government believes, as has already been stated, that privileges and immunities should be granted only to the extent that they satisfy the criterion of functional necessity. The agreements at present in force, based on this principle, seem in fact to have proved satisfactory.

Due account also must be taken of the temporary character of delegations. In the discussion on special missions which have the same temporary character, the French Government has already had occasion to draw attention to the serious difficulties which might arise for administrations if they were obliged to accord certain diplomatic privileges to persons whose presence in their territory was essentially transitional. The Convention on Special Missions, in accordance with the definition adopted, applies only to well-

defined missions. However, the articles now being proposed would apply to delegations to conferences and [article 78 (a) and (c)] to delegations to the principal or subsidiary organs of an international organization and to any commission, committee or sub-group of any such organ, in which States are members. It would seem very difficult in practice, and hardly justifiable in principle, to apply the described status indiscriminately to all persons who—according to the terms of the draft—would be able to avail themselves of it.

From this point of view also, it is impossible to extend diplomatic law, as it stands, to temporary delegations to international organizations.

The Commission must in fact have realized this since, for article 100 on immunity from jurisdiction, it has proposed two alternatives. The French Government believes that in the light of current practice in the matter, and having regard to the proper sphere of application of the draft, alternative B would be preferable. However, it does not regard this alternative as entirely satisfactory since it would enable persons benefiting from it to enjoy total immunity from jurisdiction, which is not provided for by article IV of the Convention on the Privileges and Immunities of the United Nations.

The French Government must emphasize once again that it is highly desirable for the Commission to give due consideration to the provisions of that text and of similar texts which strike the necessary balance between the various interests involved in the life of an international organization. Such consideration will undoubtedly lead it to the conclusion that provisions such as those relating to the premises of delegations, private accommodation and customs or tax exemptions are not in keeping with the solutions which have generally been adopted both for reasons of principle and for practical considerations.

The French Government would also express the hope that the Commission will consider the practical aspects of applying the provisions it adopts. It would observe, for example, that if a person is to be accorded full diplomatic status, it is essential that he should be immediately identifiable by the authorities concerned, and that the authorities should receive prior notification of his presence on the territory of the host State.

In short, the French Government believes that the Commission might usefully reconsider the articles of this part of its draft in the light of the agreements at present in force and, as regards problems which are not dealt with in these agreements, in the light of the actual practice of States and organizations.

In general, the French Government believes that, in its study of the question of relations between States and international organizations, the Commission should be guided essentially by considerations of functional necessity and should not lose sight of the need to strike a balance between the interests of the host State and the independence of the organization.

The French Government intends to offer some further observations when the Commission has completed its second reading of the draft.

#### Hungary

#### PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 22 FEBRUARY 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

#### Article 52

This article ought to lay down that all non-member States may establish permanent observer missions to the international organiza-

tions of universal character. The present wording of the provision, more specifically, the expression "in accordance with the rules or practice of the Organization", is contrary to the principle of the sovereign equality of States and to the principle of universality. It is also inconsistent with draft article 75, which forbids discrimination between States.

Furthermore there is a contradiction between article 52 and the attached commentary. Namely, it is rightly stated in paragraph 2 of the commentary that it is of vital interest to non-member States to be able to follow the work of international organizations, and that the association of non-member States with international organizations is of benefit to the organizations and conducive to the fulfilment of their principles and purposes.

In view of the foregoing, the right solution would be for the present wording of article 52 to be replaced by the text of article 51 proposed by the Special Rapporteur in his fifth report.<sup>1</sup>

#### Article 94

The last sentence of paragraph 1 of this article ought to be deleted. In this way, the paragraph would reflect exactly the right principle accepted by a large majority of States in article 22 of the Vienna Convention on Diplomatic Relations.

#### Article 100

Alternative A would seem to be the more acceptable because alternative B narrows down, with no reason, the immunity from civil and administrative jurisdiction of the representatives of States members of an international organization.

#### Israel

#### (a) PART I AND SECTION 1 OF PART II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY *note verbale* DATED 8 APRIL 1969 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

#### Article 1

The Government of Israel believes that the Commission should consider adding a definition of "representative", since the term is used both in the title and in the text of the draft articles.

It proposes that subparagraph (b) be omitted, having regard to its observations on article 2.

It suggests that in subparagraph (1), the words "are established" be replaced by "may be established".

#### Article 2

The Government of Israel does not consider that a valid or workable distinction can be drawn between international organizations of a universal character and others, for the purpose of these articles. It points out that in so far as the provisions of these articles conflict with the relevant rules or constituent instruments of any international organization at all, whatever the characteristic of that organization, the latter will in any case prevail by virtue of articles 3, 4 and 5. It therefore proposes that this article be omitted.

<sup>1</sup> Yearbook of the International Law Commission, 1970, vol. II, p. 7, document A/CN.4/227 and Add.1 and 2.

## Articles 4 and 5

The Government of Israel makes the following comments:

(1) The formulation of article 4 should correspond more closely with the terms of paragraph 2 of article 26 of the draft articles on the law of treaties (in the final form which will be given to it at the Vienna Conference).<sup>1</sup>

(2) It is noted that in the title of article 4, the word "existing" appears, but in the text reference is made to "other international agreements in force". It is therefore not clear whether the article does or does not apply to future agreements. The Government of Israel doubts if it is appropriate to restrict article 4 only to agreements in force when the draft articles themselves enter into force.

(3) In article 4, the words "between States or between States and international organizations" are superfluous.

(4) In the light of the foregoing, a more succinct formulation should be considered, such as an amalgamation of articles 4 and 5 along the following lines: "Nothing in the present articles shall prejudice other international agreements in force concerning the representatives of States to an international organization".

## Article 7

The Government of Israel suggests that subparagraph (c) be inserted immediately after subparagraph (a), in view of its generality and importance.

## Article 8

The Government of Israel considers that this article is superfluous, and believes that it could well be omitted. In view of the fact that the appointment of members of a permanent mission is not subject to the *agrément* of the host State or the organization concerned, it points out that even in the absence of this article there would be nothing to prevent a sending State from appointing the same persons as members of two or more permanent missions. By contrast, it points out, it was only the need to preserve the right of receiving States to withhold their consent that necessitated the inclusion of paragraph 1 of article 5 of the Vienna Convention on Diplomatic Relations, and article 4 of the draft articles on special missions.<sup>2</sup> The hypothesis of the present article, however, is not analogous to that with which those other provisions deal.

It is also considered that if this article is retained, then, as a matter of drafting, the phrase "as a member of another of its permanent missions", which occurs in both paragraphs 1 and 2, should in each case be replaced by "as a member of the staff of another of its permanent missions". This, it seems, would more accurately express the intended meaning, in view of the definitions of each of these phrases contained in paragraphs (f) and (g) of article 1.

## Article 9

The Government of Israel suggests that the phrase "as head of a diplomatic mission", which occurs in paragraph 1 and paragraph 2, should in each case be replaced by "as head of a diplomatic or special mission".

## Article 10

The Government of Israel recognizes that this article gives expression to the well-established practice with regard to permanent

missions, namely that their members may be appointed freely and without requiring the consent of the host State or of the organization. It nevertheless considers that in the following two cases, the host State should have the right to refuse its consent, namely:

(1) in the case of a person who has previously been convicted in the host State of a serious criminal offence;

(2) in the case of a person whom the host State has previously declared *persona non grata*.

In order to give effect to this, it proposes the addition of a new provision either as a new paragraph to article 10 or as a new article 10 (*bis*), along the following lines:

"The host State may withhold or at any time withdraw its consent to the appointment as a member of a permanent mission of any person whom it has previously declared *persona non grata* or who has previously been convicted in any of its courts of a criminal offence involving ignominy."

The phrase "a criminal offence involving ignominy" is based upon the authorized English translation of subsection (1) of section 44 of the Chamber of Advocates Law, 5721-1961.<sup>3</sup> The use of this phrase is suggested here, in order to exclude from the scope of the proposed article trivial contraventions such as parking offences.

## Article 11

The Government of Israel draws attention in this context to the necessity of making special provision, in those sections dealing with privileges and immunities, for the privileges and immunities of members of a permanent mission who are nationals or permanent residents of the host State. Such a provision could be based on paragraph 2 of article 38 of the Vienna Convention on Diplomatic Relations.

## Article 12

The Government of Israel proposes the following two amendments:

(1) To replace the words "or by another competent minister" by "or by any other authority competent to do so under the laws of the sending State". It considers that "authority" is preferable to "minister", since credentials are in fact sometimes issued by authorities other than ministers, and because the word "minister", unlike "Minister for Foreign Affairs", has no clearly defined meaning in international law. As regards the word "competent", it feels that the proposed phrase should be substituted, in order to eliminate the possible ambiguity arising from the fact that the word occurs twice in this article, the first time with the meaning "competent by the law of the sending State", and the second time with the meaning "competent by the rules of the organization".

(2) To omit the phrase "if that is allowed by the practice followed in the Organization", since the idea already covered by article 3.

## Article 13

The Government of Israel considers that the text of this article should be replaced by that suggested in paragraph 7 of the commentary. The meaning of the latter is far clearer, and it is free from the ambiguities of the present text, which leaves it uncertain (a) whether in the event of organs being specified, the permanent representative has or has not the right to appear before the unspecified organs, (b) whether in the event of organs not being specified, the permanent representative has a right to appear before any organs at all, and (c) whether paragraph 2 related to a situation in which organs have been specified, or in which they have not been specified. The Government of Israel suggests, however, that in paragraph 2

<sup>1</sup> In the Vienna Convention on the Law of Treaties as adopted by the United Nations Conference on the Law of Treaties on 23 May 1969, article 26 of the International Law Commission's draft articles on the law of treaties has become article 30.

<sup>2</sup> See *Yearbook of the International Law Commission*, 1967, vol. II, p. 349, document A/6709/Rev.1, chap. II, D.

<sup>3</sup> Israel, Ministry of Justice, *Laws of the State of Israel*, vol. 15, 5721-1960/61, Authorized translation from the Hebrew (Published by the Government Printer [n.d.]), p. 203.

of the alternative text contained in paragraph 7 of the commentary, the words "unless there are special requirements as regards representation in any particular organ" be omitted, since this point is already expressed by article 3.

#### Article 14

The Government of Israel, while not disagreeing with the provisions of this article as they stand, feels that the topic of treaties between States and international organizations would be more appropriately dealt with in the context of the codification of the law of treaties. While noting that the draft adopted in 1968 by the Committee of the Whole at the first session of the Vienna Conference is limited by article 1 to treaties concluded between States,<sup>4</sup> it draws attention to the resolution passed at the same session of that conference recommending the General Assembly to refer the study of the question of treaties concluded between States and international organizations or between two or more international organizations to the International Law Commission.<sup>5</sup> In view of this, the Government of Israel suggests that the question of the retention of article 14 should be examined only after the General Assembly has finally pronounced itself on the future study of the topic.

#### Article 15

The Government of Israel suggests that article 15 be merged with article 6, so as to form the second paragraph of that article.

#### Article 17

The Government of Israel proposes that in subparagraph (a) of paragraph 1, the words "of the members" be replaced by "of members" and the words "their arrival and final departure" by "their arrival and their final departure"; this would bring the text of the article into line with that of article 10 of the Vienna Convention on Diplomatic Relations. It also proposes that at the end of the subparagraph, the semicolon be replaced by a comma and the following words added: "and, in the case of temporary absences, their departure and return".

In subparagraph (b), it considers that the words "where appropriate" are redundant and should be deleted.

It suggests that paragraph 2 be drafted along the same lines as paragraph 2 of article 11 of the draft articles on special missions.

#### Article 18

The Government of Israel suggests that the following sentence be added to the end of article 18, along the lines of paragraph 4 of article 17: "The Organization shall transmit the notification to the host State".

It notes that no provision has been made for the accreditation of *chargés d'affaires ad interim*. It considers that this may be needed, in view of the fact that the post of permanent representative is sometimes vacant for a considerable time. It suggests that the International Law Commission obtain information as to the practice of international organizations on this point, with a view to the inclusion of an appropriate provision.

#### Article 20

The Government of Israel makes the following suggestions:

(1) That in paragraph 1, the word "express" be inserted after "prior" in order to bring the text into conformity with that of article 12 of the Vienna Convention on Diplomatic Relations;

<sup>4</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 110.

<sup>5</sup> *Ibid.*, p. 285.

(2) That the words "within the host State" be inserted after "localities".

#### Article 21

The Government of Israel proposes that the second sentence of paragraph 1 be omitted, but that the first sentence be completed by the addition of the words "and on its means of transport when used on official business", in conformity with paragraph 1 of article 19 of the draft articles on special missions.

#### (b) SECTION 2 OF PART II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 1 JUNE 1970 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

#### General observations

See the statement of the representative of Israel at the 1106th meeting of the Sixth Committee on 29 September 1969.<sup>6</sup>

#### Observations on particular articles

#### Article 26

The expression "another member of the permanent mission acting on behalf of the mission" introduces a new element which may be of much broader significance than this article. In so far as it embraces the "acting permanent representative", it would seem preferable that the issue of principle be dealt with elsewhere and the text of article 26 co-ordinated with it. On the other hand if, as seems to be the case, article 26 does not mean to refer to an acting permanent representative, then some other language should be used than the phrase in question. See in this context, the observations of the Government of Israel on article 18 (see section (a) above).

#### Article 32

Paragraph 4 of the commentary has been noted. The Government of Israel recognizes the interconnexion between paragraph 1 (d) of article 32 and article 34 of the draft articles. Expressing the hope that article 34 will be retained in the final text, the Government of Israel would wish to reserve its position on article 32, paragraph 1 (d) for the time being.

#### Article 33

The Government of Israel suggests that in paragraph 1, in place of the phrase: "The immunity from jurisdiction of the permanent representative or members of the diplomatic staff of the permanent mission and persons enjoying immunity under article 40", there should be substituted the following: "The immunity from jurisdiction of the permanent representative or members of the diplomatic staff of the permanent mission, and of persons enjoying immunity under article 40".

#### Article 35

The Government of Israel takes the view that paragraph 5 adds nothing to the provisions of articles 4 and 5, and that it could with advantage be omitted.

#### Article 38

The Government of Israel suggests that in paragraph 1 (b) "their families" be substituted for "his family", "their households" for "his household" and "their establishments" for "his establishment".

<sup>6</sup> *Official Records of the General Assembly, Twenty-fourth Session, Sixth Committee, 1106th meeting.*

*Article 39*

See the remarks of the representative of Israel at the 1106th meeting of the Sixth Committee.<sup>7</sup>

*Article 42*

The Government of Israel notes that article 39, paragraph 1 of the Vienna Convention on Diplomatic Relations reads: "from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed". On the other hand the present text reads: "from the moment when his appointment is notified to the host State". No reason for this change is given in the commentary, and the Government of Israel feels that the earlier text is preferable as being more precise. In this connexion it seems that article 17 could be made more precise as well as article 18, if the suggestion of the Government of Israel regarding that article (see above) is incorporated into the final text of the draft article.

*Article 43*

The Government of Israel suggests that the last sentence of paragraph 1 be reworded as follows:

"The same shall apply only in the case of any members of the family of the permanent representative or members of the diplomatic staff of the permanent mission enjoying privileges and immunities who are accompanying them or travelling separately to join them or to return to their own country."

The substitution of "any members" for "the members" would bring the text into line with that of article 40 of the Vienna Convention on Diplomatic Relations.

*Article 44*

The Government of Israel notes that this article is worded in the passive: "no discrimination shall be made". The corresponding passage in article 47, paragraph 1, of the Vienna Convention on Diplomatic Relations is worded in the active: "the receiving State shall not discriminate". Paragraph 6 of the commentary explains this difference by the fact that in the case of the present articles the obligation applies not merely to the host State, but also to the Organization. The Government of Israel considers that it would be better if this were made explicit, and suggests redrafting the article along the following lines:

"In the application of the provisions of the present articles, no discrimination shall be made as between States by the host State or the Organization."

*Article 45**Paragraph 2*

The Government of Israel wishes to make the following observations:

(1) The phrase "grave and manifest violation of the criminal law" appears to have no recognized legal meaning.

(2) The provisions of the paragraph apparently leave it to the sending State itself to determine whether, in the hypothesis with which the article deals, a case has arisen to recall the person concerned.

The problems with which the International Law Commission is endeavouring to grapple are appreciated, and it is considered that there is no objection in principle to recognizing that under the circumstances envisaged the host State should have the right to request the sending State to take appropriate steps. Any dispute arising out of such a request would be dealt with under the provisions of article 50. On that basis a more satisfactory formation of article 45 could read:

"If the host State has strong grounds for believing that a criminal offence involving ignominy has been committed against its laws

by any person enjoying immunity from criminal jurisdiction, then it may notify the sending State of this, and the latter shall in that case either waive the aforesaid person's immunity, recall him, terminate his functions with the mission or secure his departure, as appropriate."

The phrase "a criminal offence involving ignominy" has been explained in the observations of the Government of Israel on article 10 (reproduced above); and should the suggestions made for that article find expression in the Commission's final text, it is believed that article 45 should be co-ordinated with it.

*Paragraph 3*

The words "the exercise of", which do not appear in the corresponding provision of the Vienna Convention on Diplomatic Relations (article 41), seem superfluous.

*Article 48*

1. The Government of Israel notes that the words "to leave its territory" at the end of the first sentence have been substituted for the words "to leave at the earliest possible moment" which appear in the corresponding article of the Vienna Convention on Diplomatic Relations (article 44). It sees no reason for this change, and therefore suggests reverting to the earlier text.

2. With reference to paragraph 2 of the commentary, the Government of Israel considers that a clause obliging the host State to allow members of permanent missions to enter its territory to take up their posts should be included in the draft articles.

*Article 49*

1. The Government of Israel proposes that the word "must", wherever it appears in paragraph 1, be replaced by "shall".

2. The Government of Israel notes that, according to paragraph 2 of the commentary, the intention is that in the event of the sending State failing to comply within a reasonable time with the obligations imposed upon it under the second sentence of paragraph 1, the host State shall no longer be bound by the provisions of the first sentence of paragraph 1, but only by "any obligations which may be imposed upon it by its municipal law, by general international law, or by special agreements" as regards the property, archives and premises. It is believed that this should be made more explicit in the text in order to avoid ambiguity. The addition of a phrase such as "after which time the obligations of the host State under this paragraph shall cease" could achieve this.

The difference between the "special" protection and protection of property, archives and premises under international law is not altogether clear.

## (c) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 5 JANUARY 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

*General observations*

See the statement of the representative of Israel at the 1193rd meeting of the Sixth Committee on 8 October 1970.<sup>8</sup>

Subject to the comments set out below, Israel expresses its general agreement with the proposed draft articles.

The observations of the Government of Israel on the first and second groups of draft articles apply generally and in principle to Parts III and IV.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, Twenty-fifth Session, Sixth Committee, 1193rd meeting.



As the four parts of the draft articles will form an integral part of the diplomatic law, it is considered that in the final text of the draft articles, all those provisions relating to matters susceptible of uniform treatment should be redrafted and amalgamated in the fewest possible articles. The Government of Israel is inclined towards a broad formulation of facilities, privileges and immunities for the official representatives of States; it considers that uniformity of treatment is preferable to the many ambiguities and obscurities now encountered. If, however, this view is not adopted, it is suggested that the Commission may wish to consider presenting the material in a series of separate instruments. At all events it is considered that the present opportunity should be taken to introduce the greatest possible degree of unification and systematization into the law governing the official representatives of States, and to co-ordinate the provisions governing representatives to universal international organizations with those governing direct and inter-State representatives, now consolidated in the 1961 Convention on Diplomatic Relations, in the 1963 Convention on Consular Relations and in the 1969 Convention on Special Missions.

It is also considered desirable for the question of observer delegations to organs and conferences to be regulated in the present group of draft articles.

### Observations on particular articles

#### Article 51

The introductory words to this article dealing with the use of terms indicate that those terms would specifically apply to part III of the draft articles.

Subparagraph (a) of this draft article defines the term "permanent observer mission" as a mission sent to an "international organization". Paragraph 1 of the commentary of this draft article explains that the latter term is used in the same sense as in draft article 1.

In view of the opening words to draft article 51, it might be desirable to include the words "as defined in article 1" after the words "international organization", unless the Commission should decide to amalgamate articles 1 and 51.

#### Article 52

The Government of Israel considers that the sending of observer missions to an international organization by non-member States can only be done in conformity with the rules and practice of the organization. In that connexion it is doubtful if relatively generalized concepts such as "principles of sovereign equality of States and of universality" (paragraph 3 of the commentary) could prevail over the rules and practice of the organization in question.

#### Article 58

Since the Vienna Convention on the Law of Treaties does not deal adequately with this aspect, the Government of Israel agrees that articles 14 and 58 could be retained in the present set of draft articles, but it believes that, together with article 88, a single provision would be sufficient.

#### Article 76

The Government of Israel suggests that permanent observer missions and their members, as well as all the other representatives to which the different parts of the draft articles apply, should be required to carry third party insurance policies to cover damage or injury that may arise from the use of vehicles by them in the receiving State. This observation applies to articles 45 and 112, and it is offered as a contribution to the solution of the problem dealt with in articles 32, paragraph 1 (d) and 100, paragraph 2 (d) (alternative A).

#### Article 88

See observations on article 58.

#### Article 112

See observations on article 76.

### Japan

OBSERVATIONS COMMUNICATED BY LETTER DATED 16 MARCH 1971  
FROM THE CHARGÉ D'AFFAIRES "AD INTERIM" OF THE PERMANENT  
MISSION TO THE UNITED NATIONS

[Original text: English]

### PART I.—General provisions

#### Articles 4 and 5

In view of the great variety of functions and characteristics of agreements relating to international organizations, articles 4 and 5 have rightly been included.

### PART II.—Permanent missions to international organizations

#### General comments

1. In the view of the Japanese Government, draft articles on the diplomatic law on the relationship between States and international organizations should be based of the functional necessity, due regard being paid to the existing rules and practice. Owing to the approach taken by the Commission that the provisions on privileges and immunities of permanent missions and their members should closely follow the corresponding provisions of the Vienna Convention on Diplomatic Relations, the element of diversity of functions and needs of international organizations is not sufficiently taken into consideration. Thus the draft articles substantially depart from the prevailing practices and principles of international organizations regarding privileges and immunities.

2. In drawing up the diplomatic law of representatives of States to international organizations, the interest of the sending States should be guaranteed, but at the same time, ample consideration should be given to the adequate protection of the interests of the host States. It is to be expected that the presence of numerous permanent missions in one locality will impose a particularly heavy burden on the host State of an international organization of universal character. Particular attention should be given to safeguard the interests of the host State against possible abuses of privileges and immunities by permanent missions and their members.

3. While the draft articles grant permanent missions privileges and immunities virtually identical with those accorded to permanent diplomatic missions, they do not adequately ensure the protection of the interests of the host State by providing measures comparable to the provisions on *persona non grata* and *agrément* designed to protect the interests of the receiving State in bilateral relations. The procedure envisaged in article 50, namely, consultations among the States concerned and the organization, will not provide the host State with sufficient protection. It is, therefore, hoped that the Commission will give consideration to devising more effective procedures for the protection of the interests of the host State (conciliation procedure, for example).

### Observations on particular articles

#### Article 13

The formulation of paragraph 2 does not appear to be sufficiently clear in its meaning. The Japanese Government would favour the formulation which appears in paragraph 7 of the Commission's commentary.

*Article 19*

The end of the sentence from the words "in accordance with . . ." should be deleted in the light of the provision of article 3. If these words are retained, the article will not provide an effective residual rule where established practice or rules do not exist in the organization on the matter.

*Article 22*

The Japanese Government is not convinced of the necessity of the second sentence of article 22 on the obligation of an international organization to assist permanent missions in obtaining facilities for the performance of their functions. The provision is not supported by the practice of existing international organizations. Moreover, if the organization has the competence to accord certain facilities in accordance with internal rules or regulations, it will accord such facilities in virtue of those internal rules or regulations irrespective of the obligation envisaged in article 22.

*Article 24*

The Commission's intention, as it appears in the commentary, to enable the organization to assist the sending State may well be taken care of by the provision of article 50 on consultations between the sending State the host State and the organization. As it stands, the formulation of the present article might raise the question whether the organization will intervene in the disputes between the sending State and the host State solely in favour of the former.

*Article 25*

The provision of article 25 is considered reasonable. The third sentence of paragraph 1 should be retained.

*Article 28*

This article goes beyond the Vienna Convention on Diplomatic Relations in extending freedom of movement to members of the families of members of the permanent mission. It does not seem essential for the performance of the functions of the permanent mission to assure such an extensive freedom of movement to "all members of the permanent mission and members of their families". It is doubtful if the liberal practice as mentioned by the Commission with regard to the members of the families of diplomatic agents can be regarded as an expression of a customary rule. It is suggested that the Commission should reconsider the matter so that the formulation be aligned with the provision of article 26 of the Vienna Convention on Diplomatic Relations.

*Article 32*

The provision in paragraph 1 (d) of article 32 on action for damages arising out of a motor accident is reasonable and necessary and should be retained. The Japanese Government is also of the view that provisions be included requiring members of permanent missions to be insured against liability for accident caused by vehicles used by them.

*Article 34*

The Japanese Government believes that this article should be retained.

*Article 48*

The insertion of the words "whenever requested" is likely to be interpreted as placing a greater responsibility on the host State than the provision of article 44 of the Vienna Convention on Diplomatic Relations does on the receiving State. The expression "whenever requested" might be replaced by the expression "in case of need".

The wording "in case of emergency" is ambiguous with respect to multilateral relations. Since the bilateral relationship between a sending State and the host State is not directly connected with the

withdrawal of a permanent mission to an international organization, it is not clear what other cases of "emergency" exist.

It is considered superfluous to include a provision on the obligation of the host State to allow members of permanent missions to enter its territory such as appears in paragraph 2 of the commentary.

*Article 49*

The second sentence of paragraph 1 is reasonable and should be retained.

*Article 50*

For the reason mentioned in the general comments, the Japanese Government is not entirely convinced that the provision of this article is enough to cope with the difficulties which may arise as a result of the non-applicability between States members of the organization and the host State of the rules regarding *agrément* and *persona non grata*. For example, a situation might arise where a member of a permanent diplomatic mission declared *persona non grata* or a private person accused of violating the law of the host State, would be appointed as member of the permanent mission to an international organization seated in the host State. A more effective procedure might be provided for in order to protect the interests both of the sending State and the host State in cases where consultations of the type envisaged do not bring about satisfactory solutions.

### PART III.—Permanent observer missions to international organizations

*General comments*

It is considered that the draft articles adopted by the Commission are based too closely on those of permanent diplomatic missions and permanent missions to international organizations.

Placing permanent observer missions on the same footing as permanent diplomatic missions or permanent missions is not necessary for the performance of these limited functions.

Privileges and immunities to be accorded to permanent observer missions should be such as to ensure efficient performance of their main and normal functions. The functions of permanent observer missions consist, in principle, in observing the activities of international organizations and, to a lesser degree, in maintaining the necessary liaison between sending States and organizations. Thus, their functions differ, both in extent and in nature, from those of permanent diplomatic missions or permanent missions, which functions lie essentially in representing the sending States respectively in the receiving State or in the organization. Occasions may sometimes arise in which permanent observer missions are entrusted by their sending States with functions of representation at or negotiation with organizations. These functions, however, as the commentary on article 53 indicates, are not regularly recurrent and not inherent in the nature of permanent observer missions.

Moreover, the Commission's approach to the matter is not supported by the practice of international organizations of the United Nations family. In granting privileges and immunities to permanent observer missions, one should not depart from the practice of international organizations.

The Japanese Government would suggest that the draft articles on privileges and immunities of permanent observer missions be based on the Vienna Convention on Consular Relations.

*Observations on particular articles**Article 52*

The Commission has rightly made the right of non-member States to establish permanent observer missions conditional on the

relevant rules or practice of the organization. When such rules or practice do not provide for the establishment of permanent observer missions, a non-member State should be allowed to send an observer mission to an organization only if the host State and the organization agree to receive such a mission.

#### *Article 53*

It is noted that the Commission has included among the functions of permanent observer missions "negotiating with the Organization when required and representing the sending State at the Organization". Occasions may arise where a non-member State negotiates with the organization, or such a State must be represented at the organization. For example, parties to the Statute of the International Court of Justice that are not Members of the United Nations participate in the procedure for effecting amendments to the Statute in the United Nations. Since a non-member State has the discretion to decide by whom it shall be represented, a permanent observer may be designated to negotiate with the organization or to represent it at the organization. From this it does not necessarily follow that representing at or negotiating with the organization constitute proper functions of a permanent observer mission as such.

It is therefore suggested that the end of the sentence from the words "negotiating with" be deleted. The deletion will in no way preclude a permanent observer mission from performing such functions.

#### *Article 57*

It is doubted that the inclusion in the draft articles of a provision on the submission of credentials of a permanent observer is necessary. Since a permanent observer does not represent the sending State in the organization, there is no need for submission of credentials. The requirement of notification under article 61 will suffice for the purpose of a permanent observer. Additional formality adds nothing to the status of a permanent observer. The practice of the United Nations in this regard should be followed.

#### *Article 58*

This article should be deleted since the matter will be dealt with in connexion with "the question of treaties concluded between States and international organizations", a subject which is on the agenda of the Commission.

#### *Article 64*

The Japanese Government would favour the deletion of the reference to the use of flag.

#### *Articles 65 and 66*

The comments made on articles 22 and 24 also apply to articles 65 and 66.

#### *Article 68*

It is not considered necessary for the performance of the functions of the permanent observer mission that members of the permanent observer mission and, in particular, members of their family enjoy the same freedom of movement as members of the permanent diplomatic mission.

#### *Article 69*

The provision of article 69 goes too far. The Commission might amend the article to the effect that members of the permanent observer mission and members of their family enjoy such personal privileges and immunities as are accorded by the Vienna Convention on Consular Relations to members of consular posts.

### **PART IV.—Delegations of States to organs and to conferences**

#### *General comments*

1. The Japanese Government is not fully convinced that, because of the temporary character of their task, the privileges and immunities of delegations to organs of international organizations and to conferences convened by international organizations should be determined in the light of those granted to special missions. In the view of the Japanese Government, privileges and immunities of delegations should be determined bearing in mind the fact that the principle of reciprocity, which functions as a balancing factor between the interests of the sending States and those of the receiving States with regard to privileges and immunities of special missions, does not exist in the case of multilateral relations.

It should also be borne in mind that, because of the temporariness of the task of delegations to organs of international organizations and conferences convened by international organizations, the question of their privileges and immunities will give rise, for the host State, to particular difficulties which might not be known to States where the seat of international organizations is permanently placed. For example, the host State of an international conference convened by an international organization might be required to take special and temporary administrative and legislative measures in order to assure privileges and immunities provided for in the draft articles.

2. It would seem that the Commission takes the position that the delegations to organs of international organizations and conferences convened by such organizations should, irrespective of their nature and functions, be accorded the same extent of privileges and immunities on the ground that they represent sovereign States.

The Japanese Government hesitates to concur fully with this view, since, in its opinion, representatives to conferences which are of purely technical character and of relatively secondary importance need not enjoy some of the privileges and immunities (personal inviolability and protection, in particular), which may be indispensable to the representatives to conferences of highly political character.

It may be sometimes difficult to distinguish between conferences of technical nature and those of political nature. However, this does not mean that the difference of character may be lightly dismissed.

3. The Japanese Government would favour the inclusion of a provision for the effective settlement of difficulties which might arise between the sending States and the host State regarding privileges and immunities.

#### *Observations on particular articles*

#### *Article 80*

According to the commentary, the Commission is of the view that rules of procedure should not derogate from provisions relating to privileges and immunities. In the view of the Japanese Government, it is unlikely that conference rules of procedure would deal with provisions on privileges and immunities. It is therefore suggested that the question of derogation from the provisions on privileges and immunities be left entirely to article 79 and that the application of article 80 be limited to section 1 of part IV.

#### *Article 83*

This article does not appear to be necessary. Progressive development of law on conferences convened by international organizations should not preclude a delegation to an organ or to a conference from representing more than one State.

*Article 85*

The Japanese Government would favour the view of some of the members of the Commission that the consent of the host State can be withdrawn only if that would not seriously inconvenience the delegation in carrying out its functions. Unlike in the case of permanent missions, sudden withdrawal of the consent of the host State in the course of the session of an organ or conference might place the sending State in an awkward situation.

*Article 99*

This article seems to impose too great a burden on the host State by requiring that State to give special protection to members of delegations. The Commission might reconsider the formulation in the light of the temporariness of the task and accommodation of members of delegations.

*Article 100*

The Japanese Government supports alternative B.

*Article 103*

Paragraph 1 (b) should be deleted. Because of the temporariness of the task of delegations, exemption from customs duties and inspection of articles for the personal use of the members of the delegation does not seem justified.

*Article 105*

It is deemed sufficient that members of the families of representatives and the diplomatic staff be accorded the privileges and immunities provided for in article 104 (Exemption from social security legislation, personal services and laws concerning acquisition of nationality).

**Madagascar**

## PARTS II, III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 2 FEBRUARY 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original text: French*]

## PART II.—Permanent missions to international organizations

*Article 32*

The attention of Governments is drawn to a novel provision of article 32, paragraph 1 (d), under which immunity from civil and administrative jurisdiction is not extended to any "action for damages arising out of an accident caused by a vehicle used outside the official functions of the person in question".

In support of this provision, some delegations argued that it met a real need because of the greater frequency of such accidents and the difficulties which had arisen in some countries from the application of insurance laws.

Other delegations, however, opposed this provision, citing as a precedent the 1961 Vienna Convention, which does not deal with the question, pointing out that draft article 34 calls upon the sending States to waive civil immunity whenever possible or to use their "best endeavours to bring about a just settlement", and emphasizing the difficulties of applying the functional line that was being drawn. One other argument, based on article 45, in accordance with which it is the duty of persons enjoying immunity to respect the laws and regulations of the host State, does not appear to be valid in connexion with a liability resulting from clumsiness or carelessness.

Since experience has shown that it is somewhat unrealistic to rely on the goodwill of States to bring about a just settlement of this type of case within a reasonable period, the Malagasy Government believes that it would be advisable to concentrate on eliminating the difficulties encountered by victims of traffic accidents in obtaining compensation.

However, the provision in question does not, in its opinion, provide an effective means of achieving that goal. How will it be established that the vehicle was being used outside official functions? Will the court hearing the case decide that point? Is the court to accept the version of the facts given by the permanent mission, or can it go beyond that interpretation? Will it have to suspend judgement? What if the vehicle was being used "on duty"? These questions will not be easy to answer, and the delays or disputes which they may engender will bar the way to the desired aim.

It might be better to provide that permanent missions must take out insurance to cover any damage their vehicles might cause to third parties. This would avoid the introduction of one more exception in the context of immunities, while at the same time settling a problem which causes annoyance to host States.

*Article 42*

The expression "a reasonable period" in paragraphs 2 and 3 of this article seems very vague and needs to be further clarified.

In addition, it is rightly noted in paragraph 2 of the commentary that there is no provision regulating the duration of privileges and immunities for persons who do not enjoy them in their official capacity. A provision on this point, based on article 53 of the Vienna Convention on Consular Relations, might therefore profitably be added to article 42.

## PART III.—Permanent observer missions to international organizations

*Article 63*

As a drafting change, needed in order to eliminate any ambiguity, the word "localities" should be replaced by the words "a locality". It would hardly be reasonable to allow the premises of an observer mission to be dispersed over the territory of a host State, since such premises enjoy important immunities and tax exemptions (article 67).

*Article 64*

The right to use the flag is expressly recognized. If diplomatic relations do not exist or are severed, however, use of the flag should be the subject of arrangements to be concluded between the sending State and the receiving State.

## PART IV.—Delegations of States to organs and to conferences

*Article 83*

Article 6 of the Vienna Convention on Diplomatic Relations specifies that two or more States may accredit the same person as head of mission to another State. The article under consideration raises a similar issue and it would be desirable, for several reasons, not to specify so categorically the principle that a delegation may represent only one State.

The Malagasy Government notes, moreover, that the practice described by the Special Rapporteur is not always followed at international conferences. For example, one representative acting for the Upper Volta and the Congo (Brazzaville) signed the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft.

*Article 100*

Two alternative versions are given:

Alternative A lists the four categories of civil actions for which there is no entitlement to immunity from civil and administrative jurisdiction;

Alternative B, which seems broader in scope, excludes from the sphere of immunity acts which are not "performed in the exercise of [...] official functions".

In both cases, measures of execution are dealt with in the same way as the categories of actions to which they relate.

In the opinion of the Malagasy Government, alternative B would raise the same difficulties of interpretation regarding the definition of "acts performed outside official functions" as have already been noted in the analysis of article 32 of the draft.

For this reason, the Malagasy Government prefers alternative A, which is clearer and more specific.

In addition, the comments already made on the subject of the provision concerning actions arising out of a traffic accident are also applicable to article 100 (alternative A), paragraph 2 (*d*).

**Mauritius****PARTS I AND II OF THE PROVISIONAL DRAFT**

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 25 AUGUST 1970 FROM THE PERMANENT MISSION TO THE UNITED NATIONS

[*Original text: English*]

... Mauritius is fully appreciative of the efforts of the International Law Commission to codify international law on the topic of representatives of States to international organizations and is in general in agreement with the draft articles proposed.

**Netherlands****(a) PART I AND SECTION I OF PART II OF THE PROVISIONAL DRAFT**

OBSERVATIONS COMMUNICATED BY LETTER DATED 25 SEPTEMBER 1969 FROM THE DEPUTY PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original text: English*]

**General remarks**

1. The draft articles are intended to be rules of a non-obligatory nature, open to exceptions in the cases provided for in articles 3-5. The Netherlands Government agrees with this modest scope of the draft. Nevertheless, the draft articles must be regarded as reflecting the actual state of international law as regards relations between States and international organizations. In fact, in paragraph 1 of the commentary on article 3 the International Law Commission itself describes the draft articles as a "common denominator" and a "general pattern which regulates the diplomatic law of relations between States and international organizations", their purpose being "the unification of that law to the extent feasible in the present stage of development".

2. It is for this reason that the Netherlands Government objects to the present wording of article 6, which in principle grants States the right to establish permanent missions to the organizations of which they are members. When exercising this right, they are of course subject to the relevant rules of the organization concerned. But what if the organization's rules are silent in regard to the possibility of establishing special missions? Must it then be assumed that member States are automatically entitled to establish permanent missions, pursuant to article 6?

3. The Netherlands Government considers this interpretation undesirable, for the following reasons. Firstly, a provision of this

kind would make no allowance for the great differences between the aims of the various organizations and between their membership. With respect to many organizations, there will be a need for permanent missions. However, to several organizations (e.g., IMF and IBRD) the institution of permanent missions is unknown. Secondly, the institution of permanent missions is liable to put smaller States at a disadvantage. Through its permanent mission, a State is able to exert a certain influence, and it is easier for some States to keep large diplomatic missions than it is for others. Thirdly, if member States were automatically entitled to establish permanent missions, countries might be less inclined to make themselves available as host States in the future, and the ratification of the present rules by the existing host States might be held up.

4. For these three reasons, it would be better to word article 6 in such a way that member States are only entitled to establish permanent missions in so far as this is provided for in the rules of the organization in question. Accordingly, a different wording for article 6 will be suggested below in the comments on each separate article.

5. The Netherlands Government notes with satisfaction that the International Law Commission agrees to consider the inclusion of an article of general scope on the remedies available to host States for safeguarding their rights (paragraph 8 of the commentary on article 16). Pending the inclusion of such an article, the Government will abstain from expressing an opinion on the position of the host States as resulting from the present draft articles. However, the Netherlands Government wishes to point out that it is the host State that will have to accept the privileges and immunity provided for in this Convention. In that Government's opinion, this means that there does exist a legal relationship between the sending State and the host State (cf. paragraph 3 of the commentary on article 10).

6. The Netherlands Government is aware that guarantees for host States can also be included in headquarters agreements.

**Comments on particular articles****Article 1, sub-paragraph (b) in conjunction with article 2, paragraph 1**

7. In the opinion of the Netherlands Government the proposal that the present rules be restricted to "organizations of universal character" is inopportune, since this criterion is irrelevant in this connexion. The fact that an organization has world-wide responsibilities and membership does not necessarily qualify it for the institution of permanent missions; on the other hand, the institution might be useful for organizations of more limited scope, e.g., some of the regional organizations. The Council of Europe is a good example. If the addition to article 6 suggested below is accepted, there would appear to be no objection to allowing the existing rules to apply in principle to all international organizations. In that case, article 2 could be omitted altogether.

**Article 2, paragraph 2**

8. If article 2 is retained, the Netherlands Government recommends deleting the last sentence of paragraph 2, since it is superfluous and confusing. It goes without saying that States can agree to apply the present rules to their representatives to organizations whose membership and responsibilities are not global.

**Article 6**

9. For the reasons stated in the general remarks, the Netherlands Government suggests that article 6 be reworded as follows:

"Member States may establish permanent missions to the organization for the performance of the function set forth in article 7 of the present articles, *in so far as this is provided for in the relevant rules of the organization.*"

*Article 7*

10. This article rightly emphasizes the diplomatic, representational function of permanent representatives. It should be kept in mind that the draft articles are intended to supplement the codifications of the law on the position of State representatives so far completed, viz., the Vienna Conventions on Diplomatic Relations and on Consular Relations, and the Convention on Special Missions.

*Article 9*

11. The Netherlands Government wonders why in paragraphs 1 and 2, the permanent representative and the members of the staff of a permanent mission are named separately, whereas in paragraph 3 they are mentioned together, which is in accordance with article 1 (f). It is recommended that paragraphs 1 and 2 be combined.

*Article 10*

12. As stated in the general remarks, further guarantees will have to be given with regard to the position of the host State. It therefore is right that in article 10, reference be made to articles 11 and 16, which grant to the host State some influence as regards the nationality of the members of a mission and its size.

*Article 13*

13. The Netherlands Government prefers the wording of this article suggested by some members of the International Law Commission (paragraph 7 of the commentary), as expressing more clearly the purpose of the article.

*Article 14*

14. The title of this article is too wide; actually the article refers to only one category of conventions, namely, those between sending States and international organizations. It is therefore suggested that the title be redrafted as follows:

"Representation of States in the conclusion of treaties with international organizations."

*Article 15*

15. The Netherlands Government fails to see why paragraph 4 of the commentary on this article refers, without further explanation, to a number of definitions of the word "representatives", which term is deemed to include delegations, i.e., temporary representatives at international organizations. According to paragraph 19 of the report of the International Law Commission on the work of its twentieth session, the position of delegations to organs of international organizations and to conferences convened by international organizations will be determined in a later section of the draft articles. Quite rightly, therefore, the only term defined in article 1 (e) is "permanent representative". It is recommended that paragraph 4 of the commentary to article 15 be deleted.

*(b) SECTION 2 OF PART II OF THE PROVISIONAL DRAFT*

OBSERVATIONS COMMUNICATED BY LETTER DATED 13 OCTOBER 1970  
FROM THE DEPUTY PERMANENT REPRESENTATIVE TO THE UNITED  
NATIONS

[Original text: English]

*General observations*

1. In its comments on the draft articles on special missions,<sup>1</sup> the Netherlands Government recommended to restrict the privileges

<sup>1</sup> *Yearbook of the International Law Commission, 1967*, vol. II, pp. 388 *et seq.*, document A/6709/Rev.I, annex I, sect. 18.

and immunities to be accorded to diplomats *ad hoc*, in view of the differences in their position and responsibilities vis-à-vis permanent diplomatic representatives. Such a minimum regulation could, if needed, be supplemented by additional agreements between the sending and the host State.

2. The present draft deals with permanent diplomatic representatives of States accredited not to other States but to international organizations. From the *sending State's* point of view there is not much difference between the positions of permanent missions to States and to international organizations. In both cases, residence in the host State is permanent and the mission's task is not confined to one specific assignment.

3. This similarity justifies the privileges and immunities in the present draft being wider in scope than those laid down in the Convention on Special Missions; they conform in a large measure to those laid down in the 1961 Vienna Convention on Diplomatic Relations.

4. The Netherlands Government agrees to this in principle and will not, therefore, make proposals designed to restrict privileges and immunities, as it deemed appropriate to make with regard to diplomats *ad hoc*. It does not, for instance, intend to propose that personal inviolability be restricted to acts performed in the discharge of official duties, nor that the rule of no immunity in the event of damage due to road accidents be extended to official journeys.

5. From the point of view of *host States* however, there is an essential difference between receiving permanent missions in bilateral diplomatic relations and receiving permanent missions accredited to an international organization having its seat in the territory of the host State. In bilateral diplomatic relations, the host State accords diplomatic facilities to ensure the efficient conduct of its diplomatic relations with the sending State. This clearly serves the direct interests of both the sending State and the host State itself. In the case of missions accredited to international organizations, however, such facilities accorded by the host State are intended to ensure the efficient functioning of the *Organization*. The host State has only an indirect interest here, namely the promotion of the work of the Organization and its acting as a good host.

6. The requirement of *agrément* does not apply to members of missions to international organizations. Such missions can be sent by States not recognized by the host State or even by States whose relations with the host State could hardly be called friendly.

7. In view of these considerations, the Netherlands Government is of the opinion that in some respects the present draft could approach the matter of privileges and immunities to be accorded by the host State in a more restrictive sense.

*The role of the Organization*

8. In articles 22-24 and in article 50, the Organization is assigned a certain role in the relations between the sending State and the host State. The Netherlands Government fully supports this principle. The present draft differs from the three previous codifications of diplomatic law in that the Organization occupies a key position in the relations between the sending State and the host State.

9. The Netherlands Government is, however, of the opinion that this principle has not been elaborated quite satisfactorily. The Organization's intermediary role in questions between the sending and host States should be defined more accurately; the solving of such difficulties is in the Organization's own interest, since they ultimately affect its proper functioning.

10. The Netherlands Government fears that the present wording of articles 22 and 24 could create the impression that the Organization should be concerned solely with the interests of the sending State. It is important that the Organization's role be formulated in such a manner that its independent position be made quite clear: it must be in a position to act in the interests of both the sending State and the host State.

Paragraph 3 of the commentary on article 50 shows that the International Law Commission intends *article 24* to impose upon the Organization the *duty* to ensure the application of the provisions of the present draft. The Netherlands Government agrees with this view, but thinks it desirable that this should be clearly stated in the article. It has formulated an amended text to that effect in paragraph 16 of these comments.

#### *Position of the host State*

11. The Netherlands Government is of the opinion that this position is *insufficiently guaranteed* in the present draft. In its comments on articles 1–21 (see section (a) above), it stated that it would postpone expressing a final opinion on the matter until the guarantees the Commission intended to provide for host States had been formulated. This has now been done in articles 45 and 50. In the Netherlands Government's view, these guarantees are insufficient; the host States' position should be made clearer.

12. For instance, the provision of paragraph 2 of article 45, in virtue of which a member of a permanent mission is required to leave the host State in case of certain conduct, would in the Netherlands Government's view have to apply not only in case of grave and manifest violation of the *criminal law* of the host State but also in case of grave and manifest violation of the obligations laid down in paragraph 1 of that article.

13. Should a dispute arise between the sending and host States on this matter, the consultations provided for in *article 50*, in which the Organization may also participate, may well offer a solution. The Netherlands Government, however, considers a provision for the settlement of disputes concerning the interpretation and application of the Convention essential, in addition to the conciliation procedure of article 50. Paragraph 5 of the commentary on article 50 shows that the Commission reserves the possibility of including a provision to that effect.

#### *Comments on particular articles*

##### *Articles 22 and 24*

14. As pointed out in paragraph 10 above, the wording of these articles could create the impression that the Organization should be concerned solely with the interests of the sending State. It must be admitted, however, that in article 24 the words "where necessary" guarantee to some extent that the Organization will try to strike a balance between the interests of sending and host States.

15. The term "full facilities" in article 22 seems to suggest facilities of too wide a scope, also in the light of what has been stated in the preceding paragraph. Since the host State accords facilities with a view to the proper functioning of the *Organization*, the phrase "such facilities as are required for the performance of its functions" seems to be more appropriate.

16. With reference to the points raised in paragraphs 10 and 14, it is proposed that the phrase "take steps to ensure the application of the present articles, and assist . . ." etc. be inserted in article 24 after the words "where necessary". The Netherlands Government is aware that this proposal underlines the need to consider the fundamental question whether, in case the draft should take the form of a convention, the organizations themselves ought to become parties to the convention. It will postpone giving its views on this question until it has studied the draft articles, referred to by the Commission in paragraph 17 of its report on its twenty-first session,<sup>2</sup> on permanent observers from non-member States, delegations to sessions of organs of international organizations and conferences convened by such organizations.

<sup>2</sup> *Ibid.*, 1969, p. 206, document A/7610/Rev.1.

##### *Article 25*

17. Regarding paragraph 3, there seems to be no reason for making the means of transport of the permanent mission immune from search, requisition, attachment or execution without any restriction. Such immunity should at any rate be restricted to *official journeys*. Furthermore, it is recommended that for official journeys, a restriction of immunity be introduced similar to that adopted in *paragraph 2 of article 38* with regard to personal baggage, namely to permit inspection and attachment if the competent authorities in the host State have serious grounds for presuming that the law has been infringed in some way.

##### *Article 26*

18. In paragraph 3 of the commentary, the Commission requests Governments to supply information on the practice in their respective countries. The practice in the Netherlands is that premises *owned* by the sending State are exempt from land tax if and as long as they are intended for use by the diplomatic service. The exemption does not apply to *leased* premises, which are subject to land tax, to a tax levied on the value of the furnishings of the premises (and on their rental value) (called "personele belasting") and to some municipal and polder-board dues and taxes. Since only small sums are involved, the Netherlands Government is of the opinion that for the situation in the Netherlands, special regulations are not called for in respect of leased premises.

##### *Article 30*

19. For the reasons stated in paragraphs 2 and 4 above, the Netherlands Government will not propose—as it did in its comments on the draft articles on special missions—that the personal inviolability of diplomatic staff be restricted to acts performed in the discharge of official duties. It seems appropriate to regulate the position of permanent representatives to international organizations in this point in conformity with the Convention on Diplomatic Relations.

##### *Article 31*

20. In paragraph 4 of the commentary on article 25, the Commission proposes a new paragraph (*k bis*) to be added to article 1, reading "The 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the permanent mission, *including the residence of the permanent representative*." It is recommended that the last phrase, from "including the residence . . .", be deleted, since this idea is covered by article 31, paragraph 1.

##### *Article 32*

21. In the exceptions to immunity from jurisdiction listed in paragraph 1, the Commission has, tentatively, included in subparagraph (*d*) actions for damages arising out of accidents caused by vehicles used outside the official functions of the persons involved.

The Netherlands Government welcomes the inclusion of this provision and might refer to the fact that the Netherlands delegation to the United Nations Conference on Diplomatic Intercourse and Immunities (1961) already advocated the inclusion of such a provision.<sup>3</sup> It was not adopted until 1969, however, namely in the Convention on Special Missions [article 31, paragraph 2, subparagraph (*d*)].

If the proposed provision is adopted, the question of including in the present draft a provision requiring from diplomats entitled to immunity a third party liability-insurance loses much of its relevance. Moreover, many States already impose an obligation of this kind.

<sup>3</sup> *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No.: 62.XI.1), p. 27, document A/CONF.20/C.1/L.186/Rev.1.



22. It is recommended that *aircraft and ships* be included in *subparagraph (d)*, since these too may cause considerable damage.

23. In paragraph 30 of its comments on the draft articles on special missions,<sup>4</sup> the Netherlands Government proposed that, as regards missions *ad hoc*, the rule of no immunity in civil actions for damages arising out of road accidents be extended to official journeys. The Netherlands Government has considered whether it would be appropriate to make such a proposal in the case of the present draft. It is of the opinion, however, that the similarity between *permanent* missions to States and *permanent* missions to international organizations, to which attention has been drawn in paragraphs 2 to 4 above justifies the immunity accorded in this respect under the present draft being wider in scope than that accorded to missions *ad hoc* in the Convention on Special Missions.

#### Article 35

24. In paragraph 3 of the commentary on this article, the Commission raises the question whether the reference to bilateral and multilateral agreements concerning social security in paragraph 5 of this article is necessary, in view of the provisions of articles 4 and 5. The Netherlands Government answers this question in the negative.

#### Article 36

25. As regards the provision in subparagraph (*f*) concerning certain fees, dues and taxes with respect to immovable property, the Commission states in paragraph 5 of its commentary that it would be interested to learn whether Governments have found any practical difficulties in applying the corresponding provision appearing in article 34 of the Vienna Convention on Diplomatic Relations. In the Netherlands, registration fees, paid on the transfer to the sending State of immovable property intended for official use, are refunded. Documents signed solely by members of foreign diplomatic missions are exempt from stamp duty. This practice does not give rise to difficulties.

#### Article 42

26. As regards this article, the Commission invites the views of Governments on the desirability of including a provision similar to article 53 of the Vienna Convention on Consular Relations, concerning the dates of commencement and termination of entitlements for persons who do not enjoy privileges and immunities in their official capacity.

The Netherlands Government is of the opinion that such a provision should indeed be included.

#### Article 44

27. It was proposed in the Sixth Committee at the twenty-fourth session of the United Nations General Assembly, during the debate on the report of the International Law Commission on the work of its twenty-first session, that the article on non-discrimination be worded as follows: "In the application of the provisions of the present articles, there shall be no discrimination against any State".<sup>5</sup>

The Netherlands Government prefers this wording of article 44 to that proposed by the Commission.

#### Article 45

##### Paragraph 2

28. The Netherlands Government refers to its comments in paragraph 12 above and proposes that paragraph 2 be extended to

include all "grave and manifest violations" of the obligations laid down in paragraph 1.

##### Paragraph 3

29. As regards this provision, the Netherlands Government recommends that the *means of transport* of the mission be explicitly included. It is proposed to insert the words "and means of transport" after the word "premises".

#### (c) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 9 MARCH 1971  
FROM THE ACTING PERMANENT REPRESENTATIVE TO THE UNITED  
NATIONS

[Original text: English]

#### General observations

1. Now that the third series of articles, completing the Commission's draft, is at hand, the Netherlands Government would first of all like to express its admiration for this extensive piece of work designed to add a new, complete chapter to the codification and progressive development of international law concerning diplomatic and other missions through which States maintain mutual relations.

Reading through the complete draft, one is obliged to consider to what extent the draft body of rules satisfies the needs of the international community. The draft is remarkably detailed and treats some points very fully—an understandable and perhaps inevitable consequence of any attempt at codification. The various parts of the draft are based in part on the existing regulations for permanent and *ad hoc* diplomatic missions—with the inherent risk that dissimilar matters may be treated as similar. It may be thought that in some cases the present rules follow too closely the rules of classical bilateral diplomacy, instead of being adapted to the changed needs of modern international relations.

In international practice, a number of organizations already have rules for the functioning of and facilities for permanent missions or permanent observer missions of States and almost all organizations have such rules for delegations of States to their organs or conferences. These rules display considerable variety, as is clearly shown by the extensive research undertaken by the Commission and notably by its very capable Special Rapporteur. The Commission quite rightly takes this variety into account in articles 3, 4, 5, 79 and 80.

At the same time it is to be expected that the regulations for the individual organizations will, under the influence of the present codification, tend towards standardization. Assuming that uniformity ought never to be an aim in itself, the question should be considered whether the international community is in fact in need of highly detailed standardization for the legal relationships under review, always bearing in mind the evident multifariousness of international organizations. This line of thought might well prompt the conclusion that the final text should confine itself more to basic principles.

At the present stage of international exchange of views on the Commission's draft, the Netherlands Government would restrict itself to putting forward the above views for further comment. It reserves the right to return to these questions after considering the comments of other Governments and the final draft.

#### PART III.—Permanent observer missions

##### The observer mission as an institution

2. The question may legitimately be asked whether the institution of the observer mission—at least in the case of missions to world-wide organizations—is not in principle open to criticism, being in contradiction with the universal character of the organization.

<sup>4</sup> See foot-note 1 above, this section.

<sup>5</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 53.

Apart from certain exceptional cases—accounted for by political reasons—as regards the membership of the United Nations, States which are interested in the work of an organization ought to become members of that organization. It does not appear desirable to normalize the basically not normal institution of the observer mission—particularly not on the same footing as the permanent missions, which are a normal element in the structure of international relationships.

One argument put forward by the Commission in favour of this normalization is that it would help to solve the problem of the “micro-States” within the United Nations (see para. 8 of the “general comments” on section I of part III). It is striking that this aspect is not further mentioned in the commentary on the individual articles.

Inasmuch as the draft articles will also apply to other than world-wide organizations, the institution of the observer mission becomes more acceptable. This is the consideration underlying the following comments on the individual articles.

#### *Multiple representation*

3. Neither part II, which deals with permanent missions, nor the present part III make any provision for the possibility of one representative or observer being accredited to an organization on behalf of two States. This is in contrast to article 6 of the Vienna Convention on Diplomatic Relations, article 8 of the Vienna Convention on Consular Relations, article 5 of the 1969 Convention on Special Missions and article 83 of the present draft.

The Special Rapporteur considers this point in his third report in a “Note on appointment of a joint permanent mission by two or more States”<sup>6</sup> and, basing his observations exclusively on the practice followed within the United Nations, he concludes that joint representation is a rare phenomenon, to be found only in connexion with the assembly of an organ or with a conference; this was the reason for the drafting of article 83.

The Netherlands Government readily accepts the fact that, until now, joint permanent missions or joint permanent observer missions have seldom occurred—if at all. On the other hand it would like to point out that the absence of any reference to such a possibility in parts II and III leaves that possibility open. The Netherlands Government considers it right that the possibility should be kept open, especially in part III, in view of the fact that in the case of observer missions there is not the added complication of the exercise of voting rights. Moreover, this possibility could be in the interests of the micro-States. There is no need for such an arrangement to be regulated in the draft under review, provided that articles 6 and 52 state that no permanent missions or observer missions may be admitted, save where rules governing such admission have been laid down by the organization concerned (see the Netherlands comments on draft article 6 reproduced above, and also para. 4 below).

#### *Observations on particular articles*

##### *Article 52*

4. As regards the various points of view existing within the Commission, as reflected in paragraph 3 of its commentary, the Government of the Netherlands subscribes to the view that no State may derive from this article the right to establish an observer mission with an organization unless the rules or customary practice of the organization itself provide for such a possibility. From this point of view article 52 is too broadly formulated; a more precise formulation is recommended on the lines suggested earlier for article 6 (see the Netherlands comments on the first series of articles, reproduced above).

<sup>6</sup> *Yearbook of the International Law Commission, 1968*, vol. II, p. 135, document A/CN.4/203 and Add.1-5, paras. 31-34.

##### *Article 54*

5. While this article repeats the provisions of article 8 in respect of permanent missions, a provision analogous to that laid down in article 9 has not been included either here or in a subsequent article. In the fifth report, the Special Rapporteur did make a proposal for the latter.<sup>7</sup>

Although the commentary makes it clear why this proposal was not adopted, its exclusion suggests that the Commission deems any provision concerning the compatibility of representative functions to be superfluous for two reasons, namely, that this compatibility is not disputed in practice by any State, (a practice sufficiently well established in the Vienna Conventions of 1961 and 1963), and, secondly, that this compatibility also follows from article 59, paragraph 2.

The Netherlands Government too considers any provision analogous to article 9 superfluous, but it is of the opinion that, for reasons of balance, article 9 could and should be deleted.

##### *Article 55*

6. As previously observed in its comments on the first series of draft articles (see section (a) above general remarks and comments on article 10) and in paragraphs 11 *et seq.* of its comments on the second series (see section (b) above), the Netherlands Government would like to see the position of the host State invested with further guarantees. It should be borne in mind that the principle of reciprocity entertained in bilateral diplomatic relations can hardly ever be applied in the regulation of the quasi-diplomatic status of representatives to organizations. A partial remedy may be found in the inclusion of a provision to the effect that a host State shall have the right to require that a member of a diplomatic or consular mission, declared *persona non grata* by the host State, may not return as a member of a permanent mission, an observer mission or a delegation.

##### *Article 57*

7. The Netherlands Government sees no reason why credentials should be introduced for permanent observers. This formality is not met with in practice and a written communication to the organization as provided for in article 61, paragraph 1, seems sufficient for all conceivable purposes. Article 57 can be entirely omitted.

8. As regards the wording of paragraph 2, in conformity with the terms used in other articles and in view of the definition in article 51 (a), the words “A non-member State” should be replaced by “The sending State”.

##### *Article 58*

9. The observation made in the Netherlands’ comments on the title of article 14 (see section (a) above) also applies to the title of this article.

##### *Article 59*

10. The provision in paragraph 2 could better be placed in section 2, in the same way as article 107 has been inserted in section 2 of part IV.

11. In the last part of the provision the words used differ from those in the last part of paragraph 2 of article 9 of the 1969 Convention on Special Missions. There seems to be no difference in intent, so it is recommended that the same wording be adopted.

##### *Article 61*

12. A new provision should be inserted between subparagraphs (a) and (b) in the first paragraph (see para. 13 below).

<sup>7</sup> *Ibid.*, 1970, vol. II, p. 8, document A/CN.4/227 and Add.1 and 2, “Note on assignment to two or more international organizations or to functions unrelated to permanent missions”.

*Article 62*

13. The Netherlands Government agrees with the Commission that the sending State should not be obliged to appoint a *chargé d'affaires ad interim* for an observer mission. Accordingly, any detailed regulation governing this institution seems ponderous. If article 62 were deleted, it would suffice to add to article 61, paragraph 1, a subparagraph (b) reading as follows:

"the name of the person who will act as *chargé d'affaires ad interim*, if the post of permanent observer is vacant or the permanent observer is unable to perform his functions, and if the sending States wishes to fill this vacancy".

*Article 63*

14. Replacement of the word "localities" by "a locality" (see paragraph 2 of the Commission's commentary) would indeed seem to clarify the text.

*Article 64*

15. If this article is considered necessary, it seems preferable to refer to the "flag and emblem" (see para. 2 of the Commission's commentary).

*Article 65*

16. In accordance with the Netherlands' suggestion on article 22 (section (b), para. 15, above), article 65 should also mention:

"... such facilities as are required for the performance ...".

*Article 66*

17. Please refer to the comments in paragraph 27 below relating to article 93.

*Article 74*

18. Please refer to the comments in paragraphs 35 and 36 below relating to article 110.

*Article 75*

19. The observation of the Netherlands Government concerning a different wording of article 44 (see section (b), para. 27) is equally applicable to article 75.

20. It may be asked whether the facility to grant exemption, in individual cases, from a general prohibition by the host State—such as the forbidding of visits to certain areas or the carrying of photographic equipment—might be incompatible with the non-discrimination principle. The Netherlands Government considers the answer to be in the negative.

## PART IV.— Delegations of States to organs and to conferences

*Section I.— Delegations in general**Other conferences*

21. With references to the definition in subparagraph (b) of article 78, the Netherlands Government points out that, besides conferences convened by or under the auspices of organizations (and even including in that category conferences convened by States on behalf of organizations [see paragraph 3 of the Commission's commentary]), there are other international conferences, some of which certainly have a universal character—e.g. the International Red Cross Conferences, the Hague Diplomatic Conferences of 1951 and 1964 on the Unification of Law governing the International Sale of Goods, the Brussels Diplomatic Conferences on Maritime Law (since 1910), the European Fisheries Conference of 1963/1964 in London. The status of delegations to these and similar conferences is not covered in the

draft articles under review; nor would it seem to be covered by the 1969 Convention on Special Missions, unless article 6 of that Convention is to be interpreted as covering delegations to international conferences as well.

*Article 81*

22. The Netherlands Government shares the view of the majority of the Commission that a delegation must include at least one person empowered to represent the sending State.

*Article 83*

23. From paragraph 1 of its commentary, it would seem that the Commission is under the impression that the principle of single representation, as laid down in this article, reflects the practice of international organizations, as described by the Special Rapporteur. But his fifth report<sup>8</sup> shows that the Special Rapporteur based his findings on the practice of the United Nations alone. The Netherlands Government points out that there are other organizations which provide for the possibility of multiple representation. Bearing in mind the Commission's intention to review the matter of single or multiple representation in the light of comments from Governments, the following instances may be recalled:

The Universal Postal Union of 1874 (Berne Convention of 1874, revised in the Acts of the Union, Vienna, 1964). Article 101, paragraph 2 of the General Regulations of the Universal Postal Union<sup>9</sup> provides for the possibility of double representation in the Congress of the Union.

The International Union for the protection of Industrial Property (Convention of Paris 1883, revised at Stockholm 1967).<sup>10</sup> Article 13, paragraph 3 (b) contains a special regulation for group representation in the Assembly of the Union.

The International Telecommunication Union (Madrid Convention of 1932, revised at Montreux 1965). Chapter 5, margin Nos. 640-642, of the General Regulations pertaining to the Treaty<sup>11</sup> provides for double representation in the Conference of the Union and also for the transference of votes up to a maximum of one extra vote.

The International Organization of Legal Metrology (Paris Convention, 1955).<sup>12</sup> Article XVII provides for the possibility of transferring votes in the International Committee of Legal Metrology up to a maximum of two extra votes.

The European Economic Community (Treaty of Rome, 1957).<sup>13</sup> Article 150 provides for the possibility of a member of the Council of the Community acting as proxy for not more than one other member in case of a vote.

It seems clear that international practice—from which no doubt further examples could be drawn—requires greater flexibility than allowed for by the Commission. On the other hand the draft articles do not aim to be more than directory; see articles 3 and 80.

The Netherlands Government is in agreement with the regulation laid down in article 83. If the statutes of an organization or the regulations for a conference do not mention this matter, it seems right to accept the principle of single representation as a general rule, one of the reasons being that—as is clear from our examples taken from international practice—divergent rules are conceivable for multiple representation and the latter is sometimes not practicable without additional provisions.

<sup>8</sup> *Ibid.*, p. 1, document A/CN.4/227 and Add.1 and 2.

<sup>9</sup> United Nations, *Treaty Series*, vol. 611, p. 86.

<sup>10</sup> WIPO, *Paris Convention for the Protection of Industrial Property* (Geneva, 1970) [201(E)].

<sup>11</sup> United States of America, Department of State, *United States Treaties and other International Agreements* (Washington D.C., U.S. Government Printing Office, 1968), vol. 18, part 1, 1967, p. 685.

<sup>12</sup> United Nations, *Treaty Series*, vol. 560, p. 3.

<sup>13</sup> *Ibid.*, vol. 294, p. 17.

It seems however preferable that the commentary on this article more fully reflect current practice, and state more clearly the conclusion that it may be advisable for individual organizations and conferences to adopt a different rule than that contained in article 83.

#### *Article 84*

24. Please refer to the comments in paragraph 6 above in relation to article 55.

#### *Article 88*

25. Together with "some members" of the Commission whose opinion is reflected in paragraph 2 of the commentary, the Netherlands Government is of the opinion that paragraph 3 of the proposed article is redundant. It fears that the inclusion of this article may tend to confuse rather than clarify.

Moreover, with reference to the article as a whole, it is questionable whether in this case the repetition of what is already laid down in the Vienna Convention on the Law of Treaties is to be recommended.

#### *Section 2.—Facilities, privileges and immunities of delegations*

26. The third and last category of representatives of States to international organizations differs from the two previous categories in more than one respect: the length of their stay is by nature limited; their task is specific and limited; and the host State is not necessarily the State in which the organization has its headquarters. By the first two of these characteristics the delegations are comparable to special missions. On the other hand, their business is not connected with the relations between the sending State and the host State, as in the case of special missions, but with the aims and procedures of an organization. For this reason it seems more appropriate to approach the question of the facilities, privileges and immunities to be accorded to them from a purely functional point of view.

In this connexion, the Netherlands Government would recall the rules in existence for delegations to organs and conferences, which are laid down, for instance, in the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies, also mentioned by the Commission in its general comments on section 2. It is questionable whether it is desirable to deviate from these existing rules to any considerable extent.

#### *Article 93*

27. The Netherlands Government does not see the analogy drawn in the Commission's commentary with article 23 of the 1969 Convention on Special Missions. A special diplomatic mission entertains relations with the host State, whilst the relations referred to in this article are multilateral, or else are relations with an organization. In practice, too, as far as is known, in finding accommodation for delegates to conferences or assemblies of an organ, assistance is often given by the secretariat of the organization. To make this the responsibility of the host State seems to impose an unnecessary extra burden on the latter's hospitality. It is therefore proposed that the provision be reversed to the effect that the organization provides assistance and that, where necessary, it is assisted therein by the host State.

What has been stated above in respect of article 93 is also applicable to the accommodation of permanent missions and permanent observer missions (articles 23 and 66), albeit to a lesser extent, as providing for the accommodation of permanent representatives seems to require less strenuous efforts. It might, however, still be considered whether the distribution of duties in articles 23 and 66 too might not be reversed.

#### *Article 94*

28. Please refer to the comments on article 25 (see section (b), para. 17).

The analogy drawn by the Commission with the special missions has already been disputed in paragraph 27 above.

#### *Articles 98, 99 and 100*

29. In accordance with the views expressed in paragraph 26 above, the Netherlands Government prefers provisions limiting the immunity to acts carried out during the performance of the duties of the delegation. With reference to draft article 100, this implies the rejection of alternative A.

30. With reference to article 100, the Netherlands Government offers for consideration a supplementary provision permitting the host State to require that the representatives and members of delegations be covered by third-party insurance according to the laws of the host State, such insurance to include accidents occurring whilst on their official business. This is especially important in the case of those States where legal responsibility for damages depends on the establishment of guilt under criminal law.

31. A provision on the settlement of civil claims, such as the Commission envisages in paragraph 4 of its commentary on article 100, should be included.

#### *Article 107*

32. Please refer to the comments contained in paragraph 11 above in relation to article 59.

#### *Article 108*

33. Please refer to the Netherlands' comments on article 42 (see section (b), para. 26).

34. The Netherlands Government supports the notion, expressed by the Commission in paragraph 3 of its commentary, that a "reasonable time-limit" should be set in paragraph 1 on the enjoyment of the privileges and immunities. It is proposed that this should be one week before the date set for the commencement of the meeting.

#### *Article 110*

35. There is room for uncertainty about the meaning of the term "third State" in the relationship between a sending State on the one hand and an international organization on the other hand. Assuming that "third State" means any State which is neither the sending State, nor the State in which the organization has its headquarters, nor the State in which the organ is assembling or the conference is convened, the question still arises whether the provision under review also considers as "third States" States which are not members of the organization concerned. A State which becomes a party to the convention under review will not necessarily be a member of all the international organizations covered by the convention and may even be strongly opposed to some of the organizations. Would such a State nevertheless have to grant all the facilities mentioned in article 110?

36. The concluding words of paragraph 4—"and has raised no objection to it"—completely undermine the provisions contained in paragraphs 1, 2 and 3. The Netherlands Government is of the opinion that the third State ought not, in principle, to object to transit on subjective grounds. The reasons for refusing transit should be such as can be tested against an objective criterion, and this should be laid down in the article under review. If no objective criterion can be formulated for refusing transit, there seems to be little point in retaining the article.

#### *Article 111*

37. Please refer to the Netherlands comments on article 44 (see section (b), para. 27) and article 75 (paras. 19 and 20) above.

*Article 112*

38. With reference to paragraph 2, the same remark is applicable as that made above by the Netherlands Government with reference to article 45, paragraph 2 (see section (b), para. 28).

For paragraph 3, please refer to the observations made on article 45, paragraph 3 (see section (b), para. 29).

*Article 115*

39. It is mentioned in the commentary that the Commission wishes to make further investigations to determine whether there is need for a provision governing the obligation of the host State to allow members of a delegation to enter the country. It would seem that this obligation already follows from articles 22 and 92, so that there is no need for a separate provision.

**New Zealand**

## PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 20 JANUARY 1971 FROM THE PERMANENT MISSION TO THE UNITED NATIONS

[Original text: English]

The Government of New Zealand wishes to reiterate the views expressed by its representative in the Sixth Committee on 8 October 1970<sup>1</sup> on *article 83* of the International Law Commission's draft articles on representatives of States to international organizations.

Article 83 lays down a general rule that a delegation to an organ or conference may represent only one State. This article has to be read subject to articles 3, 4, 5, 79 and 80, which collectively ensure that the general rule it lays down does not in any way affect the relevant existing rules of international organizations or conferences nor preclude international organizations or conferences from adopting a different rule in the future. The rule in article 83 is therefore of a residual character only. The Government of New Zealand is nevertheless of the view that the rule is unnecessary and undesirable. It would prefer that the question of whether a delegation to an organ or conference should be permitted to represent more than one State should be left to be decided specifically by that organ or conference.

The Government of New Zealand has a particular interest in this question because under article V (b) of the Treaty of Friendship between New Zealand and Western Samoa concluded in 1962<sup>2</sup> it is provided that, when requested, and where permissible and appropriate the Government of New Zealand will represent the Government of Western Samoa at any international conference at which Western Samoa is entitled to be represented. In pursuance of this provision New Zealand has over the past eight years represented the Government of Western Samoa at its request on a number of occasions. In addition to this formalized arrangement which gives New Zealand a special interest in this question of dual representation, the Government of New Zealand is concerned that a number of other small States and territories in the South-West Pacific might well wish, for financial reasons, to have single delegations representing more than one State at a particular conference or conferences of interest to them. It would be unfortunate, therefore, in New Zealand's view if, as a result of the inclusion of article 83, the principle of single representation were to govern all situations where rules of procedure of the organ or conference do not provide otherwise. The Government of New Zealand would prefer that the Commission included no rule on this matter in its final text.

<sup>1</sup> *Official Records of the General Assembly, Twenty-fifth Session, Sixth Committee, 1193rd meeting.*

<sup>2</sup> United Nations, *Treaty Series*, vol. 453, p. 3.

The Government of New Zealand has consulted on this question with the Government of Western Samoa which has requested that the International Law Commission be informed that it wishes to be associated with the observations of the Government of New Zealand on this article.

**Pakistan**

## PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 15 JANUARY 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

The Government of Pakistan is pleased to note the progress achieved by the International Law Commission in the formulation of draft articles on representatives of States to international organizations. In general, the practical approach which has been adopted seems to be adequate to present needs. Particular satisfaction is felt at the consideration given by the International Law Commission on the legal status, privileges and immunities of permanent observers of non-member States to international organizations. It is noted that the progress on the subject is the consequence of the conscientious preparatory work which has been undertaken by the present Special Rapporteur on the topic and the Government of Pakistan is happy to express its appreciation of his work.

The following specific observations are put forward:

1. The Government of Pakistan feels that it is necessary to provide a legal basis for permanent observer missions hitherto regulated by practice. The questions dealt with in this set of draft articles are of particular interest to newly independent States which still lack an extensive network of embassies.
2. The Government of Pakistan is of the opinion that permanent observers, being representatives of non-member States, do not perform functions identical with those of permanent missions of member States. They do not perform as a general rule and on a standing basis the functions of permanent missions. In view of this, the Government of Pakistan endorses the approach taken by the Special Rapporteur that permanent observers may simply address a letter to the Secretary-General in conformity with the current United Nations practice instead of presenting credentials.
3. The Government of Pakistan is of the opinion that draft *article 56* correctly recognizes the right of the sending State to choose the members of its permanent observer mission from among nationals of third States possessing the required training and experience. The highly technical character of some international organizations makes it desirable not to restrict unduly the freedom of choice of States, especially in the case of developing countries.
4. The Government of Pakistan fears that the provision in draft *article 63*, paragraph 2, under which the sending State may not establish offices of the permanent observer mission in the territory of a State other than the host State, may cause hardship to newly independent States.
5. The Government of Pakistan is of the opinion that the International Law Commission rightly recognized the correct position in draft *article 83*. This article is based on the general practice at conferences convened under the auspices of the United Nations.
6. The Government of Pakistan would like to point out that it attaches great importance to the inviolability of the premises where a delegation to an organ or to a conference is established. It expresses its concern in respect of the last sentence of paragraph 1 of draft *article 94* where it is provided that in case of fire or other disaster, the agent of the host State may enter the said premises. The Government believes that the inviolability should be strictly maintained and no relaxation should be allowed without express consent.

7. The Government of Pakistan is in favour of alternative B of draft *article 100* which deals with immunity from jurisdiction.

### Poland

#### PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS TRANSMITTED BY "NOTE VERBALE" DATED 9 JANUARY 1971 FROM THE PERMANENT MISSION TO THE UNITED NATIONS

[Original text: English]

The Government of the Polish People's Republic welcomes with satisfaction the progress made by the International Law Commission in the elaboration of the draft articles on relations between States and international organizations. The codification of this branch of international law will certainly contribute to the creation of better conditions for the fulfilment by the representatives of States of their functions related to the activities of international organizations and thus it will contribute to the attainment of goals of the organizations concerned.

Part III of the draft pertaining to permanent observer missions to international organizations is of considerable importance. The unification of practice existing in this field and the foundation of such practice on a solid legal basis can and should solve the difficulties existing in this respect and make possible the extension of the scope of co-operation through international organizations.

All States should be enabled, if they wish to do so, to co-operate with the universal international organizations, and in particular with the United Nations. This will be of benefit both to the States concerned and to the organizations themselves. It is worth mentioning that numerous provisions of the Charter of the United Nations, as well as many resolutions of the United Nations organs are addressed to States in general, and not only to Member States. The attainment of the purposes of the United Nations requires, therefore, that all States willing to co-operate with the Organization should be permitted to contribute to the efforts undertaken by the United Nations. Unjustified and inadmissible is the practice under which only certain States have been allowed to establish permanent observer missions to the United Nations, while some other States, which are able and willing to co-operate with the United Nations (e.g. the German Democratic Republic) are prevented from establishing such missions.

The principle expressed in *article 52* of the draft, according to which any non-member State may establish a permanent observer mission to an international organization of universal character, should be applied equally to all non-member States. It should be made absolutely clear that the rules or practice applied in an organization cannot lead to any discrimination whatsoever in the treatment of individual States. Such a discrimination would be incompatible with the principle of sovereign equality of States and the principle contained in *article 75* of the draft.

It is to be hoped that the articles on permanent observer missions will serve in the future as a solid ground for the establishment of permanent observer missions to the United Nations and, as appropriate, to other international organizations of universal character by those States which are not willing, because of the scarcity of their human or material resources, to assume the burden of responsibilities arising out of a full membership. Permanent observer missions would enable those States to benefit from co-operation with the universal international organizations and to contribute to the attainment of the aims of those organizations.

As to part IV of the draft articles concerning delegations of States to organs and to conferences, the Government of the Polish People's Republic is of the opinion that the codification of these matters should primarily aim at systematizing the existing rules and filling the existing gaps. The Government of the Polish People's Republic

will support such solutions as will afford delegates of States to organs and to conferences the best possible conditions necessary for the performance of their functions.

### Spain

OBSERVATIONS COMMUNICATED BY LETTER DATED 23 JUNE 1971 FROM THE PERMANENT MISSION TO THE UNITED NATIONS

[Original text: Spanish]

#### General observations

(a) The draft articles set out to regulate the relations between States and international organizations in their entirety: that is to say, not only the relations arising between the States members of the organization and the organization itself, but also the relations arising, though not always in a direct form, between those States and the organization's host State.

From this point of view it is doubtful whether the draft articles, in their present form, afford an adequate guarantee of the interests at stake in the diplomacy carried on in international organizations. That is the position if we bear in mind the characteristics which distinguish this form of diplomacy from traditional bilateral diplomacy.

The law which regulates bilateral diplomatic relations seeks to protect the two mutually complementary interests at stake: the sending State's interest in the unfettered performance of a series of functions in relation to the receiving State, and the receiving State's interest that there should be no abuse or over-stepping of authority in the performance of those functions in relation to itself.

With these two complementary aims in view, international law has prescribed a set of advantages which the receiving State grant to the sending State and a set of safeguards against any abuse is the performance of functions. These safeguards are applied by then receiving State directly and immediately in relation to and against the sending State; they are the declaration of *persona non grata*, refusal to permit the performance of functions not sanctioned by general international law, and reciprocity.

In contrast, the diplomacy carried on in international organizations involves a number of interests which are neither complementary nor related to one another. On one side is the sending State's interest in freely performing a series of functions within the organization together with its member States. The free performance of those functions has to be guaranteed by the host State, although the functions are not performed in relation to it and it may not maintain bilateral relations with the sending State, or even recognize the latter as a State or acknowledge its Government. The safeguards which are available to the sending State and to the host State are not of direct or immediate application.

In the draft articles under discussion, the guarantees which exist in bilateral diplomacy by virtue of its very nature have not been included because they are inoperative. The guarantees laid down in articles 44, 45 and 50 seem on the whole to have less force than can be ascribed to those embodied in the international law of traditional diplomacy.

(b) The approach made in the draft articles—that of following the 1961 Vienna Convention on Diplomatic Relations as closely as possible in defining the advantages of permanent missions and their members—is an acceptable one. In principle, agents who perform a diplomatic function permanently should not differ substantially in status according to whether they perform that function in bilateral diplomacy or in an international organization.

It is therefore considered that the draft articles should indeed keep as closely as possible to the 1961 Vienna Convention in enumerating the diplomatic advantages of missions and their members.

There is no doubt that the 1961 Convention has already begun to show its flaws and omissions. However, no attempt should be made in the draft articles to remedy those defects unless they are fundamental and obvious; in this way it will be possible to avoid creating any basic difference between the status conferred on permanent missions and that of traditional diplomatic missions.

Any differences that may appear in the draft articles in the matter of advantages should be dictated solely by the *sui generis* position of the host State in granting those advantages—a position which is radically different from that of the receiving State in bilateral diplomacy.

### *Specific observations*

#### *Article 1*

It is assumed that the words "For the purposes of the present articles" will be amended to read "For the purposes of the present Convention" if the Commission's draft articles take shape as a convention. That was the case with the 1961 Vienna Convention on Diplomatic Relations and the 1969 Convention on Special Missions.

#### *Subparagraph (a)*

Since the draft is intended for a convention on representatives of States to international organizations, a more precise definition of the term "international organization" would be desirable. Merely to define it as an "intergovernmental organization" may have been adequate in the context of the 1969 Vienna Convention on the Law of Treaties, whose scope excludes treaties concluded with international organizations, but it is insufficient in the present draft. For this purpose the definition proposed by the Special Rapporteur in his third report—"an association of States established by treaty, possessing a constitution and common organs, and having a legal personality distinct from that of the member States"<sup>1</sup>—seems more satisfactory, possibly with the words "a legal personality" expanded to read "an international legal personality".

#### *Subparagraph (b)*

The definition of an "international organization of universal character" which is given raises a series of difficult political problems. If the draft articles did not deal with the legal status of international organizations, those problems could be avoided or minimized; if, on the other hand, the articles were made into a comprehensive instrument which dealt with that subject along with the rest, the political problems involved might become acute, making this subparagraph one of those most likely to complicate the progress of discussion on the draft. In addition the question arises whether it is really sound to confine the scope of the convention to international organizations of universal character.

#### *Subparagraph (d)*

It is a generally accepted principle that the word defined should not appear in the definition. A more satisfactory definition should therefore be sought.

#### *Subparagraph (h)*

The wording of this subparagraph exhibits a defect which was present in the 1961 Vienna Convention, but which is more serious in the present draft articles: namely, the lack of a definition of "diplomatic status".

In bilateral diplomacy, the international legal status of diplomat is acquired as a result of two wills: the will of the sending State that a person shall have that status, and the will of the receiving

State to accept the person in that status. It is the meeting of these two wills which determines the attribution of the international status of diplomat to a particular person.

In the diplomacy carried on in international organizations, on the other hand, the international legal status of diplomat is acquired solely through the will of the sending State to attribute that status to the person concerned. In diplomatic practice, the organization does not make any expression of will to accept that status; consequently the status is not the result of a meeting of wills but the consequence of a single will.

The use in the 1961 Convention and in the draft articles of the same wording<sup>2</sup> to indicate those persons who acquire diplomatic status may give the impression that the diplomatic status is the same in both cases. It would therefore be useful to insert some indication of the particular nature of the acquisition of diplomatic status by the persons to whom the draft articles are to apply.

Such an explanation of what is meant by the word "diplomatic" is more of a necessity in the draft articles than in the 1961 Convention; that Convention did no more than codify the practice of centuries, whereas the draft articles in preparation will of necessity break new ground in many of their provisions.

Furthermore it would be desirable to include the head of the permanent mission among the members of the diplomatic staff, as was done in the 1961 Convention. This would make it possible to simplify considerably the wording of the articles concerning privileges and immunities, which apply equally to the permanent representative and to the other members of the diplomatic staff of the mission. The subparagraph would then read as follows:

"The 'members of the diplomatic staff' are the permanent representative and the members of the staff of the permanent mission, including experts and advisers, who have diplomatic status."

#### *Subparagraph (j)*

No reason is given for the change in the wording of this subparagraph from that of the corresponding provision of the 1961 Convention. Although the present text is consistent with that of the Convention on Special Missions, the definition given in the Convention on Diplomatic Relations seems more appropriate.

### *Article 2*

The wording of paragraph 2 is somewhat inapt; either a simpler and more intelligible text should be found, or the paragraph should be deleted as redundant. Non-universal organizations can make use of the provisions of the Convention without it being necessary to say as much in the text. In a sense this paragraph tacitly acknowledges that it may have been a mistake to exclude non-universal international organizations from the scope of the draft articles.

### *Article 5*

After perusal of this article it is not clear what purpose the draft is intended to serve. Under this article it would be possible to conclude a treaty laying down less favourable provisions than those of the draft articles. This implies the admission that the provisions of the draft may not be strictly necessary for the satisfactory conduct of relations between States and international organizations: in other words, that those provisions are not dictated by functional requirements as in the case of the existing conventions on diplomatic matters. It would therefore seem more appropriate to word the article along the lines of article 73, paragraph 2, of the 1963 Vienna Convention on Consular Relations.

<sup>2</sup> n.b. the expression "diplomatic rank" in article 1, subparagraph (d), of the 1961 Vienna Convention on Diplomatic Relations and the expression "diplomatic status" in article 1, subparagraph (h), of the draft articles on representatives of States to international organizations are alike rendered by "la calidad de diplomático" in the Spanish text.

<sup>1</sup> Yearbook of the International Law Commission, 1968, vol. II, p. 124, document A/CN.4/203 and Add.1-5, chap. II, article 1 (a).



### Article 6

The inference from the present wording of this article is that the establishment of permanent missions is a discretionary right of the States members of the organization which could be exercised even against the organization's express wishes. Moreover the reference to article 7, which contains a non-exhaustive list of the functions of a permanent mission ("consist *inter alia* in . . ."), might imply that the permanent mission could perform no functions other than those enumerated in that list.

It would therefore seem more appropriate to use a form of words on the following lines:

"To the extent prescribed by the relevant rules or the practice of the Organization, member States may establish permanent missions to the Organization for the performance of their functions."

### Article 7

This article represents perhaps the fundamental point of the draft articles, for it must be remembered that all diplomatic law centres on the performance of a function. Its wording probably presents greater difficulties than did that of the corresponding article of the 1961 Vienna Convention. Whereas for the latter the International Law Commission was able to draw on an ample supply of learned commentaries and the diplomatic practice of centuries, both of these are lacking in the case of diplomatic functions performed in international organizations.

#### Subparagraph (a)

There is a contradiction between the wording of this subparagraph ("Representing the sending State *in* the Organization") and the definition of a permanent mission given in article 1, subparagraph (d) ("a mission of representative and permanent character sent by a State member of an international organization *to* the Organization"). It would seem more correct to use the preposition "to", as more in keeping with the notion of the international legal personality of international organizations (with its concomitant right to send and receive legations) and with the terminology of the draft articles.

#### Subparagraph (b)

The function of liaison referred to in this subparagraph is not a separate function in itself. Liaison activities are merely a consequence of the function of representation. The subparagraph should therefore be deleted.

#### Subparagraph (c)

In order to maintain consistency with the corresponding provision of the 1961 Vienna Convention, the word "Negotiating" should be used instead of the words "Carrying on negotiations".

#### Subparagraph (d)

"Ascertaining activities" is not, strictly speaking, a function but a means of duly performing the function of reporting, since it would clearly be difficult to make a report without ascertaining the facts. This inaccuracy, which originates from the Convention on Diplomatic Relations and reappeared in the Convention on Consular Relations, may be difficult to correct.

Furthermore the permanent mission also has certain reporting duties to the organization in connexion with the latter's aims and programmes.

#### Subparagraph (e)

The inclusion in the 1961 Vienna Convention of a function of promoting international co-operation does not seem sound, for no such diplomatic function exists. What does exist in the present state of organization of the international community is the principle that it is necessary to co-operate in promoting international peace, a principle which should inspire the performance of diplomatic

functions in both bilateral and multilateral relations. Thus the existence of a function of promoting co-operation, as specified in this subparagraph, is open to question. It is more a matter of a principle which should guide the performance of the diplomatic functions of a State in an international organization.

On the other hand there does appear to be one separate function which is not mentioned in the draft article. This consists in the performance of particular activities in pursuit of the aims of the organization: in other words, the functions which are performed by the members of a permanent mission as members of committees or other organs of the organization, and which are not a direct expression of the interests of the State that those persons represent. Thus there seems to be a function of realizing the aims and purposes of the Organization. The International Law Commission should consider how best to describe the activities mentioned.

Lastly, there seems to be no justification for departing from the list given in article 3 of the 1961 Vienna Convention by excluding all reference to the function of protection. Admittedly the function of diplomatic protection, in the strict technical sense of procedural action governed by international law to protect the interest of the State or of its nationals, is not fully operative in international organizations. However, although—as the International Court of Justice has acknowledged—an international organization may, as a subject of international law, perform a protective function and claim that a State is internationally liable for damage caused to the organization's officials, the organization itself may also cause damage to States or private individuals and be the defendant in an international claim. Accordingly a permanent mission can and should also perform a function of protection against the organization in respect of any damage which the organization may cause to the sending State or to its nationals. The International Law Commission should give its attention to this point as well.

### Article 9

Paragraphs 1 and 2 might be combined into a single paragraph reading: "A member of the permanent mission of a State may . . .", since, under the definition given in article 1, subparagraph (f), the "members of the permanent mission" include the permanent representative.

Moreover this article does not correspond fully to article 5, paragraph 3, of the 1961 Vienna Convention; the latter requires that the person with double accreditation should be a member of the diplomatic staff, whereas under the draft articles a member of the administrative and technical staff or even of the service staff [see the definition given in article 1, subparagraph (g)] may be doubly accredited. In order to preserve the parallelism between the provisions of the two Conventions, it might perhaps be appropriate to amend the words "A member of the staff of a permanent mission" to read "A member of the diplomatic staff of a permanent mission". In this case too, the paragraphs 1 and 2 of the present article could be combined into a single paragraph provided that the definition proposed for article 1, subparagraph (h), was accepted. The paragraph would then begin as follows: "A member of the diplomatic staff of a permanent mission of a State may . . .".

### Article 12

The decision who is to issue the credentials of the permanent representative of a State lies within the competence of that State; the present text could be taken as interference in its domestic affairs, particularly since there are no similar provisions in the 1961 Vienna Convention.

It would therefore seem more appropriate to word the article as follows:

"The credentials of the permanent representative shall be issued in accordance with the internal rules of each State and the practice of the Organization and shall be transmitted to the competent organ of the Organization."

Furthermore the question may be asked whether the credentials should not be "submitted" instead of being "transmitted".

#### Article 13

As indicated in paragraph 7 of the International Law Commission's commentary, there is room for doubt as to the interpretation which might be placed upon the present wording of the article with regard to its scope. The wording given in that paragraph seems clearer and sounder. In any case the terminology should be made consistent, since the title speaks of "accreditation to" and the text speaks of *representation in*.

#### Article 14

It is open to question whether this article is really necessary and whether it would not be better to leave it for inclusion in the draft convention on treaties with international organizations.

#### Article 16

It would be desirable to establish some kind of safeguard, however limited, for the host State in the event of non-compliance by the sending State with the provisions of this article. In this connexion, attention is drawn to the opinion expressed in paragraph 8 of the commentary. In any event it is doubtful whether the system of consultations provided for in article 50 is in itself a sufficient guarantee.

#### Article 19

In establishing an order of precedence, the article speaks only of permanent representatives and does not mention *chargés d'affaires*. For the latter, either of the following two rules might be adopted: that they should take the position which falls to the permanent representative whom they are replacing, or that they should be placed after permanent representatives. The second alternative seems the more appropriate. It might be desirable to deal with this point in the article, although there is no parallel rule in the 1961 Vienna Convention.

#### Article 23

In the first line of paragraph 1, the word "either" should be deleted.

#### Article 25

Paragraph 5 of the commentary undoubtedly makes some valid points.

The third sentence in paragraph 1 of the article does not appear in the corresponding article of the 1961 Vienna Convention, although it does in the 1969 Convention on Special Missions.

The omission of that sentence from the 1961 Vienna Convention—which has been criticized by a considerable body of juristic opinion—means that there would be an important difference between bilateral diplomacy and diplomacy in international organizations. This difference would give rise to difficult problems where the premises of the permanent mission were located within the premises of a diplomatic mission.

In any case, the words "or, in his absence, of another member of the diplomatic staff of the permanent mission" should be added at the end of paragraph 1.

#### Article 26

Paragraph 3 of the commentary states an undoubted fact. However, any attempt to correct the inequality in question would create a fundamental difference between the 1961 Vienna Convention and the draft articles. At all events, if the Commission does manage to incorporate in the article the element of progressive

development referred to in the commentary and in due course the text is approved, it would be desirable to add a parallel rule to the 1961 Convention.

#### Article 28

The phrase which has been added to the wording taken from the 1961 Vienna Convention should be retained for the reasons given in paragraph 2 of the commentary.

#### Article 29

Those phrases of this article which, as pointed out in paragraph 4 of the commentary, have been added to the wording taken from the corresponding article of the 1961 Convention should be deleted. In point of fact the additions are unnecessary, since the expression "diplomatic mission" can have a general meaning in addition to the specific meaning it has in the context of traditional bilateral diplomacy. The added words introduce an unwarranted difference between the draft articles and the 1961 Vienna Convention. Furthermore, if the text of article 27, paragraph 1, of the 1961 Convention is to be followed verbatim, there is no clear reason for replacing the word *radiquen* by the words *se encuentran* in the Spanish text.

Again it is not clear why the expression "diplomatic bag" should not be used when in fact the bag has diplomatic status. The confusion referred to in paragraph 6 of the commentary could be avoided by speaking of the "diplomatic bag of the permanent mission". Moreover it should be remembered that article 1 does not hesitate to describe persons who have diplomatic status as "members of the diplomatic staff", in the same terms as are used in the 1961 Convention, even though they differ from the diplomatic agents of traditional missions.

The same may be said of the deletion of the adjective "diplomatic" to describe couriers.

#### Article 30 et seq.

If the proposed definition of "members of the diplomatic staff" as including the permanent representative is accepted, the formulation of these articles can be simplified.

#### Article 32

Paragraph 1, subparagraph (d), of this article does not appear in the corresponding article of the 1961 Vienna Convention. In the general terms in which it is expressed, it embodies an extremely dangerous principle. An exception to immunity for traffic accidents should be allowed solely where a diplomat who is under a duty to be covered by adequate insurance is not so covered through his own fault or negligence. Where this is not the case the immunity should be maintained, particularly if approval is given to article 34 of the draft, which prescribes a waiver of immunity in certain circumstances.

To make an exception to immunity in the case mentioned means laying down a principle which could be dangerous. An accident can easily be engineered or even simulated, particularly where, as in the subparagraph in question, the damage referred to is not confined to personal injury but also includes material damage. This could be an easy means of attacking the independence and inviolability of the diplomat through civil claims for damages for which there might be no basis in reality. This is a matter to which the International Law Commission should give more attention, considering that various countries are gradually increasing the penalties for causing traffic accidents.

#### Article 34

Neither the 1961 Vienna Convention nor the 1969 Convention on Special Missions contains a rule similar to the one laid down in this article. Such a rule was expressly excluded from both Conventions, having met with strong opposition from various States. Although the opposition probably still exists, there seem to be stronger reasons

why the rule laid down in this article should be included in the present draft; a particular reason is the special situation of the host State. Article 34 could be an important guarantee and safeguard for the host State in its peculiar situation in relation to States members of the organization.

#### Article 35

Paragraph 3 of the commentary appears to refer only to paragraph 5 of the article. If so, consideration might be given to the deletion of paragraph 5. A case could nevertheless be made for keeping that paragraph in the interests of closer consistency with the 1961 Convention.

#### Article 38

If this article is intended to reproduce article 36 of the 1961 Convention verbatim, there seems to be no reason to alter the Spanish text of paragraph 1 by replacing the word *de* by the words *por lo que respecta a*.

#### Article 43

In view of paragraph 4 of the commentary, it seems advisable to leave the wording of the article as it now stands in the draft.

#### Article 44

The use of the phrase "of the present articles" might suggest that the article refers solely to section 2 of the draft. Consequently, if the draft articles become a convention, this phrase will have to be amended to read "of the present Convention". The statements made in paragraphs 6 and 7 of the commentary do not suffice to dispel the ambiguity.

#### Article 45

Paragraph 2 of this article is not carried to its logical conclusion, since no provision is made for action by the host State in the event that the sending State refuses to waive the immunity of or to recall the official who has gravely violated the criminal law of the host State. The consultation procedure laid down in article 50 may not be sufficient.

#### Article 47

This article does not seem very aptly worded in that it lumps together the end of the functions of the diplomatic staff of a permanent mission with the final or temporary end of the mission's own existence. No such confusion arises in article 43 of the 1961 Convention.

#### Article 48

The introduction of the phrase "in case of emergency", which does not appear in article 44 of the 1961 Convention, would seem to be justified but there seems to be less justification for the requirement of a prior request, which could give rise to prevarication or excuses. The host State should always be prepared to grant facilities to members of permanent missions, whether requested to do so or not.

#### Article 50

The International Law Commission should carefully consider whether the consultations provided for in this article afford a proper safeguard for the interests of the sending States and of the host State respectively: that is to say, the interest of the sending States that the permanent missions should be able to perform their functions with sufficient independence and freedom, and the interest of the host State that there should be no abuses either in the performance of those functions or in the enjoyment of diplomatic privileges.

### Sweden

#### (a) PART I AND SECTION 1 OF PART II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 1 SEPTEMBER 1969  
FROM THE ROYAL MINISTRY OF FOREIGN AFFAIRS

[Original text: English]

#### General remarks

1. In view of the diversity of the purposes and functions of international organizations, the Swedish Government considers that a code intended to serve as a standard and a model for future international agreements would be more appropriate than a convention for the purpose of laying down general rules concerning the establishment and status of permanent missions to such organizations. In all likelihood, specific agreements will continue to be needed on the matters dealt with in the draft articles. Given the form of code, the articles would be useful by providing a basis for such agreements. On the other hand, general rules adopted in the form of a convention, even though they would be of a residuary character as provided in articles 3-5, would probably make special arrangements more difficult to achieve in practice, once these rules have been generally accepted and become binding on the States.

2. The establishment of permanent missions by members of an international organization is, in principle, a matter for arrangement between the organization concerned, or its members, and the host State. Only on the basis of a special agreement between these parties can a State member of an organization claim a right to establish a permanent mission to the organization. Article 6, which provides that "member States may establish permanent missions to the Organization . . .", is, of course, quite in order if the ultimate form of the draft articles is to be a code, but does not seem acceptable as a general provision to be included in a convention which would apply to any organization falling within the definitions in article 1, subject only to the reservations contained in articles 3-5.

3. With regard to the privileges and immunities of permanent representatives of States to international organizations, a large measure of uniformity has already been achieved in practice, since such representatives have generally been accorded the same treatment as diplomatic agents in the host State, in most cases by headquarters agreements or other special arrangements. Without wishing to propose any change in the present status of permanent representatives, the Swedish Government is of the opinion that it is not axiomatic that full diplomatic privileges and immunities should be granted in every future case. It should be regarded as the maximum that can be asked for, rather than as the standard required. In its view, the general rules to be adopted in this field could be limited to granting mainly functional immunities, leaving it to the member States and the host State of any international organization to extend full diplomatic immunities to permanent missions by special agreement, if they choose to do so.

4. The following observations are submitted on individual draft articles, viewed as being intended for a code and not a convention.

#### Observations on particular articles

##### Article 1

The purpose and meaning of the expression "representative . . . character" as used in the definition of a "permanent mission" in article 1 (d) are not clear. If it is intended that some categories of missions should be excluded from the application of the provisions of the draft articles on the ground that they are not "representative", it would be necessary to indicate in what manner or on the basis of what criteria the representative character of a permanent mission is to be determined. If, on the other hand, this expression simply means

that a permanent mission should represent the sending State, this could of course be stated in more direct terms, and it is in fact clearly stated in article 7.

Although the status of a permanent mission representing the host State in an international organization may, in some respects, be different from that of other permanent missions, it is nevertheless believed that such a mission should be included in the term "permanent mission" as used in the draft articles. Since the expression "sent . . . to the Organization" in article 1 (*d*) would not be adequate as regards the permanent mission of the host State in cases where the organization in question has its seat in the capital of that State, it is suggested that those words should be replaced by "representing in the organization".

The definition in article 1 (*h*) of the term "members of the diplomatic staff" should be more precise. As appears from paragraph 6 of the commentary, this term is intended to include not only staff members having diplomatic titles but also experts and advisers assimilated to them. However, the definition lays down as a condition for such assimilation that the persons concerned should have "diplomatic status". It is believed that this condition, the meaning of which is not clear, can be dispensed with, and that article 1 (*h*) might be changed to read:

"(*h*) The 'members of the diplomatic staff' are the members of the staff of the permanent mission having diplomatic rank or serving as experts or advisers."

#### Article 9

The functions specifically mentioned in article 9—diplomatic and consular functions and special missions to a State—should presumably be regarded as examples rather than as an exhaustive enumeration of the functions which may be performed by a permanent representative and any other member of a permanent mission outside the field of his activities in that capacity. It can hardly be intended, for instance, that a permanent representative should be prevented from acting either as head of a permanent mission to an international organization of which the sending State is not a member [this case does not seem to be covered by article 8, since such a mission does not fall within the definition of a permanent mission in article 1 (*d*)] or as a delegate to an international conference (this case is presumably not covered by the expression "special mission of that State to the host State or to another State" in paragraph 1 of article 9).

It would seem, however, that article 9 should preferably deal only with the performance of diplomatic and consular functions, leaving out all questions regarding temporary assignments to other functions, such as special missions. If the scope of the article is thus limited, there would be less reason for uncertainty as to the purpose and indirect implications of the article. It is accordingly proposed that the words "or special" should be deleted after "member of a diplomatic" in paragraphs 1 and 2 of the article and that the title of the article should be changed to read: "Performance of diplomatic and consular functions by a member of a permanent mission".

#### Article 14

There is no objection to the principle underlying article 14 that permanent representatives should be regarded as being invested with powers similar to those of heads of diplomatic missions as regards the negotiation or conclusion of treaties.

The first paragraph of the article contains provisions similar to those of article 7, paragraph 2 (*b*), of the Vienna Convention on the Law of Treaties. However, the expression "adopting the text of a treaty" is not ordinarily used in connexion with bilateral treaties, and in the absence of any definition in the present draft articles, may lend itself to an interpretation different from that intended in the Vienna Convention. To avoid any misunderstandings it would seem that the word "negotiating" should be substituted for the words "adopting the text" in paragraph 1 of article 14.

Because of the differing opinions on the nature of agreements between international organizations and member States and on the legal personality of international organizations, it is suggested that the word "treaty" in article 14 should be replaced by the more neutral expression "agreement".

The Swedish Government is not convinced of the wisdom of the formula adopted in article 7 paragraph 1 (*b*) of the Vienna Convention on the Law of Treaties, and it has similar views on the clause "unless it appears from the circumstances that the intention of the Parties was to dispense with full powers" in paragraph 2 of article 14. It would be in favour of deleting this clause.

#### Article 18

It is suggested that the temporary head of a permanent mission should ordinarily be designated as "acting permanent representative" rather than as "chargé d'affaires *ad interim*" and that the text and title of article 18 should be changed accordingly. It seems desirable that the latter designation should, as a rule, be reserved for the temporary head of a diplomatic mission, and not be unnecessarily extended to other missions.

#### (b) SECTION 2 OF PART II OF THE PROVISIONAL DRAFT

PRELIMINARY OBSERVATIONS COMMUNICATED BY LETTER DATED 17 DECEMBER 1970 FROM THE ACTING HEAD OF THE LEGAL DEPARTMENT OF THE ROYAL MINISTRY FOR FOREIGN AFFAIRS

[Original text: English]

#### Article 22

Some of the draft articles purport to impose obligations on the organization concerned. In paragraph 2 of the commentary to article 22, the question is raised whether it is desirable that the obligations of international organizations should be stated in the draft articles. The question apparently needs further consideration. According to article 3,

"the application of the present articles is without prejudice to any relevant rules of the Organization".

Paragraph 5 of the commentary to article 3 states that

"the expression 'relevant rules [. . .]' is broad enough to include all relevant rules whatever their source: constituent instruments, resolutions of the organization concerned or the practice prevailing in that organization".

In such circumstances it becomes somewhat questionable to speak of "obligations". It seems that they could be invalidated simply by unilateral action—resolutions, practice—taken by the organization.

#### Article 26

In paragraph 3 of the commentary to this article attention is drawn to

"the inequality resulting from the provisions of paragraph 2 as between a State that was able to buy property to house its mission, or the mission staff, and a State which found itself obliged to lease premises for the same purpose".

The Commission would like to receive the views of Governments on the matter.

Paragraph 2 of this article provides that exemption from taxation in respect of mission premises does not apply to dues and taxes payable by persons contracting with the sending State. The inequality mentioned would, therefore, seem to be that premises owned by the sending State are not subject to taxation, while rented premises may be subject to taxes which are in law payable by the private owner but which in fact are charged to the sending State by being included in the rent.

In the case of a special tax on rents it would probably be rather simple technically to exempt from such a tax rents paid for mission

premises. Exemption from property tax based on a periodical evaluation of the property would be a more complicated matter, in particular if the mission premises are only part of the property. With respect to income taxes, it would hardly seem desirable to allow the owner to deduct from his income rent paid for mission premises. It may be doubted that the inequality referred to is grave enough to justify imposing on the receiving States tax exemptions which may cause both technical and political difficulties. Moreover, it is far from certain that the sending State and not the owner would in fact be the beneficiary of such exemptions.

#### Article 32

In paragraph 4 of the commentary, the views of Government are requested on paragraph 1 (*d*) which is placed within brackets because agreement on this provision could not be reached by the Commission.

Paragraph 1 (*d*) provides, in its context, that the immunity from civil and administrative jurisdiction does not cover "An action for damages arising out of an accident caused by a vehicle used outside the official functions of the person in question".

The Swedish Government is in favour of a provision along these lines. There is undoubtedly a growing tendency, based on public opinion, to limit the immunity in the case of traffic accidents, a tendency which has found expression *inter alia* in the report of the Council of Europe on the privileges and immunities of international organizations.<sup>1</sup> It is true that a corresponding provision was not included in the 1961 Vienna Convention on Diplomatic Relations, but this can hardly be a decisive argument. The Convention and the draft articles are not quite comparable in this respect. The Convention deals with immunities accorded by a receiving State, the draft articles with immunities accorded by a host State, and the problems caused by immunities may well be much greater in the latter than in the former State. Furthermore, as pointed out, opinions have developed since 1961 in the direction of restricting immunity from jurisdiction, particularly in traffic cases. In the words of paragraph 3 of the Commission's commentary on article 26 "an element of progressive development" should also, according to the Swedish view, be incorporated in article 32.

#### Article 35

The Commission states in paragraph 3 of its commentary that it "intends to consider, in the light of the comments to be received from Governments, whether paragraph 5 is necessary in view of the provisions of articles 4 and 5 of the present draft".

Since the general provisions in articles 4 and 5 apparently cover the special provision in paragraph 5 of article 35, that paragraph could accordingly be omitted.

#### Article 36

The Commission wishes to learn whether Governments have met practical difficulties in applying paragraph (*f*) because "it states an exception to a rule which is itself an exception" (paragraph 5 of the commentary).

The Swedish Government is not aware of any such difficulty.

#### Article 42

The Commission invites the views of Governments as to whether it is desirable to include a provision regarding the commencement and termination of entitlement for persons who do not enjoy privileges and immunities in their official capacity. It is noted by the Commission that the 1961 Vienna Convention on Diplomatic

Relations does not contain any specific provision on the question, whereas the 1963 Vienna Convention on Consular Relations does so in its article 53.

*Prima facie* it would seem preferable to have a special provision on the matter. The fact that the more recent of the two Conventions contains such a provision might perhaps also be taken as an indication that experience has shown it to be desirable.

#### Article 43

The immunities to be accorded by a third State under this article are made dependent on the condition that the person enjoying them was granted by that State "a passport visa if such visa was necessary". During the discussion in the Commission the question was raised of deleting that condition, and arguments were presented for and against the requirement of a visa.

A case could be made for the omission of the said requirement, in the cases where the transit country is a member of the organization. It is questionable, however, whether this would be realistic. States may not wish to dispense with their option of requiring transit visa as a condition for an obligation to guarantee unimpeded and inviolable transit.

#### Article 45

According to paragraph 3 of the commentary, paragraph 2 of the article is intended

"to ensure the protection of the host State in the event of a grave and manifest breach of its criminal law by a person enjoying immunity from criminal jurisdiction in the absence of the *persona non grata* procedure in the context of relations between States and international organizations".

It is open to doubt whether paragraph 2 would fulfil that expectation. Several questions may be raised such as: What happens if the host State asserts and the sending State denies that the person has committed a "grave and manifest violation of the criminal law of the host State"? Does the person have to leave or could he stay? Is it reasonable to provide that only in case of grave and manifest violation of the criminal law the host State is entitled to demand his recall? What will happen if the person concerned, in violation of paragraph 1 of article 45, makes political propaganda involving the host State or, in violation of article 46, exercises a professional or commercial activity? Are those provisions without a sanction? Furthermore, is it really desirable that the recall provisions should not apply "in the case of any act that the person concerned performed in carrying out the functions of the permanent mission within either the Organization or the premises of a permanent mission"? It is one thing that he should not be prosecuted, but it is another matter whether there should not be the sanction of recall. It can hardly be in the interest of the organization concerned that a person who has committed a serious crime in exercising his functions—if such a situation is at all conceivable—should continue to serve as a member of a permanent mission. It is difficult, moreover, to imagine that the activities of the mission would be seriously disturbed by such a person being recalled.

#### (c) PARTS III AND IV OF THE PROVISIONAL DRAFT

PRELIMINARY OBSERVATIONS COMMUNICATED BY LETTER DATED 23 MARCH 1971 FROM THE ROYAL MINISTRY FOR FOREIGN AFFAIRS

[Original text: English]

#### PART III.— Permanent observer missions to international organizations

#### Article 51

Three of the articles drafted so far deal with the "use of terms", namely articles 1, 51 and 78. As stated in its commentaries to articles

<sup>1</sup> Council of Europe, *Privileges and immunities of international organizations: Resolution (69)29 adopted by the Committee of Ministers of the Council of Europe on 26 September 1969, and Explanatory Report* (Strasbourg, 1970).

51 and 78, the Commission will at the second reading review all these articles together with article 2 on the "scope of the articles" in order to co-ordinate them and make such adjustments as may be necessary.

It may be useful in that connexion to point out that, while according to article 1 subparagraph (a), an "international organization" means "an intergovernmental organization", it seems obvious, in view of article 2 which limits the scope of the articles to "international organizations of universal character", that when the term "international organization" is used in the substantive articles of the draft, it is in fact intended to mean not only that the organization should be intergovernmental as indicated in the definition in article 1, but also universal in character, as indicated in article 2. It is suggested that this point should be made clearer.

Besides this problem of drafting, the question might perhaps be further examined whether the universal—in contradistinction to regional—character of an organization should be the criterion for the applicability of the draft articles to that organization. The elaborate provisions drafted by the Commission and the substantial privileges and immunities accorded in the draft seem to presuppose that the draft articles are intended to apply only in the case of organizations of considerable importance. It is doubtful whether the importance of an organization can be measured simply by the geographical extension of its membership or responsibilities. Indeed, regional organizations may be found which are far more important than some organizations of "universal character". From that point of view it might be prudent not to take a final decision regarding the scope of the articles until the Commission has taken up and studied in depth the status of the organizations themselves.

In any case, the present definition of an international organization of universal character as an "organization whose membership and responsibilities are on a world-wide scale" is hardly precise enough and should be given further consideration.

Finally, attention is drawn to the observations previously made by Sweden regarding article 1 on the use of terms (see section (a) above).

#### Article 52

In the Swedish general remarks on the first twenty-one articles of the draft it is stated:

"The establishment of permanent mission by members of an international organization is, in principle, a matter for arrangement between the organization concerned, or its members, and the host State. Only on the basis of a special agreement between these parties can a State member of an organization claim a right to establish a permanent mission to the organization."

This principle applies, *a fortiori*, to the establishment of a permanent observer mission by a non-member State. Article 52 therefore seems unacceptable. There is no valid reason why the articles alone should create a right, even if residuary, for non-member States to be represented at the organization. The article ought to be omitted or replaced by an article to the effect that the establishment of a permanent observer mission is left to agreement between the interested parties. Such an agreement would not necessarily have to be explicit but could also result from practice between the parties.

#### Article 53

If the establishment of permanent observer missions were left to agreement between the interested parties, this article, too, could be omitted or could be revised so as to make reference to the agreements between the parties. The functions of a mission would be specified in each case by the agreement, whether explicit or developed by practice.

#### Articles 54-77 (in general)

Sweden would prefer that these articles also be omitted and the substance of them left to be settled by explicit agreement or by practice. If it is felt that the articles should contain some reference to

permanent observer missions, it seems sufficient to draft an article stating generally that in case there exist permanent observer missions at an organization, these missions should enjoy such facilities, privileges and immunities as are necessary for the fulfilment of their functions.

Regarding some of the articles in particular, the following observations are submitted.

#### Articles 55, 56 and 60

These articles confer upon the sending State wide discretionary powers regarding the appointment of members of a permanent observer mission. The International Law Commission has in fact applied to observer missions the substance of the corresponding rules concerning permanent missions of members States. This is hardly justified. There is a considerable difference between a State having the rights and duties of membership and taking part in the activity of the organization and an outside State, however great its interest may be in following the work of the organization. If a non-member State wishes to have a permanent mission at an organization, it would seem reasonable that the size and composition of such a mission should be matters to be agreed upon by the sending State, the organization and the host State. This view is strengthened by the fact that in this field there exists no *persona non grata* procedure.

#### Article 62

The Swedish observations on article 18 (reproduced above) apply.

#### Article 65-75

In the Commission's commentary to article 65 it is stated:

"Article 65 reproduces the provisions of article 22 except as regards the words 'full facilities', which have been replaced by the words 'facilities required' in the first sentence. In introducing this change, the Commission has sought to reflect the difference, both in nature and scope, between the functions, obligations and needs of permanent missions, on the one hand, and those of permanent observer missions, on the other, which makes it unnecessary for the latter to be given the same facilities as the former."

In view of this emphatic pronouncement on the difference between the functions and needs of permanent missions and those of permanent observer missions, it is surprising that in the following articles of this section, the Commission has chosen without stating the reasons for such a decision to apply to permanent observer missions the corresponding articles on permanent missions.

It is hoped that the Commission, if it considers that the section on facilities, privileges and immunities of permanent observer missions should be retained, will at the second reading re-examine the section in the light of the passage quoted above.

#### Article 76

The Swedish observations on article 45 (reproduced above) apply *a fortiori* with respect to observer missions.

### PART IV.—Delegations of States to organs and to conferences

#### General remarks

The subject-matter of part IV would be better indicated if, in the title, the word "organs" were replaced by the words "meetings of organs" or "sessions of organs". Part IV is in fact concerned with delegations to meetings, sessions or conferences of limited duration in contradistinction to the permanent missions dealt with in parts II and III.

However, it is far from evident that meetings of organs of an international organization and conferences convened by or under the auspices of an international organization should be dealt with on the same level and be subject to the same rules. Although generalization may be dangerous, it may perhaps be said that meetings of organs are part of the regular activities of the organization, while conferences are convened now and then, when it is considered useful. Furthermore, if general rules are to be drafted for international conferences, it does not seem particularly relevant whether or not the conference is convened by an organization of universal character. The functional needs of a conference convened by a regional organization or by one or more States would hardly differ from those of a conference called by an organization of universal character. It would therefore seem more practical to deal with international conferences as a separate matter. This question which in itself is comprehensive would then be treated in its proper context. At the same time part IV, if it were limited to meetings of organs of international organizations, could be greatly simplified.

In the present draft, part IV is to a large extent based upon the Convention on Special Missions. It is doubtful whether that approach to the matter is justified. A special mission is a mission sent by one State to another to deal with specific questions. It is not apparent why the functional needs of such a mission should be substantially the same as those of delegations to international conferences or to meetings of organs of international organizations. One would have thought that a safer method would have been to study the practice of these organs and of international conferences and build on the experience to be found in such practice. Without such a study of practice the doubt will persist whether all the privileges and immunities accorded in the draft are necessary for the proper functioning of the organs or the conferences.

#### *Observations on particular articles*

##### *Article 78*

See the observations on article 51 above.

##### *Article 79*

The content of the article seems to belong in part I (General provisions) and should be included in article 5.

##### *Article 83*

When advanced as a general residuary rule, the contents of this article, namely that unless the rules of procedure provide otherwise (cf. article 80), a delegation to an organ or to a conference may represent only one State, is not acceptable. It is hard to see why, in principle, several States should not be considered free to send one (joint) delegation to represent them all. In the case of a particular organ or conference, the rules of procedure could prohibit such representation, or else regulate the status of a delegation representing more than one State.

As a residuary rule referred to above need not be expressly stated, the article could be omitted and the matter left to rules of procedure.

##### *Article 86*

The article should be omitted. It is unnecessary and in any case too rigid.

##### *Article 89*

These provisions seem unduly detailed.

##### *Article 91*

The article is superfluous. In substance it provides only that the rules of international law regarding the status of heads of State and persons of high rank should be respected.

##### *Article 94*

It is doubtful if the provisions regarding the inviolability of the premises of a delegation are realistic, especially when extended, in accordance with articles 99 and 105, to the private accommodation of delegation members. It is common that delegations are housed in hotels in different parts of a conference site. In the case of a fairly big conference, the task imposed upon the authorities of the host State by these articles might well be impossible to fulfil. Much depends of course on what precise meaning is given to the term "all appropriate steps".

It would be advisable to reconsider the articles in order to formulate the obligations imposed by them with more precision and, at the same time, limit them to what it is possible to fulfil.

##### *Article 99*

See the observations on article 94 above.

##### *Article 100*

Sweden would prefer alternative B of this article.

##### *Article 105*

See the observations on article 94 above.

##### *Article 112*

See the observations on article 45 (see section (b) above).

#### **Turkey**

##### **PARTS III AND IV OF THE PROVISIONAL DRAFT**

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 13 APRIL 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original text: French*]

The Turkish Government congratulates the International Law Commission on the results of its work on the draft articles on relations between States and international organizations. It has examined the draft with great interest and submits herewith its observations on the articles adopted in 1970.

#### **PART III.—Permanent observer missions to international organizations**

##### **Section 1.—Permanent observer missions in general**

##### *Article 51*

The term "international organization" in subparagraph (a) is broad and not very clear. For greater precision, the words "of universal and political character" should be added after "international organization".

##### *Article 52*

The words "in accordance with the rules or practice of the Organization" may give rise to differing interpretations. To improve the wording it is suggested that they be replaced by the words "in accordance with the rules applicable to the Organization".



*Article 53*

The functions of a permanent observer mission, as listed in the article, have not yet been clearly defined in practice. A list of functions of this kind may have adverse effects on current developments in this field. Hence it is Turkey's view that there is no point in retaining the article. Moreover some of these functions do not concern an observer mission. Either the article or its title needs to be reworded in order to bring them into harmony. As for "reporting . . . to the Government of the sending State", it is for the permanent observer mission itself to choose the most suitable method of informing its Government. The words "and reporting . . ." are therefore superfluous, assuming that article 53 is to be retained.

*Article 54*

The term "accreditation", which is used for diplomatic missions, is not appropriate for permanent observer missions. Turkey would prefer the term "sending" to "accreditation" so as to cover the situation of permanent observer missions.

*Article 58*

The deletion of the article is suggested on the same grounds as those adduced in the case of article 53.

*Article 62*

Turkey suggests that the expression "*Chargé d'affaires ad interim*" used for diplomatic missions be replaced by the expression "acting head of the permanent observer mission" in order to bring out clearly the difference between the two kinds of mission.

*Article 64*

Turkey would like to see the words in square brackets retained both in the title and in the text of article 64.

*Section 2.—Facilities, privileges and immunities of permanent observer missions*

*Article 68*

In general, Turkey supports the view that the privileges and immunities accorded to permanent observer missions should be confined to the facilities necessary for the performance of their functions and is accordingly inclined to favour the deletion of article 68. It is, of course, always open to the host State to grant this freedom to permanent observer missions. If the article is retained, it would be desirable to add the words "to the extent necessary for the performance of their functions".

*Article 76*

Turkey cannot accept the reference to the provisions of article 45 unless the word "manifest", in paragraph 2 of that article, is deleted and a provision concerning the *persona non grata* procedure is included.

**PART IV.—Delegations of States to organs and to conferences**

*Article 78*

Turkey does not support the view that the same privileges and immunities should be accorded without distinction to delegations of States to organs and to delegations of States to conferences. Acceptance of the text as it stands would represent a considerable departure from the principle that privileges and immunities should

be accorded to the extent necessary for the performance of the respective functions.

Apart from this general observation, it considers that the term "international organization" in article 78 (a) should be amplified in the light of its comments on article 51 (a), and that in view of the temporary character of the functions of the delegations concerned, subparagraphs (g), (h), (i), (j), and (k) should be deleted.

*Article 88*

In view of the subject-matter of article 88, there is no justification for retaining it in the draft convention and Turkey accordingly suggests that it be deleted.

*Article 89*

Paragraph 4 of article 89, on notifications, seems inadequate from the practical standpoint. Since it is the host State which grants privileges and immunities it is to the host State that the notifications should be sent first.

*Article 91*

Turkey considers that article 91 is out of place in the convention. This matter should be left to international law to be dealt with in accordance with custom.

*Article 94*

Paragraphs 1 and 2 would be very difficult to apply, although in appearance they may be worth retaining. They would seem to relate mainly to hotels. The provisions relating to the premises occupied by the mission cannot be applied to commercial buildings. To avoid any possible dispute, Turkey would suggest that the two paragraphs be either deleted or at least redrafted so as to diminish the obligation therein laid down.

*Article 100*

Turkey prefers alternative B of draft article 100 on immunity from jurisdiction.

*Article 101*

Seeing that immunity is granted in the interest of the functions performed a further paragraph should be added providing for waiver of immunity where immunity is not warranted by the function performed.

**Union of Soviet Socialist Republics**

PART I AND SECTION 1 OF PART II OF THE PROVISIONAL DRAFT  
OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 19 DECEMBER 1969 FROM THE PERMANENT MISSION TO THE UNITED NATIONS  
[Original text: Russian]

The Permanent Mission of the Union of Soviet Socialist Republics to the United Nations has the honour to state that the draft articles on representatives of States to international organizations (articles 1-21) do in general reflect existing practice and do not give rise to any objections of principle.

The Permanent Mission believes that in view of the representative nature of permanent missions to international organizations established by sovereign States, and also in order to ensure the normal and uninterrupted functioning of such missions, the principle of according them all the privileges and immunities which are accorded to diplomatic missions should be consistently followed throughout the draft articles, and the status of members of the staff of such missions should be analogous to the status of staff of the corresponding category in diplomatic missions.

## United Kingdom of Great Britain and Northern Ireland

### (a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 27 NOVEMBER 1970  
FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

### General

1. The project as envisaged by the International Law Commission is to study "the question of diplomatic law in its application to relations between States and intergovernmental organizations".<sup>1</sup> The Government of the United Kingdom have some reservations about the method which the Commission has chosen to adopt in carrying out this purpose. The Commission's approach seems to consist in treating the representatives of States to international organizations as if they were diplomatic personnel on a permanent or temporary mission, then determining what modifications of the Vienna Convention on Diplomatic Relations and of the Convention on Special Missions are called for and, finally, drafting articles apparently for inclusion in a general convention on the subject.

2. This approach gives rise to two basic difficulties. The first is as to its relationship to the considerable body of treaty provisions already covering the same ground in various ways. The second, which is connected with the first, is that the approach adopted assumes that all organizations can be treated in the same way notwithstanding the differences between them which have been reflected in the differences admittedly sometimes slight but also sometimes important, in the privileges and immunities provisions at present applying to them. These difficulties are to some extent met by draft articles 2, 3, 4 and 5 prepared by the Commission. It is true that, in accordance with these articles, the draft articles as a whole at present only relate to "organizations of universal character"; that they would not prejudice the "relevant rules" of organizations; that they would not affect existing international agreements in the matter; and that they would not preclude the conclusion of international agreements containing different provisions. But the commentary to article 3 says in its paragraph 1 that the draft articles

"seek to detect the common denominator and lay down the general pattern which regulates the diplomatic law of relations between States and international organizations. Their purpose is the unification of that law to the extent feasible in the present stage of development".

Thus, if and when a convention on the basis of the draft articles were concluded, its impact in the field would be likely to be greater than its strict legal effect. That is to say, although it did not legally affect the existing situation or prevent the conclusion of agreements with different provisions, it might tend to become the norm—if it did not simply become a dead letter.

3. The Government of the United Kingdom continue to share the view expressed by the General Assembly of the United Nations in its resolution 22 D (I) of 13 February 1946 on the co-ordination of the privileges and immunities of the United Nations and the specialized agencies:

"[...] the General Assembly considers that the privileges and immunities of the United Nations should be regarded, as a general rule, as a maximum within which the various specialized agencies should enjoy such privileges and immunities as the appropriate fulfilment of their respective functions may require, and that no privileges and immunities which are not really necessary should be asked for".

The Council of Europe has carried out a study of the question of the privileges and immunities of international organizations and, on 26 September 1969, the Committee of Ministers of the Council of Europe adopted the report prepared by the European Committee on Legal Co-operation. This report has been printed<sup>2</sup> and it is understood that copies have been made available to the Commission. The report considered the practice and the principles relating to the privileges and immunities of organizations and among its conclusions was the following:

"It is not necessary or desirable to lay down a scale of privileges and immunities applicable to international organizations generally. Rather the privileges and immunities to be accorded to each organization should be determined with due regard to the needs of the organisation for the accomplishment of its aims and the exercise of its functions."<sup>3</sup>

The United Kingdom Government fully supports that conclusion.

4. With regard to draft articles 22 to 50 on which the comments of Governments have been invited, it is true that, broadly speaking, permanent representatives to international organizations have, under existing international agreements, a status generally similar to that of members of permanent diplomatic missions. In commenting on the draft articles 22 to 50 therefore, the Government of the United Kingdom are merely recognizing this fact and do not wish to imply that they regard any general modification of the law on this subject as necessary or desirable or that any general assimilation of the status of representatives of States to international organizations with that of diplomatic personnel on a permanent or temporary mission as laid down in the Vienna Convention or the Convention on Special Missions will be acceptable to them or that they would not welcome reconsideration by the Commission of its general approach to the topic and of the assumptions on which it is based.

### Observations on particular articles

#### Article 22

This and other articles involve the placing of obligations on organizations. The Government of the United Kingdom note that the Commission will consider at a later stage the question whether international organizations would be parties to any convention which would embody the draft articles. The Government of the United Kingdom are not in principle opposed to the participation of organizations in such a convention.

#### Articles 25, 30, 31 and 32

These articles once again raise the question of the compatibility of the service of legal process with the inviolability of premises and persons. Given that there are exceptions to the immunity from jurisdiction of persons, problems can arise in relation to the service of process, in cases covered by these exceptions, on persons who have inviolability or who are in premises which have inviolability. This problem was left unresolved by the Vienna Conference on Diplomatic Relations of 1961 and the Commission may like to consider whether it can be resolved on this occasion.

#### Article 28

The Government of the United Kingdom are not entirely convinced of the arguments in favour of a more extensive privilege in the matter of freedom of movement than that conferred by the Vienna Convention on Diplomatic Relations and the Convention on Special Missions.

<sup>1</sup> Yearbook of the International Law Commission, 1968, vol. II, p. 194, document A/7209/Rev.1, para. 16.

<sup>2</sup> Council of Europe, *Privileges and immunities of international organizations: Resolution (69)29 adopted by the Committee of Ministers of the Council of Europe on 26 September 1969, and Explanatory Report* (Strasbourg, 1970).

<sup>3</sup> *Ibid.*, p. 71, para. 188(3).

*Article 29*

The Government of the United Kingdom would favour the inclusion of a provision on the lines of article 28 paragraph 3 of the Convention on Special Missions.

*Article 32*

The Government of the United Kingdom support the inclusion of a provision on the lines of paragraph 1 (d) relating to actions for damages arising out of accidents caused by vehicles used outside the official functions of the person in question. It is to be noted that this exception is now contained in article 31, paragraph 2 (d) of the Convention on Special Missions adopted by the General Assembly of the United Nations on 8 December 1969.

*Article 34*

The Government of the United Kingdom support the inclusion of this provision in the body of the convention itself as a progressive step which would help to reassure parliamentary and public opinion.

*Article 39*

The United Kingdom and certain other States have not ratified the Optional Protocol concerning Acquisition of Nationality adopted with the Vienna Convention on Diplomatic Relations in 1961. It would be preferable once again to include this provision in an optional protocol.

*Article 40*

The Government of the United Kingdom are not convinced of the justification for the privileges and immunities conferred by paragraph 2. They also remain of the view that the private staff referred to in paragraph 4 should not be accorded tax exemption.

*Article 41*

In paragraph 1, the word "only" should be placed after "shall enjoy" instead of before "in respect" (cf. the English text of article 38 of the Vienna Convention on Diplomatic Relations and article 40 of the Convention on Special Missions).

*Articles 45 and 50*

These two articles do not appear to give adequate protection to the interests of the host State. It is true that the concept of *persona non grata* is not appropriate in relation to representatives to international organizations. However, some means must be found to deal with the case where the host State cannot tolerate, for reasons of public order or national security, the presence on its territory of a particular representative. The Government of the United Kingdom consider that, when possible, Governments should be encouraged to waive immunity rather than simply recall the person concerned. They do not at the present stage have any alternative drafts to suggest. They will be interested to see the results of further consideration of this matter by the Commission in the light of comments by Governments.

## (b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 19 MARCH 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

## PART III.—Permanent observer missions

The Commission has rightly drawn attention in paragraph 2 of its general comments<sup>4</sup> to the fact that there is at present no clear

treaty basis for the status, privileges and immunities of permanent observer missions sent by non-member States to certain international organizations. But the Commission has not referred to any evidence to suggest that this situation causes any appreciable difficulty in practice. Nor is it at all clear that the best way to remedy the situation would be by creating a new general international legal entity to be known as a "permanent observer mission" whose status, privileges and immunities would be largely the same as those of permanent missions of Member States.

The concept of a permanent observer mission in the draft articles appears to involve granting to representatives of States which have no obligations under the constitutional instruments of the organization concerned, and possibly to representatives of entities which are not recognized as States or Governments by the host country, a status and functions which they are not entitled to have under the constitutional instruments of the organization. Due regard must be had to the position and interests of the host country and in the case of those organizations where there is no constitutional provision for observer missions and no settled practice, their establishment should be a matter for arrangement between the sending State, the organization and the host country, taking into account the special circumstances of each case. It is not at all clear that there would be any advantage in removing the flexibility which the present situation allows.

The Government of the United Kingdom are therefore not convinced of the necessity or desirability of including in the proposed convention articles such as those in Part III of the draft articles. The articles are in any case drafted largely by reference back to Part II. It would be better to leave organizations in the future to decide for themselves whether and, if so, to what extent they should seek to accord the Part II status to observer missions.

## Section I.—Permanent observer missions in general

*Article 52*

The drafting of this article might suggest that a non-member State has in some way a right to establish a permanent observer mission if it considers that it can do so in accordance with the rules or practice of the organization. This objection would indeed be strengthened if there were any question of the word "practice" being intended to cover the mere fact that other non-members already had observer missions to the organization. A non-member State is, by definition, not a party to the constitution of the organization in question and it is only by agreement or decision of the members that a non-member State can become entitled to send an observer mission. Moreover, in the absence of any provision in the constitution or otherwise binding on the host State, the establishment of observer missions in its territory must require its consent.

If it is felt that any provision is required on the question of the establishment of permanent observer missions, it would be preferable to provide simply that the establishment of permanent observer missions to an organization is regulated by the member States of the organization in accordance with the relevant constitutional documents and decisions of the organization and subject to the consent of the host State. But the problems presented by the drafting of this article illustrate the general difficulty of trying to lay down uniform rules relating to observer missions given that the cases which arise in practice are naturally so heterogeneous.

*Article 53*

The functions listed are broader than those which might be performed by some observer missions. In other cases, the functions of such a mission could be wider than those listed. Here again, it would be preferable to leave this matter to be dealt with case by case in the future.

<sup>4</sup> Yearbook of the International Law Commission, 1970, vol. II, p. 276, document A/8010/Rev.1.

*Articles 54, 57 and 58*

These articles also deal with matters on which it is not necessary or desirable to seek to lay down uniformity in the proposed convention. The matters in question should be dealt with as a matter of practice in each organization or in the rules of procedure of the organization.

*Article 61*

Paragraphs 3 and 4 do not take sufficient account of the position of the host State. It is the host State which must accord the privileges and immunities to which the persons in question are to be entitled. There should at least be some requirement that the organization should transmit the notifications to the host State without delay.

*Article 62*

Although the title *Chargé d'affaires* may be appropriate in some cases, it would not be suitable in all. "Acting head of the permanent observer mission" or "acting permanent observer" would be more suitable in most cases. Here again, however, the flexibility of the present situation is preferable to any attempt to lay down a uniform rule. If anything, a slight amendment to article 51 (b) would be preferable to the inclusion of article 62.

*Section 2.—Facilities, privileges and immunities of permanent observer missions*

The Government of the United Kingdom note that privileges and immunities are at present accorded to certain observer missions on a scale similar to that accorded to missions of Member States. The Government of the United Kingdom do not consider it advisable to adopt articles which imply that this assimilation will be justifiable in all cases. The matter should be left to be dealt with in a flexible manner, case by case.

**PART IV.—Delegations of States to organs and to conferences***General remarks*

The privileges and immunities of delegations to meetings of organs of the United Nations and the specialized agencies and to conferences convened by them are provided for in the General Convention on the Privileges and Immunities of the United Nations and in the Convention on the Privileges and Immunities of the Specialized Agencies. The relevant provisions are Article IV (Sections 11 to 16) of the General Convention and Article V (Sections 13 to 17) read with the definition in Section 1 (vi) of the Specialized Agencies Convention. There is also a considerable body of international practice based on these agreements. Underlying these agreements and this practice is the principle, embodied in paragraph 2 of Article 105 of the United Nations Charter, of functional need.

It is the view of the Government of the United Kingdom that any attempt to codify and develop the law must have regard to existing agreements and practice. The correctness of this approach appears to have been recognized by the Commission in paragraph 1 of its commentary on draft article 3 where the Commission explains its general aim as follows:

"Given the diversity of international organizations and their heterogeneous character, in contradistinction to that of States, the draft articles merely seek to detect the common denominator and lay down the general pattern which regulates the diplomatic law of relations between States and international organizations. Their purpose is the unification of that law to the extent feasible in the present stage of development."

Consistently with this approach, the Government of the United Kingdom would have expected that articles 78 to 116 would reflect

existing agreements and practice. The Conventions referred to above purported to lay down the scale of privileges and immunities considered necessary for the exercise of the functions of the United Nations and of the specialized agencies. They have been in force and have been applied in practice for some twenty years. The Government of the United Kingdom are aware of no evidence to suggest that this aspect of the Conventions is in any substantial way inadequate or unsatisfactory.

However, in formulating this group of draft articles, the Commission appears to have departed substantially from the Conventions. Instead it has adopted a different approach which bears little relationship to existing practice and consists of applying *mutatis mutandis* the provisions of the Convention on Special Missions. The United Kingdom Government can see no justification for this. They continue to share the view expressed by the General Assembly of the United Nations in resolution 22 D (I) of 13 February 1946 that:

"[.] the General Assembly considers that the privileges and immunities of the United Nations should be regarded, as a general rule, as a *maximum* within which the various specialized agencies should enjoy such privileges and immunities as the appropriate fulfilment of their respective functions may require, and that no privileges and immunities which are not really necessary should be asked for."

Draft articles 78 to 116 could produce the anomalous situation that members of delegations to other organizations of a lesser importance would be accorded a higher scale of privileges and immunities than delegations to organs of the United Nations. In many countries, there is already much parliamentary and public criticism of the extent to which privileges and immunities are accorded to international organizations and persons connected with them, and it is very difficult to see how the additional privileges and immunities provided by the Commission's draft articles could be justified as necessary in the light of the experience of the last twenty years. It must be borne in mind that the conferring of privileges and immunities on one person deprives others of their normal legal rights and remedies. This is justifiable within certain limits. Nevertheless, care must be taken not to recommend extensions of these privileges beyond what is strictly justifiable. Rather the effort should be made to seek acceptable limitations of those privileges which already exist and appropriate means of protecting the interests of third parties.

It is no doubt true that in some ways a delegation to an organ of an organization or to a conference convened by an organization is comparable to a special mission (within the meaning of the Convention on Special Missions) sent by one State to another. They both temporarily represent a State in the territory of another State. But the special status of a special diplomatic mission also reflects the fact that it is merely another form and, as a matter of historical fact, an older form of diplomatic mission. As between adopting the law relating to diplomatic missions between States and adopting the law relating to delegations to international organizations, the Government of the United Kingdom consider it correct to place special diplomatic missions in the framework of the law relating to diplomatic missions (as does the Convention on Special Missions and as customary international law perhaps already does) and to place delegates to organs and conferences of international organizations in the framework of the law and practice which has already developed in relation to such persons. A special mission is sent by one State to another State and under the Convention on Special Missions, a State may only send a special mission to another State with the consent of the latter. It is one matter to accord extensive immunities and privileges to a special mission; but it is quite another matter to do so in respect of large numbers of persons attending meetings of international organizations. The Government of the United Kingdom do not see how it would be possible to justify abandoning at this stage the principles underlying the General Convention on the Privileges and Immunities of the United Nations and the Specialized Agencies Convention merely to gain the convenience of having further texts based on the Vienna Convention on Diplomatic Relations.

It follows from the above that the Government of the United Kingdom are not able to accept the principles underlying Part IV of the Commission's draft articles and they very much hope that the Commission will revise Part IV with the above considerations in mind. The following comments on particular articles are without prejudice to that position.

### *Observations on particular articles*

#### *Article 91*

As in the case of the comparable provision in the Convention on Special Missions (in connexion with the adoption of which the United Kingdom delegation made a statement of its position),<sup>5</sup> the Government of the United Kingdom find it difficult to accept the implication in paragraph 2 that persons other than the Head of State and his suite have privileges and immunities under international law, as opposed to those which may be accorded as a matter of courtesy, going beyond those contemplated in the succeeding articles.

#### *Articles 94 and 99*

The obligations which would be imposed by these articles go beyond the provisions in the existing Conventions. It is very difficult to conceive how such general obligations could be carried out in practice in the case of all delegations and delegates to organs and conferences of international organizations, except of course where a special situation called for special protection.

#### *Article 98*

The corresponding provision in the United Nations and Specialized Agencies Conventions does not confer such a general personal inviolability. The Government of the United Kingdom do not see any justification for the change.

#### *Article 100*

The two alternatives offered by the Commission are substantially different from the existing position under the United Nations and Specialized Agencies Conventions. Alternative A is based on the Convention on Special Missions which, as already explained, is not considered to be the appropriate precedent. But even Alternative B would confer immunity from criminal jurisdiction in respect of the non-official acts of a representative. Under the United Nations and Specialized Agencies Conventions, the immunity is only from arrest and detention in connexion with such matters, and not immunity from jurisdiction as such. The Government of the United Kingdom do not consider that the proposed departure from existing practice is justifiable.

#### *Article 101*

This draft article omits the provision requiring the sending State to waive the immunity in certain circumstances which is contained in the United Nations and Specialized Agencies Conventions. This provision is useful in practice.

#### *Articles 102 and 103*

These draft articles are substantially different from the provisions in the United Nations and Specialized Agencies Conventions. The Government of the United Kingdom do not accept that the proposed departure from the provisions of those Conventions is justified.

<sup>5</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda item 87, document A/7799, paras. 177 and 178.*

### **United States of America**

#### *(a) PART I AND SECTION 1 OF PART II OF THE PROVISIONAL DRAFT*

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 23 MARCH 1970 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original text: English*]

The United States has reviewed the draft articles on representatives of States to international organizations contained in the report of the International Law Commission on the work of its twentieth session. The United States considers that these twenty-one draft articles have been carefully and thoughtfully worked out by the International Law Commission and is, in general, in accord with the Commission's proposals.

There are a number of articles as to which explicit comment is considered desirable.

#### *Article 1*

Sub-paragraph (b), which defines an "international organization of universal character" as "an organization whose membership and responsibilities are on a world-wide scale", does not adequately dispose of all the problems raised by an attempt to distinguish between universal international organizations and all others. The phrase "on a world-wide scale" leaves open such questions as whether membership has to be substantially universal or merely representative of all the regions of the world. The same problem arises in connexion with the concept of responsibilities. While the existing international organizations to which permanent missions are accredited may not give rise to substantial difficulties regarding the application of article 1 (b), and the strictly regional organizations, such as OAS, would clearly be excluded, it is not difficult to find organizations which occupy a penumbral area. The parties to the Commodity Agreements, for example, may not meet a requirement of practically universal membership but, none the less, most of them have a sufficiently varied membership to meet the requirement of being "world-wide" if that phrase is construed liberally. The same conclusion could be reached regarding the responsibilities of the organizations established under those Agreements.

Another example is the Asian Development Bank. Although ostensibly a regional organization, the membership is very widely distributed and the responsibilities, if considered on a reciprocal basis, are the same.

It may be queried whether, in view of the ability of any international organization to limit the application of the articles through adoption of a "rule", the attempt to distinguish between organizations of universal and non-universal character is either necessary or desirable.

#### *Article 2*

In the light of the comments regarding article 1 (b), it is suggested the Commission reconsider whether paragraph 1 of article 2 should not be revised.

#### *Articles 3, 4 and 5*

These articles are reasonable and necessary provisions. They recognize that the diversity of international organizations, the varying character of existing agreements with host States and the unforeseeable variances in headquarters agreements that may be necessary to accommodate future relationships of international organizations with host States require the maintenance of flexibility and the preservation of wide degrees of tolerance.

#### *Article 7*

It is doubted that clause (b) relating to liaison is necessary. It would appear to be subsumed under clauses (a) and (c).

## Article 9

It is clearly the intention of the International Law Commission not to modify in any way the requirements of the Vienna Conventions on Diplomatic and Consular Relations as a result of the coming into force of the present articles. Accordingly, the proposal contained in paragraph 7 of the commentary to add a provision along the lines of paragraph 2 of article 17 of the Convention on Consular Relations appears essential.

## Article 14

Article 14 will have to be reviewed in light of the text of article 7 of the Vienna Convention on the Law of Treaties.

## Article 16

Article 16 is a well-balanced solution of a difficult problem that takes into account all the competing requirements relating to the size of a permanent mission.

## Article 19

It is doubtful that an alternative proposal for determining precedence is desirable. The purpose of the article is to lay down a residual rule if an organization does not have a rule relating to precedence. Consequently, affording a choice between two solutions in accordance with established practice does not offer a definite solution. The United States considers that it would be desirable to adopt the rule of alphabetical order since that procedure is generally followed in international organizations.

## Article 20

Paragraph 1 is a helpful clarification of the established rule but contains a slight ambiguity as a result of the word "localities". May the sending State establish an office of the permanent mission in another State without the consent of the State where the seat of the organization is established if there is an office of the organization in that other State? There would not appear to be any particular reason for such a restriction but under paragraph 1 as worded it could be argued that such permission was necessary.

(b) SECTION 2 OF PART II AND PARTS III AND IV  
OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 30 MARCH 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

PART II.—Permanent missions to international organizations

Section 2.—Facilities, privileges and immunities

## Article 25

With regard to the second sentence of paragraph 1, the United States suggests that it would be preferable to follow more closely the language used in paragraph 2 of article 31 of the Vienna Convention on Consular Relations. We believe that in cases causing serious danger to public safety it is not practical to insist on exhaustive efforts to contact those in authority at the mission involved before taking protective action.

Regarding paragraph 3, the United States is of the view that the immunity accorded means of transport should only apply for official journeys.

Regarding paragraph 4 of the commentary on article 25, the United States has no problems with the suggested definition to be inserted in article 1 as paragraph (k bis).

## Article 26

The United States suggests revising paragraph 1 of this article to read:

"The premises of the permanent mission, or the sending State or any person acting on its behalf who is the owner or lessee of such premises, shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the permanent mission, whether owned or leased, other than such as represent payment for specific services rendered."

This language is intended to have the same effect as that of the corresponding articles in the Vienna Conventions on Diplomatic and Consular Relations, but is slightly expanded to be more complete. By specifically exempting the premises themselves from taxes, the provision on the face of it bars *in rem* actions against such premises. Article 23 of the Vienna Convention on Diplomatic Relations refers only to the persons exempted in regard to taxes on the premises, while article 32 of the Vienna Convention on Consular Relations exempts the premises themselves in addition to these persons.

## Article 28

The United States would prefer the language of article 96 to that contained in article 28. Under section 11 of the Headquarters Agreement between the United States and the United Nations, the United States already guarantees free transit to the Headquarters District of the United Nations. We thus accept the principle that free transit should be assured to those travelling to the Headquarters District of an international organization. In addition, the United States considers it appropriate that freedom of movement be assured within the territory of a country to representatives of members of an international organization when their official functions require such additional travel, provided that this entails no serious threat to the host State's national security. While the United States is, in principle, in favour of the broadest possible freedom of movement within its territory, we see no compelling reason why essentially private freedom of movement outside a headquarters district should be guaranteed by a convention if such movement bears no relationship to the functioning of the organization or mission involved.

## Article 30

Section 15 of the Headquarters Agreement between the United States and the United Nations and section 11 of the Convention on the Privileges and Immunities of the United Nations grant privileges and immunities similar to those provided in draft article 30. The United States finds draft article 30 acceptable, provided that adequate provision is made to protect the host State against abuse of privileges and immunities which are accorded. Section 13 (b) of the Headquarters Agreement provides such protection, and it would be essential to include this provision in draft article 45 (section 13 (b) of the Headquarters Agreement is applicable as well to persons granted privileges and immunities under the Convention on the Privileges and Immunities of the United Nations by virtue of section 26 of the Headquarters Agreement, and this was restated for the sake of clarity in the United States reservation to the Convention). If draft article 45 is not improved, the United States would have to reconsider its view on draft article 30. In this regard, see the United States comments on draft article 45 below.

## Article 32

In regard to subparagraph (d) of draft article 32, the United States suggests that the same treatment be accorded this subject as is by article 43 of the Vienna Convention on Consular Relations.

## Article 35

In regard to paragraph 3 of the commentary, the United States believes paragraph 5 is not necessary.

*Article 40*

The United States believes the privileges and immunities accorded members of the mission should only be accorded to the class of people defined in section 16 of the Convention on Privileges and Immunities of the United Nations. We think it excessive to accord "the administrative and technical staff [. . .] together with members of their families forming part of their respective households" all the same privileges and immunities. Nor is this necessary for the effective functioning of the mission. If immunities are to be granted, they should only relate to members of the administrative and technical staff, not to members of their families, and immunities granted should only be in respect of acts performed in the course of their official duties. Indeed, we believe the assumption in paragraph 2 of the commentary is unwarranted.

*Article 44*

While the United States agrees completely with the provision of draft article 44 that no discrimination be made as between States, we understand that this of course does not in any way prohibit distinctions based on rational grounds, which are in certain instances warranted. The draft articles themselves implicitly recognize this fact. For example, article 25, paragraph 2, provides that the host State is under a special duty to take all appropriate steps to protect the premises of the permanent mission; the application of this provision may require that reasonable distinctions be made in the treatment accorded different States—for example, three policemen may be required for one mission but only one for another because of the size and location of the mission and its particular political problems.

*Article 45*

In regard to paragraph 2 of draft article 45, the United States believes it essential to substitute for this paragraph language along the lines of section 13 (b) of the Headquarters Agreement between the United States and the United Nations. Similar language is contained in section 25 of the Convention on the Privileges and Immunities of the Specialized Agencies. If privileges and immunities as broad as those provided for in the draft articles are to be accorded, a means must be provided by which the host State can protect itself against any serious abuse of the privilege of residence, whether or not it constitutes a grave and manifest violation of the criminal law. The Secretariat of the United Nations recognized this fact in its observations on this draft article.<sup>1</sup> Examples of activities from which a host State is entitled to protection are given in paragraph 11 of the United Nations Secretariat observations. In such cases, provided that there are such clear procedural safeguards as in section 13 (b) of the Headquarters Agreement, the host State must retain the ability to require that a person that has seriously abused his privilege of residence leave the country (this is of course the case with regard to diplomats who are accredited to States and who may be declared *persona non grata*).

*Article 49*

Regarding paragraph 1, the United States agrees with the Government of Israel that the word "must", which appears twice, should be replaced by the word "shall".<sup>2</sup> This would make the first paragraph consistent with the second paragraph of the draft article and, indeed, with the entire draft convention.

*Article 50*

It might be desirable to formalize the conduct of the consultations to a greater extent than is provided in article 50. Provision for some type of conciliation may be appropriate.

<sup>1</sup> See below, section C, 1, paras. 9–11.

<sup>2</sup> See the observations of Israel above.

In addition, the United States strongly believes a new article should be added along the lines of section 30 of the Convention on the Privileges and Immunities of the United Nations.

### PART III.—Permanent observer missions to international organizations

The draft articles in part III create new and extensive privileges and immunities for permanent observer missions to international organizations. The United States believes that it is worthwhile to codify the existing privileges and immunities of observers, and in some limited cases to agree on their expansion. But we believe that the status given such missions in this part of the draft articles is not warranted. When a country undertakes to be host to an international organization, it is appropriate that the country provide the necessary privileges and immunities to the organization and to its members. It is implicit that the legitimate functioning of the organization must in no way be hindered. But observers are not formally participants in the work of the organization. In most cases they are not provided for in the charter or constitution of the organization, and it is difficult to imply an undertaking on the part of the host State with regard to them. To the extent that a practice has been established whereby observer missions exist, the United States believes it appropriate only to accord to such missions the limited privileges and immunities necessary for the functioning of the mission in its capacity as an observer. We believe that any further privileges and immunities must await action by the concerned international organizations to give observers formal, official status.

*Article 52*

The United States believes that, unless the international organization concerned has given formal consent to the establishment of the particular observer mission concerned, the consent of the host State should be required for the establishment of a permanent observer mission.

*Article 53*

The draft article seeks to elevate the status of observer missions from that of "observers" for the sending States to that of "representatives" of the sending States in the international organization. The United States believes that giving observers representative status is not warranted. Of course, "observers" do represent their States abroad in the sense that anyone who goes abroad represents his State. But this does not make them diplomatic representatives in the full sense, and they are not "representatives" in the international organization. Thus, in the view of the United States the words "and representing the sending State at the Organization" should be deleted from the end of draft article 53.

To take into account this change, consequential changes will be required in draft articles 51 (a) (deletion of the words "representative and"), 51 (d) and (e) (deletion of the reference to "diplomatic staff"), and 59 (deletion of the reference to "diplomatic staff").

*Article 56*

If the function of the permanent observer mission is to observe on behalf of the sending State rather than to represent that State, the United States has no objection to the observer being a national of the host State.

*Article 59*

In regard to paragraph 1, the United States is concerned that the listing of members of permanent observer missions may presage or even instigate the institutionalization of large observer missions. It is doubtful that an observer mission requires, in addition to the permanent observer, substantial diplomatic, administrative, technical and service staffs.



*Article 62*

The United States believes it is inappropriate to use the term "*chargé d'affaires ad interim*". This term has become standard usage with regard to diplomatic missions and therefore carries with it too many implications relating to such missions. We suggest that the term "Acting permanent observer" be used.

*Article 64*

The United States supports the deletion of the words in brackets. Indeed, the United States is of the view that the permanent observer mission should not have the right to use either the flag or the emblem of the sending State. Even use of the emblem is symbolic of a representative function at the international organization since members use such emblems. It would therefore not be proper for observers to have their use.

*Articles 65 to 77 (in general)*

As noted in the introductory remarks to part III, the United States is of the view that the privileges and immunities of permanent observer missions should strictly be limited to those required for the effective fulfilment of the function of the mission, i.e., observing. In regard to the specific draft articles, the United States refers to its previous comments regarding draft articles 25, 26, 28, 40, 44, 45 and 49. We should however like to make the following additional comments:

*Article 69*

The United States does not believe it is appropriate to guarantee to observer missions such broad privileges and immunities as are covered by draft articles 30 and 32. In the view of the United States, the privileges and immunities regarding arrest and immunity from jurisdiction should be no broader than those provided officials of the United Nations under section 18 (a) of the Convention on the Privileges and Immunities of the United Nations. Moreover, it should be made clear that the "official capacity" referred to is merely that of an observer. We also question whether the exemption of personal baggage from inspection, as provided in paragraph 2 of article 38, is necessary to ensure the effective fulfilment of the functions of an observer mission.

*Article 76*

The restriction on professional activities contained in article 46 may not be warranted with regard to members of an observer mission who have no formal duty to represent their sending State in the organization.

## PART IV.—Delegations of States to organs and to conferences

*Article 91*

The United States believes this draft article is unnecessary since the privileges and immunities covered in the article are already accorded by international law. However, we have no difficulty with the article.

*Article 94*

The United States questions the wisdom of paragraph 1 of article 94. Most members of delegations will be quartered in hotel rooms often for short periods of time. Is this what is meant by "premises where a delegation [. . .] is established"? As suggested in the commentary, the United States believes a definition would be necessary. It would seem unreasonable to make such hotel rooms inviolable. The normal functioning of a hotel necessitates that service personnel enter the room. One cannot expect that a hotel will permit its routine to be disrupted because a delegation member is there. On the other hand, if the "premises" turn out to be those

of the permanent mission, draft article 25 already provides the necessary protection. The United States comments on draft article 25 should also be referred to.

*Article 95*

The United States believes that this article needs clarification.

*Article 99*

The United States believes that paragraph 1 raises difficulties similar to those expressed in our comment on draft article 94.

*Article 100*

The United States believes alternative B is the better article. Regarding the immunity from criminal jurisdiction provided for in paragraph 1, the United States wishes to refer to its comments on draft articles 30, 32 and 45.

*Article 102*

The United States is of the view that to exempt members of a delegation from sales taxes and other taxes of this nature is impractical. The relatively brief period of time most delegations spend in the host country and the small amounts involved do not warrant the significant administrative burden that would be required to arrange for the refund of such taxes.

*Article 103*

The United States believes it is important that the language of articles 38 and 103 be uniform.

*Article 105*

As pointed out in the foot-note to article 105, if the preferable alternative B of article 100 is adopted, paragraph 2 of article 105 will require revision. In any case, the United States wishes to refer to its comments on draft article 40 in connexion with draft article 105.

*Article 111*

The United States wishes to refer to its comment on draft article 44.

*Article 112*

In regard to draft article 112, the United States wishes to refer to its comments on draft article 45.

*Article 116*

The United States questions whether it is reasonable to require protection of the premises of a delegation after the end of a conference. As noted in previous comments on other draft articles in part IV, the premises of a delegation will normally be a hotel room and the archives, one would assume, would consist of a brief case full of documents.

**Yugoslavia**

## (a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 18 AUGUST 1970 FROM THE PERMANENT MISSION TO THE UNITED NATIONS,

[Original text: French]

**General**

The Yugoslav Government has studied the draft articles on representatives of States to international organizations adopted by the International Law Commission at its twentieth and twenty-first

sessions, and regards them as an important contribution to the codification and progressive development of rules on representatives of States to international organizations which are destined to play a special role in the promotion of peaceful international co-operation.

Furthermore, the stress placed on the optional nature of the draft (articles 2, 3 and 4) should make it easy for this international instrument to be adopted by a large number of interested parties (host States, international organizations and sending States).

The draft articles rightly cover the main functions of permanent missions. Bearing in mind that permanent missions also exercise other functions important for the development of international relations (e.g. *ad hoc* representation in an international organization, quasi-diplomatic relations between States through their good offices, etc.), the question arises whether it would not be desirable to give these functions a specific place in the text of the draft.

One very important point is that the Commission, having regard to the specific nature of the institution of permanent missions of States to international organizations, has introduced a number of provisions in the draft (e.g. articles 24, 28, 34 and 39) which constitute in a sense a further elaboration of the Vienna Conventions system. Noteworthy too is the important decision taken by the Commission to round off the draft articles with legal rules concerning permanent observers for non-member States and representatives attending sessions of organs of international organizations; without these provisions the draft would be incomplete.

### *Observations on particular articles*

#### *Article 1*

The inference to be drawn from the definition of the term "permanent representative" is that the main function of a permanent representative is to be the head of a permanent mission. The definition should emphasize his function as representative of a State to an international organization; this would be in keeping with subparagraph (d) of the article.

#### *Article 12*

The Yugoslav Government considers that to add "another competent minister" to the list of authorities empowered to issue credentials to the permanent representative would be at variance with the norm adopted in General Assembly resolution 257 A (III) of 3 December 1948, inasmuch as it would derogate from his representative character.

#### *Article 26*

In principle, the provisions of paragraph 2 of article 26 should not go further than those of the Convention on Diplomatic Relations.

#### *Article 28*

The Yugoslav Government regards the broadening of the provisions concerning freedom of movement and travel of members of permanent missions and their families beyond the scope of the Vienna Conventions as sound, particularly as the principle of reciprocity does not apply in multilateral diplomacy.

#### *Article 29*

Having regard to the development of international relations and the need to ensure that representatives of States and their missions are provided with appropriate means of communication with their Governments, and in the interests of the normal performance of the tasks of the international organization itself, the Yugoslav Government considers it justifiable to allow permanent missions to send messages in code or to use a wireless transmitter, as provided in the Vienna Conventions system.

#### *Article 32*

Since the provisions of draft article 34 satisfactorily safeguard the interests of the host State and the exercise of the functions of the permanent representative, the Yugoslav Government does not regard it as essential to include in this article the exception provided for in paragraph 1 (d), especially since the application of the functional test is a very complex matter.

#### *Article 42*

As regards the duration of privileges and immunities, the incorporation in their entirety of the basic provisions of article 39 of the 1961 Vienna Convention on Diplomatic Relations would be justified. The reason is that, as experience has shown, representatives of States, especially those accredited to international organizations, occasionally find themselves in a situation where they cannot perform their normal functions, not only in the case of armed conflict, but also in the case of a grave deterioration in international relations.

#### *Article 44*

The Yugoslav Government regards the introduction of the principle of non-discrimination as being of vital importance for the draft articles as a whole. To ensure the scrupulous application of the principle in practice, the draft should provide for the protection of the State sending the permanent mission against discrimination by the host State such as could result, for example, from the absence of diplomatic relations. The Yugoslav Government would point out in this connexion that the host State has already been given special protection in draft article 45, and there is no reason for making the observance of the principle of non-discrimination subject to special conditions.

#### *Article 48*

The Commission's idea, expressed in paragraph 2 of the commentary to this article, concerning the obligation of the host State to allow members of permanent missions to enter its territory to take up their posts, warrants separate examination.

#### *Article 50*

The principle of trilateral consultations between interested States and international organizations is of special importance for the whole system embodied in the draft articles. Such consultations could not only help to settle any difficulties that might arise between the States and the organization, but would in general make for efficient co-operation between them.

The Commission's views on the possibility of inserting at the end of the draft articles provisions concerning settlement of disputes arising out of the application of the future convention deserve particular attention.

#### *(b) PARTS III AND IV OF THE PROVISIONAL DRAFT*

OBSERVATIONS COMMUNICATED BY A "NOTE VERBALE" DATED 1 JUNE 1971 FROM THE DEPUTY PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: French]

The Government of the Socialist Federal Republic of Yugoslavia has studied parts III and IV of the draft articles on representatives of States to international organizations—dealing respectively with permanent observer missions to international organizations and with delegations of States to organs and to conferences—and wishes to make the following preliminary observations concerning the present stage of the work on this question.

## PART III.—Permanent observer missions

*General observations*

For practical reasons it would be highly desirable to reduce part III of the draft, on permanent observer missions, to the essential provisions and to provide in transitional articles that the corresponding articles of the preceding parts shall also apply *mutatis mutandis* to the institutions whose status, privileges and immunities are governed by part III of the draft.

*Observations on specific articles**Article 51*

In this article, which defines the terms to be used in part III of the draft, it would also be useful to specify the meaning given to the expression "family of a member of the permanent observer mission" (article 61). In the other texts this concept is defined separately. Since the present article 51 defines in detail the terms used in part III, it might also cover this category of terms for the purposes of this part of the draft.

*Article 53*

An addition might be made to the text of this article, to the effect that the functions of the permanent observer mission also include maintaining relations with the permanent missions of member States.

## PART IV.—Delegations of States to organs and to conferences

*Article 83*

For practical reasons, this article should provide for an exception to the effect that one State may represent another State to an organ or to a conference if the statutory provisions of the Organization so allow.

*Article 100*

Alternative A is drafted in greater detail and, from this point of view, offers better safeguards. However, in the Yugoslav Government's opinion, there is no need to include in this article the exception stated in paragraph 2, subparagraph (d), of the draft, particularly since the application of the "official functions" criterion is a very complex matter.

*Conclusion*

The Yugoslav Government considers that the text in question should be adopted as an international convention, i.e., as a fourth part of the code of diplomatic and consular law.

## B. OBSERVATIONS OF SWITZERLAND

## (a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 22 JUNE 1970 FROM THE PERMANENT OBSERVER TO THE UNITED NATIONS

[Original text: French]

The Swiss Government has followed with interest the work of the International Law Commission in the field of relations between States and international organizations. Not only has Switzerland long been a member of many international organizations, in the establishment and administration of which it has sometimes played

a prominent part, but it now has many such organizations within its territory. It welcomes the efforts undertaken by the Commission, at the request of the General Assembly of the United Nations, with a view to codifying as far as possible this new aspect of international relations, which has become particularly important as a result of the development of multilateral international co-operation following the Second World War. In that connexion, the Swiss Government submits the following observations.

*General remarks*

The status and legal relations of international organizations are a field pre-eminently suited to contractual regulation. The existence, capacity and activity of each organization is based on its constitution, the application and, generally speaking, the interpretation of which are the responsibility of its organs. At first sight it might seem that the subject, regulated as it is by conventional instruments, does not lend itself to codification. However, the relevant constitutions and multilateral conventions often fail to cover all eventualities; although the procedure and functioning of organs can be treated on the basis of general principles, the situation is much more difficult when, for example, the status of certain persons connected with international organizations has to be defined in detail. Similarly, the constitution can only regulate relations between the organization and third parties within certain limits. It can impose rules on the organization itself, but not on its partners.

The Swiss Government therefore considers that there is justification for seeking to codify the rules on relations between States and international organizations, in so far as those rules cannot be codified by the constitutions of the organizations themselves, or where it seems desirable to establish common rules for a particular category of organizations.

For example, the rules concerning the conclusion of treaties between States and international organizations or between international organizations, a field in which the prevailing practice is complex and sometimes unclear, seem to require codification. In view of the rapid development of international organizations it may also be considered desirable to define the normal status of certain categories of organizations, both as regards the immunities and privileges of the organizations themselves and of their personnel and as regards the representatives (especially representatives of States) to the organizations.

The Swiss Government understands that the question of treaties concluded by international organizations will be taken up later. With regard to immunities and privileges, it would seem preferable to deal first—as indeed the International Law Commission has done—with the status of permanent representatives of member States to the organizations. It will be noted that this is a subject on which many conventions (including the headquarters agreement to which Switzerland is a party) are silent. Furthermore, the status of such permanent representatives, unlike that of persons employed by the organizations or connected with them (such as non-permanent representatives) is very similar to that of diplomatic agents or members of special missions. That being so, there are good grounds for considering them first and, as it were, in parallel with the texts already prepared by the Commission.

However, the Swiss Government wishes to observe that no conclusions can be drawn from the status of such permanent representatives—hitherto assimilated in international practice to diplomatic agents—as to the status of other representatives or of the organizations and their personnel. Those are fields in which there exist in addition a number of important multilateral and bilateral treaties, all based on more or less the same principles, which are completely distinct from those applicable to bilateral diplomacy.

The Swiss Government can also support the International Law Commission with regard to the general principle on which its draft is based, that is, the assimilation of permanent missions to diplo-

matic missions. This principle does not rest on a superficial analogy, but is solidly founded on State practice. In a field where customary rules are rare, if not non-existent, it is particularly important that codification should proceed in line with the facts of experience, as derived from the conventional rules in force and the practice of host countries. The rules in question, formed in the relations between the organization and the host State and confirmed by long usage, are extremely consistent in their effects. They are designed to avoid unnecessary friction and prevent abuses, preserving both the sovereignty of the host State and the independence of the organization. The Swiss Government hopes that, in pursuing its codification work, the International Law Commission will take due account—particularly in connexion with non-permanent representatives—of the current situation, which has proved to be fully satisfactory.

### *Text of the articles*

#### *Article 1*

##### *Subparagraph b*

It seems desirable to restrict the scope of the draft articles to a limited category of organizations whose size and responsibilities justify the presence of permanent missions. The definition may nevertheless still seem somewhat too wide. Not all organizations with responsibilities on a world-wide scale have activities of a type which require the presence of permanent missions or, if missions do seem necessary, which justify granting them privileges as extensive as those envisaged in the draft. It would be advisable to replace the word "responsibilities" by an expression suggesting that there are special additional conditions which must be fulfilled. The application of the draft could also be limited to institutions of the United Nations family, which would have the advantage of avoiding any dispute about the universal character of an organization.

##### *Subparagraph 1*

The commentary seems to imply that the International Law Commission intends the term "office" to mean an establishment constituting a sort of second seat, as distinct from a bureau or a separate organ established in a country other than that in which the organization has its seat. The term "seat" and for that matter the term "office", should probably be defined in subparagraph 1. The definition could read as follows: "... its seat, that is, the principal establishment of its permanent organs and its secretariat, or an office, that is, another establishment having responsibilities analogous to those of the seat ...".

#### *Articles 4 and 5*

Article 4 provides that the rules established in the articles "are without prejudice to other international agreements in force between States or between States and international organizations", while article 5 states that nothing in the articles shall preclude the conclusion of other international agreements. It does not seem that the Commission, by this difference in wording, intended article 5 to refer to a category of agreements more limited (or more extensive) than that mentioned in article 4. It would therefore be preferable to use the same wording in both articles.

#### *Article 6*

This article creates a right in favour of the members of an organization covered by the article, by virtue of which they may establish a permanent mission to the seat or at an office of the organization. In view of the extent of the privileges granted to such missions in later draft articles, it may be wondered whether this provision does not exceed its goal, which is to ensure that any member State, on terms of perfect equality, may exercise its rights as a member and assert its interests within the organization.

It is true that article 6 is to be applied without prejudice to any "relevant rules of the Organization" (article 3). However, such rules do not always exist and are not always rules of the organization. For example, by virtue of consistent practice—mentioned, it may be noted, by the Commission (article 1, paragraph 7 of the commentary)—the permanent missions of member States to the specialized agencies with seats in Geneva are accredited to the Office of the United Nations. Thus, a single mission represents a member State both to the Office and to the specialized agencies. The results of this practice have been completely satisfactory, and it would be desirable for that fact to be taken into account in the text of article 6. To that end, two amendments could be made in the draft: the first the insertion after "Organization" of the words "in accordance with the latter's practice", and the second the addition of a paragraph 2, reading as follows:

"They may establish a single permanent mission to several organizations".

The Swiss Government feels that such a provision would facilitate the representation of sending States in countries where several organizations have their seats, and would enable them to organize their missions more rationally.

#### *Article 8*

As noted in the commentary, the provisions of paragraph 1 conform to the practice followed in Geneva with regard to the specialized agencies. The provisions of paragraph 2 seem acceptable, provided that the representative so designated does not have the status of head of mission.

Practice has shown that difficulties may arise in the case of multiple accreditations if the accreditation is not officially notified to the host State. Special provision should be made for this in article 17, for it may happen that such notifications are not given in the case of persons who already enjoy the immunities involved.

#### *Article 9*

There may be some justification for this article in so far as it signifies that the assignment of a diplomatic agent to a permanent mission is not in itself an obstacle to his being simultaneously assigned to a diplomatic mission or a consular post. It may, however, remain a dead letter as regards heads of mission and heads of consular posts, who may be refused the *agrément* or the *exequatur* without any reason being given.

The notification of such dual assignments should also be mentioned in article 17.

#### *Article 10*

Subject to the provisions of article 11, this article empowers any State which is a member of an organization covered by article 2 to send any person as a representative or agent to the territory of the host State, with extensive privileges, the host State having absolutely no say in the matter. Such a regulation may in practice lead to situations which the host State is not obliged to accept.

The *agrément* procedure is not in keeping with the nature of the relations between the host State and the sending State. On the other hand, in view of the position which the agent is called upon to occupy in the territory of the host State, the latter should be authorized to formulate objections to the presence of a given individual in its territory as a member of a permanent mission. These objections could be examined by the conciliation commission whose establishment is suggested below.<sup>1</sup>

In the absence of such an objection procedure, the host State should be empowered to refuse to grant all or some of the immunities to the person concerned.

<sup>1</sup> See observations on article 50.

### Article 11

In its commentary, the Commission mentions the question of stateless representatives. In that connexion, it should be specified that the host State should not be obliged to accept the presence of stateless representatives unless the sending State takes them under its protection and is prepared to admit them to its territory at the end of their mission.

### Article 14

In the Swiss Government's view, this article relates to the conclusion of treaties between States and international organizations, a field which will perhaps eventually be codified. The corresponding provision concerning heads of mission in relations between States is contained in article 7 of the Convention on the Law of Treaties of 23 May 1969. It is therefore suggested that this article should be deleted.

### Article 16

Unlike article 11 of the Convention on Diplomatic Relations, and for easily understandable reasons, this article does not give the host State the right to limit the size of the permanent mission. Unless what is intended is merely a moral exhortation addressed to the sending State, however, it would be desirable to allow the host State the possibility of objecting to the size of the permanent mission, the objection being handled in accordance with a conciliation procedure described below.

### Article 17

It was noted above (articles 8 and 9) that it would be highly desirable for multiple accreditations and the assignment of a member of a permanent mission to a diplomatic mission or a consular post to be expressly notified.

The provisions of article 17 deal simultaneously with two completely separate questions: notification of the organization, and notification of the host State. It may be wondered whether, in order to make the text clearer, it would not be preferable to have two separate articles, especially since the two types of notification have very different consequences.

Notification of the host State is particularly important, for it constitutes a condition *sine qua non* of the granting of privileges and immunities. It is therefore essential that the host State should be informed as soon as possible of any changes which take place. In that connexion, the Swiss Government would point out that paragraph 4 of its decision of 31 March 1948, quoted in paragraph 4 of the Commission's commentary, was amended by a decision of 3 November 1967 reading as follows:

"The establishment of a permanent delegation is notified to the Political Department by the diplomatic mission of the State concerned at Berne, or, in the absence of such mission, through the competent Swiss diplomatic representation. Arrivals and departures of members of delegations are notified to the Political Department by the diplomatic mission at Berne or by the delegation. The Department issues to members of delegations an identity card (*carte de légitimation*) stating the privileges and immunities to which they are entitled in Switzerland.

The Swiss Government considers that it is the permanent mission, not the organization, which should give notification to the host State. This procedure is simpler and safer and makes for prompter issue of the cards.

### Article 22

This article, like article 24, creates obligations for the organization; other articles deal with the relations between the organization and the sending State. Article 50 provides for consultations between the organizations, the sending State and the host State. This struc-

ture, which would be peculiar to this particular convention, would seem to justify its being opened, in an appropriate form, for signature and accession by the organizations which it covers.

### Article 25

The Swiss Government ventures to draw the Commission's attention to the last sentence of article 31, paragraph 4, of the Convention on Consular Relations, which provides for the case of expropriation. The Swiss Government considers that this provision could usefully be added to article 25.

Subparagraph *k bis*, which it is proposed should be inserted in article 1 (paragraph 4 of the commentary on article 25), includes the residence of the permanent representative in the premises of the mission. The Swiss Government considers this definition acceptable, provided that, even if there were several permanent representatives, only one residence would be considered to form part of the premises of the mission. The other residences would be sufficiently protected by article 31.

### Article 28

While stressing that it has never taken and does not intend to take any restrictive measures with regard to members of permanent missions, the Swiss Government would observe that these facilities, unlike those provided for diplomatic and consular agents, are not really justified by the functions of the persons concerned. In that connexion, reference may be made to article 27 of the Convention on Special Missions.

### Article 32

The Swiss Government favours the retention of paragraph 1 *d* of this article.

### Articles 33 and 34

The Swiss Government regards it as an important advance that the principle stated in resolution II accompanying the Convention on Diplomatic Relations has been embodied in the text of article 34 and that a clear obligation is now laid on the sending State. It nevertheless regrets that article 34 of the text should lag behind the Conventions relating to international organizations now in force, which specify that the sending State "has the right" and "is under a duty" to waive immunity from jurisdiction, without limiting the "duty" to the case of civil immunity. It is generally agreed that the provision authorizing the sending State to waive the diplomatic immunity of a diplomatic agent contained in article 32 of the Convention on Diplomatic Relations is virtually never applied. The sanction in criminal matters is usually a request for recall or a declaration of *persona non grata*. The latter institution is not provided for in the draft articles, for the same reasons which rule out a genuine *agrément* procedure. Recall is possible in the case of article 45, paragraph 2, which will be commented on below and which is not fully satisfactory.

In that connexion, it may be noted that one of the reasons which led to the granting of what is in practice total immunity to diplomatic agents is the fact that, as an intermediary between the sending State and the receiving State, the diplomatic agent may be liable simply through the normal exercise of his functions, to arouse the resentment of the receiving State. In the case of a permanent representative, such a possibility is much more remote, for the representative's activity in the organization has generally nothing to do with the host State. It would therefore be justifiable to specify not only a right but, as in the existing agreements with and concerning international organizations, a "duty" to waive immunity in cases other than those mentioned in article 34.

### Article 35

It seems that the purpose of using the expression "private staff" of members of the mission in the Convention on Special Missions,

instead of the expression "private servants" which had been used in the Convention on Diplomatic Relations, was to take account of the differences between permanent missions and special missions, the latter being of a temporary nature, with the result that their members often do not employ servants. In the present draft, it would seem preferable to keep to the wording employed in the Convention on Diplomatic Relations.

#### Article 36

Although the Convention on Diplomatic Relations rule corresponding to subparagraph *f* is formulated as an exception to an exception, its application has caused no difficulty in Switzerland.

#### Article 39

The Swiss Government cannot agree with the views of the International Law Commission on article 39. Switzerland approves *per se* of the rule that the child of a member of the permanent mission may not acquire the nationality of the host State by the operation of *jus soli*. However, the rule laid down in article 39 is wider in scope: it covers all provisions for the automatic acquisition of the nationality of the host State, whether or not they make such acquisition dependent on residence in that State.

For the reasons which guided the Vienna Conferences of 1961 and 1963, the Swiss Government recommends that this provision should be dealt with in a separate protocol.

#### Article 40

With regard to the "private staff" of members of the mission, see the comment on article 35.

#### Article 41

Same comment as for the preceding article.

#### Article 45

The Swiss Government appreciates the intention of the Commission in inserting in article 45 a paragraph on the recall of members of the permanent mission. However, this provision has several drawbacks and on the whole must be considered inadequate. In the first place, it excludes offences committed within the premises of the mission, which implies that such offences do not fall within the jurisdiction of the host State. Furthermore, the obligation laid upon the sending State depends upon its good will and upon its interpretation of the violations. When, as has in fact occurred, the violation consists of an infringement of the security of the host State, the sending State can hardly be expected to recall the offender spontaneously. Yet recall is absolutely necessary in such cases.

The Swiss Government suggests two possible ways of replacing paragraph 2 of article 45 by a more satisfactory provision:

(a) A general provision on the protection of the security of the host State, such as those included in several headquarters agreements. This could read as follows:

"Nothing in these articles shall affect the right of the host State to take the necessary precautions in the interest of its security. In taking the necessary measures, which should be proportionate to the needs, the host State shall take due account of the interests of the organization and of the sending State. It shall enter into contact with them, as soon as circumstances permit, with a view to reaching agreement on appropriate measures to ensure the protection of those interests."

(b) A provision on the procedure to be followed in the event of expulsion, such as that contained in section 13 of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations.

#### Article 49

According to the commentary, the second sentence of paragraph 1 also covers the designation of a third State as protector of the property of the mission. It would seem preferable, while retaining the general formula, to mention this possibility expressly, as is done in article 45, subparagraph *b*, of the Convention on Diplomatic Relations.

#### Article 50

The Swiss Government has already indicated that it considers article 50 inadequate. In its view, the inadequacy is twofold.

First, the consultations provided for are insufficient for the application of a codification convention. The Swiss Government maintains its view that the corollary to the codification of international law must be the jurisdiction of international tribunals, preferably existing tribunals and in particular the International Court of Justice. It will make a proposal in that sense in due course.

Secondly, the special nature of the relations between the sending State and the host State require for certain specific questions the establishment of a tripartite body capable of coming to a decision in a very short time. This body could be made responsible for handling, through a conciliation procedure, the objections of the host State to a member of a permanent mission (article 10) or to the size of the permanent mission (article 16).

The conciliation machinery could operate in accordance with the text suggested below:

"Within six months after the Convention enters into force with regard to the Organization, the latter shall establish a Conciliation Commission based on the following principles:

"1. The Commission shall be composed of three members: one representative of the Organization, one representative of the sending State and one representative of the host State.

"2. The representatives shall be designated in advance and their names shall be included in a list maintained by the Organization.

"3. Matters may be brought to the cognizance of the Commission by the Organization, the sending State or the host State.

"4. The absence of a representative shall not prevent the Commission from taking a decision.

"5. The Commission shall take its decisions by majority vote; it may make recommendations to the parties."

#### (b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 22 JANUARY 1971 FROM THE PERMANENT OBSERVER TO THE UNITED NATIONS

[Original text: French]

#### Introduction

The Swiss Government has been greatly interested in the results of the work of the International Law Commission on permanent observer missions to international organizations and on delegations of States to organs and to conferences. Switzerland attaches the greatest importance to these matters, both as the host State for the European headquarters of the United Nations and for many other international organizations and also as a non-member State of the United Nations which is represented in New York by an observer. The Swiss Government is happy to be able to collaborate in the codification work undertaken by the Commission at the request of the General Assembly, and its observations on the Commission's draft articles are given below.

As a preliminary comment, it is suggested that the references to earlier articles in the draft—those in articles 66 to 77 for example—

should be grouped together in one or more articles. Moreover, this suggestion seems to meet the concern expressed by some members of the Commission itself.

#### Article 52

The words "in accordance with the rules or practice of the Organization" should be replaced by "with the agreement of the Organization and in accordance with its rules or practice", which would come at the beginning of the sentence, for it is felt that the organizations should be empowered to grant or refuse permission to establish a permanent observer mission. The present reference to the rules or practice of the organization seems to signify that permanent observer missions may be established if the general practice of the organization admits of their existence. On the other hand, it does not seem to permit a separate decision to be taken in each case.

#### Article 53

The Swiss Government has some misgivings about the views in paragraph 2 of the commentary contrasting permanent missions and observers. In its view, the permanent observer does specifically represent his Government in (*auprès*) the Organization. Moreover, it may be noted that, in French, this is the term used in describing such missions. For example, the Swiss observer mission in New York is officially called the "Office of the Permanent Observer of Switzerland to (*auprès*) the United Nations" and the Swiss representative at Geneva is called the "Observer of the Federal Political Department to (*auprès*) the United Nations in Geneva and Permanent Representative to (*auprès*) the other International Organizations".

Precisely because the sending State is not a member of the organization, the position of the mission is very similar to that of an embassy to a foreign Government. In the same way as an embassy represents the sending State in (*auprès*) the receiving State, the observer mission represents it in (*auprès*) the organization, and participation in the internal work of the organization, which is one of the fundamental tasks of a Member State's permanent mission, is, in principle, clearly impossible in the case of observers, just as of course there is no equivalent in international relations. Like the ambassador, the observer therefore ensures representation between two entities which are exterior to each other. Accordingly, it is not a Member State's permanent mission which should be equated with a diplomatic mission (while the observer is accorded a lower degree of competence) but rather the observer who should be equated with the embassy, since the permanent mission, which participates in the internal work of the organization, has an important extra degree of competence for which there is no analogy in inter-State relations.

This similarity between observer missions and diplomatic missions has certain practical consequences relating to their status which should be taken up again at a later stage.

As to the text of the draft article, the words "representing its Government at sessions of organs of the Organization at which it has been invited to participate" should be added to the text. This formulation is based on the wording used in the United Nations Legal Counsel's memorandum dated 22 August 1962,<sup>2</sup> part of which is cited in the Commission's report on its twenty-second session.<sup>3</sup> An organization sometimes invites non-member States to participate in some of its work and, occasionally, it is obliged to do so. In that connexion, it is possible to cite Switzerland's participation in the elections in the International Court of Justice and in the revisions of the Statute of the Court. Such participation is one of the normal responsibilities of observer missions.

<sup>2</sup> Reproduced in *Yearbook of the International Law Commission*, 1967, vol. II, p. 190, document A/CN.4/L.118 and Add.1 and 2, part one, A, para. 169.

<sup>3</sup> *Ibid.*, 1970, vol. II, p. 277, document A/8010/Rev.1, chap. II, B.

In addition, it is suggested that in the penultimate line of the article the words "with the Organization" should be changed to "with or in the Organization", the phrase used in article 7, c.

#### Article 54

In addition to plurality of functions as observer to two or more international organizations, it is indeed useful to provide for the possibility of accrediting the head or a member of a permanent mission to one organization as an observer to another organization. This is advantageous to States which are members of only one or some of the organizations established at a given place and which want observer status in other organizations. It may be noted, here again, that at Geneva the same person acts as permanent representative to the specialized agencies of which Switzerland is a member and as observer to the United Nations. His title, which was quoted in connexion with article 53, mentions both these functions.

However, the present wording of the article is not perhaps absolutely clear and it might be amended as follows:

"The sending State may accredit the same person as permanent observer to two or more international organizations or *simultaneously as a member of its permanent mission to one or more international organizations and as permanent observer to one or more other organizations*".

#### Article 55

Please see the Swiss Government's comment on article 10. The host State should be empowered to formulate objections to the presence of a given individual in its territory as a member of an observer mission. Without prejudice to the conciliation commission which it has been suggested should be set up, it should be empowered to refuse to grant all or some of the immunities to the person concerned.

#### Article 57

The Swiss Government supports the idea of issuing permanent observers with credentials. This results in a welcome clarification of their status.

#### Article 58

In its earlier comments, the Swiss Government suggested deleting article 14, whose place in the part concerning permanent missions is the same as that of article 58 in the part concerning observers. It expressed the view that this matter relates to the conclusion of treaties between States and international organizations, a field which should be codified separately.

Secondly, it is suggested that the word "adopting" in paragraph 1 should be replaced by "negotiating", so as to avoid confusion with signing—dealt with in paragraph 2—and also to make allowance for the modern tendency to replace signing by a vote of adoption.

#### Article 60

The Swiss Government reiterates its earlier comment on article 16, concerning the limiting of the size of the mission.

#### Article 61

The Swiss Government reiterates its earlier comment on article 17, concerning notification of the host State by the observer and not by the organization, as an indispensable requirement for the granting of privileges.

With regard to notification of double assignments (article 59, para. 2), please see the earlier comments on articles 9 and 17.

#### Article 63

The Swiss Government endorses the principle set out in this article. In addition, it shares the view expressed by some members



of the Commission that the words "in localities" should be replaced by "in a locality".

#### Article 64

In view of the observations on the similarity between observer missions and diplomatic missions (see comment on article 53), it seems natural to grant the mission the right to display the flag of the sending State on its premises and to extend that right to the observer's residence and the vehicle he uses.

#### Article 67 et seq.

The Swiss Government supports the idea that the privileges and immunities of observer missions should be the same as those of permanent missions. In its view, a great deal could also be borrowed from the status of diplomatic missions, because of the similarity between the two types of missions.

#### Article 68

Please see the earlier comment on article 28.

#### Article 79

It might be desirable to amend this article so as to cover agreements already concluded, as well as those to be concluded in the future.

Moreover, the purpose of this provision, including the proposed addition, would be met by articles 4 and 5, provided it was clearly understood that they apply to the draft as a whole—as indeed the Commission observes in its commentary on article 4—and that the wording of article 5, which is too restrictive in its present form, is revised accordingly.

#### Article 82

The subject of this article is a rather delicate one. It is not easy to define the rights of the host State in cases where a delegation to an organ or to a conference is of an exaggerated size. The fundamental rule, deriving from general international law, is that each State is, in principle, free to refuse entry into its territory, subject to the special obligations it has entered into in that connexion, i.e., in our case, those resulting from the headquarters agreement concluded with the organization. For the host State, such special norms will commonly involve the obligation to allow delegations to enter, with some opportunity to formulate objections in cases where they are of an exaggerated size. Where it is not possible to invoke any special norm, the general principle applies and it may be wondered whether this article limits the discretionary power of the host State in that regard. This does not seem to be the case with the present wording of the draft and such an approach appears to be acceptable.

The Swiss Government wishes to reaffirm in this connexion its intention to pursue a most liberal policy in this matter.

#### Article 83

It would seem advisable to take account here of the trend towards multiple representation which has been noted on a number of occasions. Among its other advantages, this practice has the merit of facilitating the participation of small States in the work of international organizations and conferences. It is therefore suggested that the text of the draft should be amended to authorize multiple representation.

Apart from the representation of two or more States by the same delegation, it would be advisable—for the benefit of small States in particular—to raise no obstacle to the different but well-established practice whereby a member of a permanent mission or an observer mission acts as the delegate of another State at certain meetings. For example, in the election of judges at the International Court of

Justice, a member of the Office of the Observer of Switzerland to the United Nations is usually designated as the delegate for Liechtenstein.

Since it shares some of the concern expressed by the Commission in the commentary, the Swiss Government proposes the addition of a new article 83*bis*, establishing that, under certain conditions, a member of a delegation may represent another State.

#### Article 84

Please see the comment on article 55.

#### Article 86

It would be preferable for the acting head to be designated in advance, before any case of unavoidable absence, which may be sudden, can occur.

#### Article 95

The reference to the nature of the functions performed by delegations introduces an element which might lead to difficulties of interpretation and one which is not perhaps indispensable. This reference could be deleted and the article could start with the words "For the duration of the functions . . .".

#### Article 100

In view of the fairly loose ties delegates have in the host State—where their stay is only temporary—alternative B seems better. In the circumstances, this wording of the text ensures adequate protection.

#### Article 101

See the observations on articles 33 and 34.

#### Article 102

The detailed provisions of this article do not seem destined for broad practical application, since delegates do not in principle have a domicile in the host State or, if they do, they generally have diplomatic status. Consequently, it might be desirable to attempt to simplify the wording of this article and reduce it to a simple statement of principle. The wording might be something similar to the following:

"The sojourn in the host State of representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff shall never make the persons concerned liable to dues and taxes, personal or real, national, regional or municipal to which such persons would not have been liable if they did not have such status".

The idea underlying this text is that delegates shall be liable to the taxes which affect all persons who are in the territory for any purpose, even if they are merely passing through (for example, the indirect purchase taxes referred to in subparagraph *a* or those referred to in subparagraph *e*), and the taxes to which they are liable regardless of their presence in the territory of the country (subparagraphs *b* to *d*)—i.e. precisely the exceptions listed in the present draft—whilst they are exempted from all other taxes which are generally based on the existence of a domicile or sojourn in the territory of the host country.

#### Article 108

In paragraph 2, the words "in which to do so" might be interpreted as meaning that the privileges and immunities would subsist so long as the host State had not fixed a time-limit for the delegate to leave the territory. Since such a practice is not followed at the

present time and there would be no advantage in encouraging its introduction, it would seem preferable to adopt the following version for the beginning of the paragraph:

"When the functions of a person entitled to privileges and immunities under this part have come to an end, the privileges and immunities of such person shall normally cease at the moment when he leaves the territory of the host State or on the expiry of a reasonable period after the functions have come to an end".

#### Article 114

It would be desirable for the notification referred to in subparagraph *a* to be sent to the host State as well.

### C. OBSERVATIONS OF THE SECRETARIATS OF THE UNITED NATIONS, THE SPECIALIZED AGENCIES AND THE INTERNATIONAL ATOMIC ENERGY AGENCY

#### 1. United Nations

##### (a) PARTS I AND II OF THE PROVISIONAL DRAFT

[Original text: English]

1. In pursuance of the request of the International Law Commission made at its twenty-first session, 1969, the Secretariat of the United Nations submits the following observations on parts I and II of the draft articles on representatives of States to international organizations, adopted by the Commission at its twentieth and twenty-first sessions.

#### *Right of entry and sojourn*

2. The Secretariat of the United Nations believes it desirable that express provision should be made in the draft articles to ensure to members of permanent missions and their families the right of entry into and sojourn in the territory of the host State and the freedom of transit to and from the premises of the international organization concerned. The Commission has indicated, in paragraph 2 of its commentary to article 48 of the draft articles, that it would consider this point at its second reading of the draft articles.

3. Entry into the territory of the host States is an indispensable privilege and immunity for the independent exercise on the part of members of permanent missions of their functions in connexion with the organization to which they are accredited. It is a prerequisite to all other privileges and immunities in the host State. Provisions for it have been made in the Convention on the Privileges and Immunities of the United Nations (section II, para. *d*), the Convention on the Privileges and Immunities of the Specialized Agencies (section 13, para. *d*) and the Agreement on the Privileges and Immunities of IAEA (section 12, para. *d*). Similar provisions are contained in the headquarters agreements of the United Nations and in those of various specialized agencies, of IAEA, and of the subsidiary organs of the United Nations such as the regional economic commissions and UNIDO.

4. In the draft articles in their present form, the right of entry is probably implied in article 28 dealing with "freedom of movement" in the host State, in article 48 on "facilities for departure" and in article 45, paragraph 2, on "recall" (of the person concerned by the sending State). These provisions, on the other hand, appear to make its omission all the more conspicuous. Indeed, its absence renders the enumeration of privileges and immunities of representa-

tives logically incomplete and the enjoyment of those already provided for possibly nugatory. Under article 42, every person entitled to privileges and immunities shall enjoy them only "from the moment he enters the territory of the host State". This provision would preclude a representative from claiming vis-à-vis the host State, any privilege and immunity, including that of entry, until he has entered the host State. It is therefore imperative to expressly provide for the right of entry into the host State. Without such a provision, a host State might in effect be given the unintended power of veto over the appointment by States of their representatives.

5. In the experience of the Secretariat of the United Nations, there have been occasions when—convention, headquarters agreement and/or "host agreement" notwithstanding—a representative of State has been refused entry by a host State. While most of such cases concerned representatives to a specific session of a United Nations organ or to an *ad hoc* meeting convened under the auspices of the United Nations, members of permanent missions have on occasion been involved too. Indeed, sessions of a regional economic commission have had their venue changed from one Member State to another because entry was not assured for the representative of a State entitled to attend.

6. The Secretariat of the United Nations would therefore suggest that an article be added to provide for members of permanent missions the right of entry into the host State in order to exercise their functions in connexion with the organization to which they are accredited. In the context of the existing text of the draft articles, in the light of the relevant provisions of existing conventions and headquarters agreements, and on the basis of the experience of the Secretariat, the additional article on entry might comprise several elements:

- (1) The host State should facilitate
  - (a) entry into its territory, and
  - (b) sojourn in its territory

of all members of all permanent missions and members of their families forming part of their respective households;

(2) It should ensure the freedom of transit to and from the organization to any person referred to in 1 above;

(3) Visas, where required, should be granted free of charge and as promptly as possible; and

(4) Laws or regulations of the host State tending to restrict entry or sojourn of aliens should not apply to any person referred to in 1 above.

7. With reference to the privilege of sojourn in the host State, it is noted that article 45 of the draft envisages the recall or termination by the sending State of any member of its permanent mission "in case of grave and manifest violation of the criminal law of the host State" by the person concerned.

8. Should the Commission decide to add a new article in the sense suggested above, the text might be inserted so as to precede existing articles 28 ("Freedom of movement"). For the convenience of the Commission in its consideration of this matter, the Secretariat appends the following draft text which indicates the substance which such article might cover:

#### *"Article 27 bis. Entry into and sojourn in the host State"*

"1. The host State shall take all necessary measures to facilitate the entry into and sojourn in its territory of any person appointed, in accordance with article 10, by a State member of the Organization as a member of that State's permanent mission and of any member of the family forming part of the household of such member of permanent mission.

"2. The host State shall ensure to all persons referred to in paragraph 1 of this article the freedom of transit to and from the Organization and shall afford them any necessary protection in transit.

"3. Visas, where required for any person referred to in paragraph 1 of this article, shall be granted free of charge and as promptly as possible.

"4. Laws or regulations of the host State tending to restrict the entry or sojourn of aliens shall not apply to any person referred to in paragraph 1 of this article."

### *Abuse of privilege of residence*

9. Article 45, paragraph 2, provides an obligation of the sending State, if it does not waive the immunity of a member of a permanent mission, to recall or otherwise remove him only "in case of grave and manifest violation of the criminal law of the host State". It is suggested that this obligation should be broadened to bring it into line with the corresponding provision of the Headquarters Agreement of the United Nations. It would then cover any serious abuse of the privilege of residence, whether or not it constitutes a grave and manifest violation of criminal law, subject only to the proviso already included in the last sentence of paragraph 2.

10. The language of the Headquarters Agreement of the United Nations (section 13, para. b) is "in case of abuse of such privileges of residence by any such person in activities in the United States outside his official capacity", and this has been followed in other headquarters agreements and conference agreements. Thus the practice in the wording of agreements supports a broader formulation than that in the present draft; and there have also been cases of abuse of the privilege of residence (for example by engaging in commercial activity in the host State without that State's permission) which have led a sending State to recall the persons involved after protest by the host State.

11. Under the present formulations of the draft articles, if there is a serious abuse of the privilege of residence which does not constitute a grave and manifest violation of criminal law—for example, conspicuous interference in the internal political affairs of the host State, or running an extensive private business without permission, or even a long series of minor offences showing contempt for the local law—the only thing the host State could do to stop the abuse would be to consult with the sending State and the organization under article 50. If, however, duties are imposed only on the individuals concerned (as under the present article 45, paragraph 1, and article 46) and not on the sending State, the latter would have no legal obligation to take action, and the consultation might not be fruitful.

### (b) PARTS III AND IV OF THE PROVISIONAL DRAFT

[Original text: English]

1. The Secretariat of the United Nations submits to the International Law Commission two points concerning the Commission's draft articles on permanent observer missions to international organizations (part III) and those on delegations of State to organs and to conferences (part IV). These comments are parallel to its observations on part II of the draft articles dealing with permanent missions to international organizations and are motivated by the same considerations.

2. The Secretariat believes, in the first place, that express provision should be made, in parts III and IV of the draft articles, to ensure to members of permanent observer missions and of delegations of States to organs or conferences of international organizations, and to members of their families, the right of entry into and sojourn in the territory of the host State and the freedom of transit to and from the premises of the international organization, or to and from the site of the organ or the conference concerned.

3. The Secretariat is of the opinion, secondly, that the obligation of the sending State, envisaged by reference in articles 76 and 112,

to recall or otherwise to remove a member of its permanent observer mission or of its delegation to an organ or conference, if it does not waive his immunity, should be extended to cover any serious abuse of the privilege of residence.

4. The reasons for the foregoing suggestions may be found in the Secretariat's observations on part II of the provisional draft, which are applicable, *mutatis mutandis*, to those on permanent observer missions and delegations to organs and conferences.

## 2. International Labour Organisation

### (a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 21 AUGUST 1970  
FROM THE LEGAL ADVISER

[Original text: French]

Before offering the comments which certain of the draft articles seem to us to call for, I should like to make a general comment which we feel is of very considerable importance.

The draft convention will be adopted by States. It naturally imposes certain obligations on these subjects of international law, but it also imposes a number of obligations on international organizations. It seems to us that this raises the question whether, legally, an inter-State agreement can impose obligations on a third subject of international law, in this instance international organizations of universal character. In the case of relations between States the validity of such obligations is doubtful at best according to authoritative legal opinion, unless the third State on which the obligations are imposed, signifies its acceptance of them.

It is true that certain international conventions, such as the constitutions of international organizations, impose certain obligations on those organizations. However, in such cases the situation is different from the one we are dealing with here, for what those constitutions define is in fact the functions and purposes of the organizations, whereas in the present case the obligations imposed on the organization are not part of the latter's constitutional functions.

A comparison with the general conventions on privileges and immunities, whether of the United Nations or of the specialized agencies, does not seem to us entirely satisfactory, for under those conventions the obligations imposed on the international organizations are in reality simply prior conditions which the organizations must fulfil in order to obtain certain privileges or immunities. In the present instance, however, the obligations have no connexion with any rights which the organizations may enjoy.

As to this point, therefore, we feel that in order to clarify the situation the organizations should if possible be parties to the future convention or should at least have the opportunity formally to accept the obligations which it would impose on them.

Turning to our specific comments, we should like to stress the following points.

### *Article 3*

The full significance of this article does not seem to us very clear, even in the light of the explanation given by the International Law Commission itself. Judging strictly from the explanation and the text, it would appear that the organization, in its relations with the host State and with a sending State, could completely ignore the provisions of the convention, even if the latter had been ratified by the two States: it could contend that its relevant rules and practices were different from those set forth in the convention and that consequently only the former were applicable. As that is surely not the intent of this provision, it would presumably be desirable to clarify somewhat the relationship between existing rules and practices and the draft convention.

## Articles 4 and 5

These texts, the purpose of which is to safeguard existing agreements and permit the conclusion of special agreements in the future, also seem to us to justify some doubts. An existing agreement might not necessarily be in the usual form but might derive from an exchange of letters or even from unilateral decisions accepted as valid *per se* and applied over long periods (such is the case, for example, in Switzerland). Would these arrangements, which may even have acquired the character of customary law, be maintained under the new system, or would the convention have to be regarded as displacing them?

Moreover, a particularly delicate situation might arise if one or more of the sending States ratified the new convention and the host State did not. In such a case, the earlier arrangements would presumably be maintained. However, the sending State could request the organization—which would be bound vis-à-vis the sending State by the convention—to take the measures in its favour specified under the convention as being incumbent on the international organizations, while the host State did not recognize the organization's action. Such a situation would naturally be unsatisfactory, and perhaps some clarification of the problems which would arise could be included in the convention itself.

## Article 7

This article, which describes the functions of a permanent mission, should of course be expanded, as far as the ILO is concerned, to take into account the fact that the ILO's relations with member States are primarily of a technical nature. For that reason, relations with member States are for the most part, under article 11 of the Constitution,<sup>1</sup> handled through the "government departments of any of the Members which deal with questions of industry and employment", which communicate with the Director-General, when necessary, through the representative of their Government on the Governing Body. Of course, draft article 7 is subject to the reservations set forth in article 3 and could thus, in the case of the ILO, at least to some extent be disregarded; but the impression given by article 7 is that henceforth only the permanent mission, as normally constituted or with the addition of technical experts, would be competent to have dealings with the ILO. It might be useful to specify what the situation would be, at least in an appropriate commentary of the draft convention.

Article 7 also provides that one of the functions of the permanent mission is that of "carrying on negotiations with or in the Organization". This provision does not seem to be applicable to the ILO, since no negotiations are carried on in the organization, at least as regards the adoption of the most important ILO instruments, namely conventions and recommendations, which takes place in the Conference.

## Article 16

This provision, which deals with the size of the mission, and in particular the limits which the size of the mission should not exceed, gives no indication of who would decide what is reasonable and normal. It could place the organization in a very difficult situation, considering that article 50 of the draft provides that any question arising between a sending State and the host State concerning the application of the convention shall be the subject of tripartite negotiations between the sending State, the host State and the organization. The organization would thus be obliged to take a position on a problem which had very little to do with it.

## Article 17

This article would completely disrupt the ILO's present practice. Until now the ILO has limited itself to receiving and taking note of notification regarding accreditation to the organization. The informa-

tion received concerns only members of permanent missions representing their countries in the ILO. The considerable amplification of the obligation to notify provided for in article 17 would make it necessary to set up a very cumbersome system in which the Organization would simply act as a transmitting body. At Geneva, moreover, the members of permanent missions are in the great majority of cases assigned to several organizations at the same time. To oblige the permanent missions to notify each of the organizations of the names of all the persons referred to in article 17 and to oblige all the organizations to transmit that information to the host State would entail a duplication of effort which would hardly seem justifiable. Perhaps in cases of accreditation to several organizations the notification could be made to only one of them, which would be responsible for informing the host State and the other organizations.

## Article 19

The order of precedence provided for in this article would be determined by the alphabetical order. Perhaps the article should specify which alphabetical order is meant, as it would vary according to the language used.

## Articles 22, 23 and 24

These articles provide that the organization shall assist the permanent mission in various matters. They raise the same problems as article 50. The organization's role with reference, in particular, to obtaining accommodation is not clearly defined, and could include the obligation to provide private accommodation for members of the permanent missions. It is difficult to see how the organizations could carry out such an obligation.

## Article 50

This general provision envisages tripartite consultations between the sending State, the host State and the organization concerning the application of the convention. It thus imposes on the organizations the obligation to provide for the diplomatic protection, as it were of the sending State. It seems to us that it would be very difficult for an organization to play the role of conciliator, perhaps even arbitrator, in connexion with problems not directly related to its own interests, such as respect for exemption from customs duties or the extent and content of immunity from jurisdiction. While there is no question that an organization can and should intervene if the host State hinders the functioning of the organization by, for example, prohibiting the entry into its territory of representatives of member States, it does not seem to us that questions relating rather to diplomatic usage and the comity of nations can usefully be made the subject of intervention by the organization. They are matters touching solely on the relations between two States and having nothing to do with the organization.

## (b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 2 DECEMBER 1970  
FROM THE LEGAL ADVISER

[Original text: French]

... I should like to point out that my general comments concerning parts I and II [of the provisional draft] also apply to [parts III and IV].

Turning to particular points, I feel that the following observations could be made.

## Article 51

Paragraph *a* of this article does not indicate whether, to benefit from the convention, a non-member State has to be a party to the convention or whether it is enough if the host State has ratified it.

<sup>1</sup> International Labour Office, *Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference* (Geneva, 1968).

Probably both States have to be parties to the convention, but it might be preferable to say so specifically.

The term "office" in paragraph *i* of the same article does not seem very clear. It may refer to offices with a general field of activity, such as the United Nations Office at Geneva, as well as the regional offices of the Organization, which are designed only to meet the needs of their particular region. If the latter meaning is intended, it would appear that the host State would have to allow the establishment of missions in its territory by non-member States of the organization which are not situated in the region covered by the office to which the mission would be accredited. I am not sure that this was the intention of the authors of the draft. The fact that article 52 refers to the rules or practice of the organization does not seem to be a completely satisfactory solution in this case, since some organizations, such as the ILO, have no practice or rules relating to this matter.

#### Article 78

Quite obviously, article 78 refers solely to delegations consisting of government representatives and not to non-government delegations such as those representing employers and workers as we know them in the International Labour Office. For example, the status of the employers' and workers' members of the Governing Body of the International Labour Office or of the persons invited by the Governing Body to take part in advisory committees or regional conferences or meetings of experts does not fall within the scope of the draft. Similarly, there is no provision covering non-permanent observer delegations to an organ of the organization or to a conference. This seems to us to be an omission in the draft which might be of some importance, particularly as regards rights of entry, sojourn and departure in the country where the conference or the meeting is held, and also as regards the principal immunities.

Lastly, concerning the relation between the fourth part of the draft and article 13, which deals with the accreditation of permanent representatives to organs, it would seem desirable to state specifically that delegations to organs or to conferences should always be accredited according to the rules of the organization and that general accreditation to the organization would not be a sufficient basis for assuming that permanent delegates are automatically members of the delegation of the country they represent in each particular meeting.

#### Article 79

This article, which basically reproduces the text of article 5, might create some ambiguity, particularly with regard to the scope of articles 3 and 4, which are not reproduced. Accordingly, it is felt that it would be preferable either not to reproduce the substance of article 5, or to reproduce the whole of articles 3 to 5.

#### Article 81

It should be noted in this connexion that although States may appoint a head of delegation, the rules applicable in the ILO do not compel them to do so, since each of the government delegates (as well as the employers' and workers' delegates) are treated by the conference as being on an equal footing. The delegates representing employers and workers are not subject to the authority of any head of delegation.

#### Articles 84 and 86

The comments concerning article 81 apply equally to these two articles.

#### Article 89

It would indeed be desirable if organizations could be told of the dates of arrival and departure of the persons referred to in article 81 and so inform the Government of the country in which the conference meets of the period in which those persons will fall under the system established in the draft convention.

However, this provision might face almost insurmountable difficulties when it came to be implemented. In the first place, it is

easy to imagine that some delegates, not to say members of their family, will fail to inform the organization of their arrival or departure; equally, some delegates, including the employers' and workers' delegates in the ILO, will prolong their stay at the place in which the conference meets beyond the closing date. In that case, should the Government be informed of the actual date of departure of the persons concerned? Alternatively (and, it would seem, more logically) should the period of application of the draft cease on the closing date of the conference?

#### Article 90

In the ILO, the problem of precedence among Member States does not really arise since, in practice, the order in which Governments are called in roll-call votes and seated in the conference room is alternately forward and reverse French alphabetical order. These are the only cases in which some precedence is observed.

Lastly, I note that the question of the status of observer missions which are not composed of national officials, such as the representatives at Geneva of the large employers' and workers' organizations, is not taken up in the draft convention.

### 3. Food and Agriculture Organization of the United Nations

#### PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY A LETTER DATED  
5 JANUARY 1971 FROM THE LEGAL COUNSEL

[Original text: English]

#### Article 12

In the third sentence of paragraph 5 of the commentary, the words "the Conference (FAO), or" should be deleted. In FAO the Director-General does *not* report to the Conference on credentials or appointment of permanent representatives; the Conference and its Credentials Committee may have to examine such credentials in cases in which the permanent representative is to represent his country at a session of the Conference by virtue of his general credentials.

#### Article 13

The first sentence of paragraph 4 of the commentary should be accompanied by a foot-note reading as follows:

"In 1969, FAO amended Rule III.2 of its General Rules in this sense; the relevant provision now reads: 'A Permanent Representative to the Organization does not require special credentials if his letter of accreditation to the Organization specifies that he is authorized to represent his Government at sessions of the Conference, it being understood that this would not preclude that Government from accrediting another delegate by means of special credentials'." <sup>2</sup>

The previous practice has been modified by this amendment which has been drawn up in the light of the draft articles.

### 4. United Nations Educational, Scientific and Cultural Organization

#### (a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 2 SEPTEMBER 1970  
FROM THE ASSISTANT DIRECTOR-GENERAL FOR INTERNATIONAL  
STANDARDS AND LEGAL AFFAIRS

[Original text: French]

The observations of the UNESCO Secretariat refer to the draft articles and the commentaries on them, and also to the interpreta-

<sup>2</sup> FAO, *Basic Texts of the Food and Agriculture Organization of the United Nations, 1970 Edition*, pp. 24-25.

tion given to the information provided by UNESCO in its letters dated 2 March and 3 September 1965, 15 September 1966 and 2 August 1968.

1. In *article 11*, the provision that the permanent representative and the members of the diplomatic staff "may not be appointed from among persons having the nationality of the host State, except with the consent of that State which may be withdrawn at any time" seems to me too restrictive. Nationality should not be of any concern in the choice of a permanent representative and of the diplomatic staff of the mission, and the host State should not be given a right of veto in the matter. I note that

"some members of the Commission considered that in principle there should be no restrictions on the appointment by the sending State of non-nationals to its permanent mission" (commentary, para. 2).

The only restriction with regard to nationals of the host State which seems to me to be justified is that concerning privileges and immunities, and I appreciate that the host State should not be obliged to grant such persons all the privileges and immunities; those restrictions are explicitly laid down in articles 40 and 41, and it would be advisable to leave it at that.

2. In *article 14*, it does not seem to me very apt to speak of "adopting the text of a treaty" in the case of a bilateral instrument. It would seem to me more accurate and more in accordance with the facts to say that a permanent representative is considered as representing his State "for the purpose of negotiating and drawing up the text of a treaty . . ." or "for the purpose of negotiating a treaty and drawing up the text thereof . . .".

3. The commentary on *article 15* seems to me to call for two comments:

(a) Paragraph 3 of the commentary draws attention to the practice of certain States of appointing to their permanent missions "deputy permanent representatives" or "alternate permanent representatives" and to the increasing importance of the functions performed by these officials, and observes that this practice is often followed at United Nations Headquarters in New York but is not a common occurrence "at headquarters of other international organizations". This is not correct in the case of UNESCO, where the practice in this matter is the same as in New York. There are many deputy permanent delegates at UNESCO Headquarters in Paris, and the functions performed by them are increasingly important. Moreover, the Headquarters Agreement<sup>3</sup> makes mention of such deputy permanent delegates (article 9, para. 2, c, and article 18, para. 1).

(b) In paragraph 4 of the commentary, the reference should no longer be to the "Interim Arrangements on Privileges and Immunities of the United Nations concluded between the Secretary-General and the Swiss Federal Council" but to the "Agreement on Privileges and Immunities of the United Nations concluded between the Swiss Federal Council and the Secretary-General of the United Nations on 19 April 1946". The original title was amended by an "exchange of letters constituting an additional agreement" of 5 and 11 April 1963, which entered into force on 11 April 1963.<sup>4</sup>

4. Article 17, paragraph 1, a, should speak of the "*cessation de leurs fonctions*" and not the "*cession de leurs fonctions*". This mistake occurs in the French text only.

5. In the French text of paragraph 4 of the commentary on article 20, it would be better to say *Conseiller juridique*, rather than *Conseil juridique*.

6. The last part of the commentary on *article 21* described the practice with regard to permanent delegates to UNESCO in terms which

do not accurately reflect what was set forth in the reply that I addressed to you under cover of my letter of 2 March 1965.<sup>5</sup> I can only refer to that letter.

7. With regard to *article 22*, it is open to question whether a clause providing that the organization shall assist the permanent mission in obtaining the facilities necessary for the performance of its functions and shall accord it such facilities as lie within its own competence would not be out of place in such a convention. I understand that this question arose in the Commission (commentary, para. 2).

8. *Article 23*, paragraph 2, sets forth the obligation of the organization to assist permanent missions, where necessary, to obtain suitable accommodation for their members. Such an obligation seems to me to be questionable and often difficult to fulfil. In any event, it seems to me quite unwarranted, if not wrong, to base such an obligation on the idea that this assistance by the organization "would be very useful, among other reasons, because the organization itself would have a vast experience of the real estate market and the conditions governing it" (commentary, para. 3). A specialized agency is not a real estate brokerage, and it is certainly going too far to assume that it has such experience. Moreover, the same question arises here as in the case of article 22, namely, whether a provision of this kind is not out of place in a convention of this kind.

9. In *article 32*, I consider that paragraph 1 d, which appears in brackets, should be deleted completely. Such a provision would constitute an exception to immunity from civil jurisdiction and might give rise to other exceptions that would not be desirable. The problem of judicial action arising out of a third-party insurance policy does not seem relevant, since in most States the victim of an automobile accident would have a direct claim against the insurer and that claim could be enforced even if the policy-holder, having immunity from jurisdiction, could not be sued. I think that, as stated in the commentary (para. 4), "the Vienna precedent should be followed" and that the principles set forth in draft articles 34 and 45 (not article 44, as wrongly stated in the French version of the penultimate sentence of paragraph 4, of the commentary), the importance of which should not be underestimated, should be adhered to.

10. With regard to *article 33*, there seems to me to be every justification for providing that, in the situation covered by paragraph 3, the person concerned "shall [be precluded] from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim". However, I think that this should apply to appeals as well as counter-claims, as is generally provided by the makers of diplomatic law; for it is impossible to see how a person enjoying a privileged status who had obtained a judgement could be allowed to block his opponent's appeal by relying on his immunity from jurisdiction.

[For a further observation on article 33, see section b, para. 7, below.]

<sup>5</sup> The relevant paragraph of the letter reads as follows:

"21. The permanent delegations with offices in the UNESCO Headquarters do not display their national emblems. The flags of member States (and that of the United Nations) are flown at the entrance to the Headquarters on the occasion of national holidays and visits of the respective Heads of State.

"With regard to the right of permanent representatives to fly their national flag from their private residence, the Protocol Department of the Ministry of Foreign Affairs was consulted on the matter and stated that there were no official rules on the point.

"Permanent representatives who are holders of a 'Head of diplomatic mission' card and who have a CMD plate on their car are entitled to fly a pennon in their national colours on their car (in the exercise of their official functions)."

<sup>3</sup> United Nations, *Treaty Series*, vol. 357, p. 3.

<sup>4</sup> *Ibid.*, vol. 509, p. 309.

11. In paragraph 4 of the commentary on *article 36*, the statement about UNESCO does not reflect quite accurately what was stated in the reply contained in my letter of 2 March 1965.<sup>6</sup>

12. In paragraph 5 of the commentary on *article 38*, the last sentence should state that "other delegates or members of delegations may import . . ." and should add that they may also temporarily import motor-cars free of duty, under customs certificates without deposits (see my letter of 2 March 1965).<sup>7</sup>

13. I note that in *article 40*, paragraphs 2 and 3, and in *article 41*, persons who are permanently resident in the host State are placed on the same footing as nationals of that State, which means that they are deprived of the essentials of diplomatic status. Article 41 is most significant in this respect.

These provisions are regrettable. Such assimilation will enable States to refuse, or even to withdraw, privileges and immunities which have hitherto been granted. Moreover, permanent residence is not a concept which has a uniform interpretation (length of stay before taking up the post, conditions of stay, activity carried on, etc.); States might consider that a previous stay of one year, for example, could confer the status of permanent resident, within the meaning and for the purposes of the application of these provisions.

The Headquarters Agreement between France and UNESCO, dated 2 July 1954, has no clause of this nature; only the possession of French nationality places a restriction on certain privileges and immunities. Nevertheless, the French authorities, basing themselves on the provisions of the Vienna Convention on Diplomatic Relations (articles 37 and 38, which correspond to draft articles 40 and 41), did show a desire to place UNESCO officials who were considered to be permanent residents (one year's previous residence was sufficient for this) on the same footing as their French colleagues.

14. With regard to *article 45*, it is normal that the obligations it lays down should not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission within the organization but it is not normal that this non-application should also cover an act performed "within . . . the premises of a permanent mission". The important point is that the act should have been performed in carrying out the functions in question, but it does not matter where the act—official or private—has been performed. If an act had only to be performed on the premises of a permanent mission in order to escape the applicability of the obligations set forth in article 45, the result would be a partial revival of the notion of extritoriality, which, however, is nowadays rejected both by the courts and by writers on legal topics.

<sup>6</sup> The relevant paragraph of the letter reads as follows:

"22. The taxation system applied to permanent delegations is in principle the same as that enjoyed by embassies.

"Delegations pay only the taxes for services (scavenging, sewerage, garbage collection) and real property tax (*contribution foncière*) when the permanent delegate is the owner of a building.

"Permanent delegates are exempt from tax on movable property (*contribution mobilière*) (a tax imposed on residents of France, according to the residential premises they rent or occupy) in respect of their principal residence but not of any secondary residence."

<sup>7</sup> The relevant paragraph of this letter reads as follows:

"23. Only permanent delegates accredited to the Organization with the rank of ambassador or minister plenipotentiary are assimilated to heads of diplomatic missions (article 18, para. 3, of the Headquarters Agreement). In this capacity they may import goods for their official use and for that of the delegation free of duty.

"Other delegates or members of delegations are assimilated to members of a diplomatic mission accredited to the French Government; they may import free of duty their furniture and personal effects at the time of their installation in France and may temporarily import motor-cars free of duty, under customs certificates without deposits (article 22, subparagraphs *g* and *h*, of the Headquarters Agreement)."

15. *Article 49* does not seem to me to have settled the question in an entirely satisfactory and comprehensive manner. It should have been based more on article 45 of the Vienna Convention, in particular subparagraph *b*. Provision should have been made for the mission which had been recalled to entrust the custody of its property and archives to the permanent mission of another State or to the diplomatic mission of another State. The idea expressed in paragraph 2 of the commentary ("The sending State is free to discharge that obligation in various ways, for instance, by removing its property and archives from the territory of the host State or by entrusting them to its diplomatic mission or to the diplomatic mission of another State") should have been made a provision of the convention.

#### (b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 25 FEBRUARY 1971  
FROM THE ACTING DIRECTOR, OFFICE OF INTERNATIONAL STANDARDS AND LEGAL AFFAIRS

[Original text: French]

1. In section I of part III of the draft, under the heading "General comments", it is stated in paragraph 1 that "Permanent observer missions have [. . .] been sent [. . .] on some occasions to the United Nations Educational, Scientific and Cultural Organization". Actually the Holy See maintains a permanent mission to the organization, and has done so for a long time. The Executive Board of UNESCO took a decision regarding permanent observers—with particular reference to the permanent observer of the Holy See—as far back as 1951, at its twenty-sixth session. The text should therefore be amended along the following lines:

"... for instance, by the Holy See to the Food and Agriculture Organization of the United Nations and the United Nations Educational, Scientific and Cultural Organization, and by San Marino . . .".

2. In *article 56*, the provision that the permanent observer and the members of the diplomatic staff of the observer mission "may not be appointed from among persons having the nationality of the host State, except with the consent of that State which may be withdrawn at any time" seems too restrictive. This draft article calls for the same observations as we have formulated concerning article II. Nationality should not be of any concern in the choice of a permanent observer and the diplomatic staff of the mission, and the host State should not be given a right of veto in the matter. I think that even the provision whereby the permanent observer and the members of the diplomatic staff of the mission "should in principle be of the nationality of the sending State" is too restrictive, because, for reasons of another kind, the permanent representative and the permanent observer cannot be put on the same footing in that respect. The only restriction with regard to nationals of the host State which seems to me to be justified is that concerning privileges and immunities, and I appreciate that the host State should not be obliged to grant such persons all the privileges and immunities; those restrictions are explicitly laid down in articles 69 (by reference to the provisions of article 40) and 70 (by reference to the provisions of article 41), and it would be advisable to leave it at that.

3. In *article 58* it does not seem to me very apt to speak of "adopting the text of a treaty" in the case of a bilateral instrument. It would seem to me more accurate and more in accordance with the facts to say that a permanent observer is considered as representing his State "for the purpose of negotiating and drawing up the text of a treaty . . .", or "for the purpose of negotiating a treaty and drawing up the text thereof . . .". We had made a similar remark concerning article 14.

4. With regard to *article 65*, it is open to question whether a clause providing that the organization shall assist the permanent observer mission in obtaining the facilities necessary for the performance of its functions and shall accord it such facilities as lie within its own



competence would not be out of place in such a convention. I refer here to the observation made by the UNESCO secretariat regarding article 22.

5. *Article 66*, which states that article 23 shall apply in the case of permanent observer missions, calls for the same observations as we made concerning article 23, paragraph 2.

6. Similarly, *article 69*, which states that article 32 shall apply in the case of permanent observer missions, calls for the same observations as we made concerning article 32.

7. I note that article 69 does not state that article 33 shall apply in the case of permanent observers and members of the diplomatic staff of the permanent observer mission. I think that this is the result of an oversight, because if such persons enjoy the immunity from jurisdiction provided for in article 32, provision must also be made for waiving that immunity. There is no reason why the question of waiving immunity should be provided for and regulated in the case of some (permanent representatives) and not in the case of others (permanent observers). In my view it would be better to speak of "withdrawing" the immunity rather than "waiving" it, because to speak of "withdrawing the immunity" shows immediately that it is not for the beneficiaries themselves to deprive themselves of the immunity but that such a decision must be taken by the authority to which they are responsible.

8. Article 69 again states that article 40, paragraphs 1, 2, 3 and 4, shall apply in the case of permanent observer missions, and the same is true of article 70 with regard to the application of article 41. In this connexion I can only refer to the observations which the UNESCO secretariat made concerning articles 40 and 41 and reiterate that we regret the assimilation of persons having their permanent residence in the host State to nationals of that State.

9. *Article 76* states that article 45 shall apply in the case of permanent observer missions. Here again I refer to the remarks we made concerning article 45.

10. Finally, *article 77* states that article 49 shall apply in the case of permanent observer missions, and I can only refer to the observations we made concerning article 49.

## 5. World Health Organization

### (a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 18 AUGUST 1970  
FROM THE DIRECTOR OF THE LEGAL OFFICE

[*Original text: English*]

As regards part I and section 1 of part II of the draft articles, I have noted that in the commentary to *article 6* it is stated that "The legal basis of permanent missions is to be found in the constituent instruments of international organizations—particularly in the provisions relating to functions [. . .]" (para. 4), with a further provision that "the Commission wishes to make it clear that the establishment by member States of permanent missions is subject to the general reservations laid down in articles 3, 4 and 5 concerning the relevant rules of the organizations [. . .]" (para. 5).

It may be relevant to note that in so far as the World Health Organization is concerned, the functions of permanent missions as outlined in *article 7* of the draft articles need to be considered in the light of the provisions of articles 10, 1, 24 and 25 of the WHO Constitution,<sup>9</sup> relating to participation at constitutional meetings, and of article 33 relating to the direct access of the Director-General to the departments of members, including health administrations and national health organizations.

For delegates to the World Health Assembly and persons designated to serve on the Executive Board, the Constitution contains a recommendation that they should be technically qualified or competent in the field of health and permanent representatives have not been seated as such in constitutional meetings. The rules of procedure of the World Health Assembly<sup>9</sup> (rule 22) require formal credentials for representatives of members and associate members, irrespective of whether permanent representation exists, while in the case of the Executive Board, the persons serving thereon are not representatives of the members who have designated them.

It may be noted that one permanent mission in Geneva has for some years included a medical officer on its staff for the purposes of liaison with WHO.

With regard to communications, article 33 of the Constitution leaves it to members to decide to what government departments the Director-General may have access, and in the comment by the Technical Preparatory Committee on the draft constitution for WHO,<sup>10</sup> it was stated that the original provision in the draft was intended only to invest the Director-General and the Secretariat with the right to communicate with national health administrations in such manner as might be agreed upon with the competent authority of each country. Direct communication with other branches of government should be through such channels as might be approved by the above-mentioned health authority.

The notion of direct access to national health administrations is not new; it flows from similar arrangements under the Pan American Sanitary Code (article 57) and the Statutes of the International Public Health Office in Paris. The reason for these provisions was that experience had shown that it was not satisfactory to have communications on urgent international public health matters passing through traditional diplomatic channels, owing to the delays and misunderstandings that resulted and that these delays and misunderstandings could represent either a danger to public health or entirely unwarranted interference in international commerce and the free movement of persons and means of transport.

I should like to take this occasion to draw attention to paragraph 4 of the commentary on *article 12*. The wording suggests that in the case of WHO the authorities mentioned (Head of State, the Minister for Foreign Affairs, or the Minister of Health or any other appropriate authority) are empowered to issue credentials to permanent representatives. It should be pointed out that the reference to WHO practice is to a rule of procedure of the World Health Assembly relating to credentials of delegates to the Assembly (rule 22). This rule has no application to permanent representatives and the report of the Commission is erroneous in this regard.

As regards *article 14*, permanent representatives have occasionally signed agreements between WHO and the member concerned. However, the bulk of agreements between WHO and its members are related to the execution of operational programmes which are dealt with at the regional level and as there are no permanent representatives at any of WHO's regional offices, these agreements are signed on behalf of the members in the ministries concerned.

In Geneva, since permanent representatives are usually accredited to the United Nations and to the international organizations in Geneva, it is presumed that the notifications referred to in *article 17* would be made to the United Nations. Lists of permanent missions are prepared by the United Nations and circulated to the other organizations. However, I query the value of the inclusion of subparagraphs *c* and *d* in this article as these would seem to be of marginal interest only.

<sup>9</sup> See WHO, *Basic Documents*, 22nd ed. (Geneva, April 1971), p. 97.

<sup>10</sup> See WHO, *Official Records of the World Health Organization*, No. 1, p. 72.

<sup>8</sup> United Nations, *Treaty Series*, vol. 14, p. 185 and *ibid.*, vol. 377, p. 380.

On precedence (article 19), WHO practice has already been indicated in my letter of 5 August 1968, and there has been no change in this practice to date.<sup>11</sup>

With respect to section 2 of part I, my only comments relate to the provisions placing various responsibilities on the organization with respect to the securing of the enjoyment of privileges and immunities, etc. (articles 22, 23 and 24). Apart from the specific question of housing under article 23, where WHO does not have in Geneva any arrangements for assisting its own staff (outside the United Nations housing service) and therefore could not assist permanent missions, I have some reservations on the more general obligations contained in articles 22 and 24. If by "facilities", office space or related facilities are intended to be included, then the administrative and budgetary aspects become predominant, particularly in view of the fact that WHO headquarters has itself been perennially short of space. As regard the securing of the enjoyment of privileges and immunities, I would observe that in practice most of the time devoted to this matter concerns the situation of individuals particularly as regards fiscal matters, personal disputes, traffic accidents and road traffic regulations and customs regulations. This is time-consuming and we only have limited facilities and time available for dealing with such matters.

In WHO, our practice is invariably to waive the immunity of our officials in cases where the interests of the organization are not involved so that difficulties could arise if, for example, we were requested to secure the privileges or immunities of a member of the staff of a permanent mission under circumstances where we would have waived the immunity.

Moreover, a difficult situation would arise if a mission were to consider that the organization had not been sufficiently diligent in securing its interests or if there were to be an actual difference

between the organization and the mission as to the interpretation or extent of the privileges and immunities claimed. For these reasons it would seem that the application of article 24 would have to be limited to substantial matters and that day-to-day personal questions should be excluded.

(b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 8 JANUARY 1971  
FROM THE DIRECTOR OF THE LEGAL OFFICE

[Original text: French]

**Observations concerning permanent observer missions  
to international organizations (part III of the draft)**

1. There are in practice two general categories of observers from non-member States to WHO, the main distinction being whether they are temporary or permanent. The first category covers certain situations where States which are not members but which are on the point of becoming members attend the World Health Assembly as observers, pending a decision by the Assembly on their application for membership. Provision for this is contained in rule 3 of the rules of procedure of the Assembly, which stipulates that the Director-General may invite States which have made application for membership or territories on whose behalf an application for associate membership has been made to send observers to sessions of the Assembly. Again, situations of this type have arisen in the case of associate members which have acceded to independence on a date which, under the rules, did not allow them to submit their application for membership in the organization. Such States were nevertheless invited as observers and the rules of procedure of the Assembly were changed later, after the adoption of appropriate resolutions by the Executive Board and Health Assembly.<sup>12</sup>

Aside from these temporary situations, there are others where quasi-permanent observers participate regularly in the work of the Health Assembly. Permanent observers from non-member States of WHO are in a special situation, which is similar to, yet different from, the situation in the United Nations. The similarity lies in the fact that the status of the permanent observers from non-member States is not established in any special provision and is not mentioned in the Constitution, the headquarters agreement or the resolutions adopted by the Executive Board or the Assembly. It exists solely as a result of the practice followed by the organization. However, the situation is different because such permanent observer missions to WHO are few in number and also because the legal bodies in question are of a very special character. In the United Nations, the establishment of permanent observer missions is justified because a number of States are not members of the Organization. On the other hand, most of them are members of WHO. The Federal Republic of Germany, the Republic of Korea, Switzerland and the Republic of Viet-Nam are cases in point, so that at present there are only three examples of permanent observers. In addition, these are very special situations in the context of international law, since they involve the Holy See, San Marino and the Order of Malta.

2. The relations established in these three cases are derived solely from practice and have no foundation in any written text. San Marino applied for membership in WHO in 1948, but the First Health Assembly declared the application inadmissible for procedural reasons. The application was submitted again in 1949, but it was accompanied by a reservation concerning San Marino's financial contribution.<sup>13</sup> The reservation was not accepted by the Assembly.<sup>14</sup>

<sup>11</sup> The relevant paragraphs of the letter read as follows:

"In so far as the precedence accorded to Permanent Representatives is concerned, I should point out that in Geneva, Permanent Representatives are accredited to the United Nations Office in Geneva and to the Specialized Agencies and that questions of precedence and liaison have been principally dealt with by the United Nations itself. WHO has never established any official list of precedence but for internal purposes official invitations, etc.) we usually establish precedence amongst permanent delegates on the basis of the date of deposit of the credentials.

"In so far as delegates of members attending the World Health Assembly are concerned our practice is to list these in alphabetical order in the language in which the list is drawn up. Within the lists themselves, Chief Delegates and Deputy Chief Delegates are given precedence over other delegates and alternates; Ministers of Public Health when serving on delegations normally are designated as chief delegates and enjoy precedence for that reason. However, persons of ambassadorial rank will not necessarily enjoy, in the list, any precedence over other delegates within the same delegation.

"In practice in the Health Assembly, Ministers of Health are often called upon to speak early in the general discussion but this practice is based not so much on precedence but on the fact that often Ministers attend only the first days of the session and are very anxious to be given an early opportunity to speak before returning to their country. The practice on matters of precedence is otherwise similar to that followed in the General Assembly and the members of the General Committee of the Health Assembly enjoy precedence over other delegates.

"There is however one point of difference which may be of interest. Under rule 72 of the rules of procedure of the Health Assembly, votes by roll-call are taken in the English or French alphabetical order of the names of the members in alternate years. Our practice is consequently to make the seating arrangements in the Assembly hall in alternate years in English or French as the case may be, the cards bearing the names of the countries being in whatever language is being used in a particular year. Roll-call sheets and lists for making the call of the delegates for secret ballots are similarly prepared in one or the other language in alternate years."

<sup>12</sup> Resolution EB27.R25 (*Official Records of the World Health Organization*, 108, 10); resolution WHA14.45 (*ibid.*, 110, 19). This happened, for example, in the case of Togo in 1960 (*ibid.*, 103, 21).

<sup>13</sup> *Official Records of the World Health Organization*, No. 21, p. 312.

<sup>14</sup> Resolution WHA2.98 (*ibid.*, p. 54).

and, since that time, San Marino has been invited to each Health Assembly as an observer. Relations have been maintained on that basis ever since. Moreover, San Marino has in Geneva a permanent observer mission to the United Nations and other international organizations.

Relations with the Holy See also date back to the same period. The Holy See did not participate in the First Health Assembly. However, when the Second Assembly was convened at Rome in 1949, it was decided to invite the Vatican to participate in the work of the Assembly as an observer. Since that time, the Holy See has been invited regularly to the sessions of the Health Assembly. Like San Marino, it has a permanent observer mission to the United Nations Office and the specialized agencies at Geneva.

WHO's relations with the Order of Malta have an unusual origin, and were established much more recently. In 1950, the Order of Malta applied for admission to WHO, but consideration of the application was deferred. In 1952, a new application was submitted to the Assembly and included in its agenda. However, it was withdrawn, on the initiative of the Order itself. Ten years went by and in 1962 the Order of Malta asked, not for admission, but to be invited to attend WHO meetings as an observer. The Director-General decided that he would invite the Order to participate in the Assembly as an observer whenever the agenda included items which might be of interest to it. In fact, since that time the Order has regularly been invited to attend the Assemblies and has moreover established a permanent delegation to international organizations at Geneva.

3. The present status of permanent observers is in fact no different from that of the other observers covered by the WHO regulations. When these three observer missions were established, WHO was informed and it received a notification. They are invited to each Health Assembly and the names of the observers are communicated to the Director-General. They are granted the facilities laid down in the regulations for observers in general. Rule 19 of the Rules of Procedure of the Health Assembly stipulates that, unless the Assembly decides otherwise, plenary meetings are open to them. In addition, under rule 46 of the rules of procedure, they may participate in any public meeting of the main committees of the Assembly and, upon the invitation of the Chairman or with the consent of the Assembly or committee make a statement on the subject under discussion. Moreover, such observers have access to non-confidential documents and to such other documents as the Director-General may see fit to make available. They may also submit memoranda to the Director-General, who determines the nature and the scope of their circulation.

The privileges and immunities which may be accorded such observers, regardless of privileges they may enjoy in other respects, are governed by the relevant provisions of the Headquarters Agreement<sup>15</sup> when the meeting is held at Geneva or of other agreements, concluded either previously or for the occasion, when the meeting is held away from Headquarters. As a general rule, these agreements provide for a minimum of freedom of entry and sojourn for all persons irrespective of nationality, summoned by WHO, as is the case with observers to whom an official invitation has been extended.

#### **Observations concerning delegations of States to organs or to conferences (part IV of the draft)**

WHO would like first to comment on points relating to some of the draft articles. It will then offer observations concerning the facilities and privileges accorded to delegations of States.

1. The first comment concerns *article 78*. Subparagraph *e* says that a "representative" means any person designated by a State to represent it in an organ or at a conference. WHO uses a different term. Under *article 11* of its Constitution, the persons who re-

present States are called "delegates". Under *article 47* of the Constitution, the term "representative" is used in the case of WHO Regional Committees. The draft articles should therefore take account of the special system laid down in WHO's constituent instruments.

*Article 82* states that the size of a delegation shall not exceed what is reasonable or normal. *Article 11* of WHO's Constitution provides that each member State shall be represented by not more than three delegates while *article 12* provides that alternates and advisers may accompany delegates. There is no written provision limiting the number of alternates and advisers, and the size of the delegation varies considerably according to the country concerned.

The principle of single representation embodied in *article 83* of the draft also applies in WHO, although it may be noted that WHO practice also allows delegates from a member State to represent one or indeed more non-governmental organizations in the Assembly.

*Article 85* of the draft states that the members of a delegation should in principle be of the nationality of the sending State. WHO has no rule in this connexion, although the principle always seems to have been observed, at least so far as delegations to the Assembly are concerned. It will be noted, however, that in the Executive Board, which is made up not of delegates but of "persons" designated by twenty-four States selected by the Assembly (*article 24* of the Constitution), a State has sometimes chosen a person who was not one of its nationals—for example, the members of the Benelux union.

In the case of credentials, referred to in *article 87* of the draft, rule 22 of the rules of procedure of the Health Assembly states that they shall be issued by the Head of State or by the Minister for Foreign Affairs or by the Minister of Health or by any other competent authority. The Health Assembly's practice has been to regard as a "competent authority", apart from those mentioned above, the ministerial departments responsible for health matters, embassies and permanent delegations.

*Article 89* relates to notifications concerning delegations. WHO is notified of the members of the delegation, as already stated, but notification is not required in the other instances set out in *article 89*, paragraph 1 (persons belonging to the family of a member of the delegation, persons employed by members of a delegation, etc.).

*Article 90* establishes that precedence among delegations shall be determined by the alphabetical order used in the host State. In WHO, precedence is determined by using English or French alphabetical order in alternate years, in accordance with the rules of procedure.

2. The facilities, privileges and immunities of delegations participating in WHO conferences are established in a number of texts. *Article 67 (b)* of the Constitution provides that representatives of member States, persons designated to serve on the Board and technical and administrative personnel of the Organization shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization. The Convention on the Privileges and Immunities of the Specialized Agencies also contains a number of special provisions which require no comment. So far as WHO headquarters is concerned, these provisions were supplemented in the Headquarters agreement concluded with the Swiss Federal Council in 1948. Similar agreements have also been envisaged for each of the six regional offices and for the International Agency for Research on Cancer. When conferences are held in countries with which there is no special agreement, an *ad hoc* agreement is concluded which either contains a number of special provisions or refers to an existing agreement—most often the Convention on the Privileges and Immunities of the Specialized Agencies.

The legal system laid down in such agreements is well known and needs no special comment. It will, however, be noted that some of the obligations imposed in some articles of the draft do not apply to WHO. For example, *article 93* states that, where necessary, the organization shall assist a delegation in securing premises or accom-

<sup>15</sup> United Nations, *Treaty Series*, vol. 26, p. 331.

modation for its members. To date, WHO has not followed this practice.

It will be noted in connexion with *article 96*, concerning freedom of movement, that as a general rule WHO has always refused to allow any discrimination to be practised by the host country among the delegates attending a conference. In one most unusual case, however, it agreed to a certain restriction on the movements of a delegation from a particular country, but the situation never materialized because the conference was later transferred as a result of important political changes in the country where it was originally to have been held.

The other articles of the draft required no special comment on the part of WHO.

## 6. International Bank for Reconstruction and Development

OBSERVATIONS COMMUNICATED BY LETTER DATED 14 JANUARY 1971  
FROM THE GENERAL COUNSEL

[Original text: English]

### Introduction

1. The International Bank for Reconstruction and Development (IBRD) has reviewed with interest, on its own account and on behalf of the organizations affiliated with it (IFC, IDA, ICSID), the draft articles on representatives of States to international organizations circulated on behalf of the International Law Commission during the past several years. IBRD recognizes that the instrument that is thus being formulated is likely to be merely the first in a series that will give general definition and structure to the still relatively fluid law of international organizations.<sup>16</sup> Indeed, for the reasons indicated below, the most important of the following comments are addressed not to the substance of the draft articles but to the procedure by which they are to become part of international law (see paras. 4 and 5 below).

2. IBRD recognizes that an instrument on the subjects dealt with in the draft articles will have at most a minor direct effect on either the Bank itself or on its affiliates. This is due primarily to the particular structure and in part to the activities and methods of operation of these organizations.<sup>17</sup> As a consequence of this special structure and other features, neither member nor non-member States have established any permanent missions to the organization of the IBRD Group, nor is it likely that they will do so. Members and a few non-member States send delegations to the annual meetings of the Boards of Governors of the Bank, IFC and IDA (and of the Administrative Council of ICSID), but these sessions are relatively brief (traditionally some five days) so that many of the questions dealt with in

<sup>16</sup> The International Law Commission has already started the consideration of treaties concluded between States and international organizations or between two or more international organizations, and has identified the topic of the succession of States in respect of membership in international organizations.

<sup>17</sup> The special nature of the representative organs of IBRD, IFC and IDA was described in replies made by the Bank to questionnaires distributed by the United Nations Secretariat at the beginning of the International Law Commission study of this subject, which are summarized in an annex to part I of the study prepared by the United Nations Secretariat on the practice of the United Nations, its specialized agencies and IAEA concerning their status, privileges and immunities (hereafter referred to as the "Study by the Secretariat").<sup>a</sup> Though the Bank's replies did not refer to ICSID, and its structure differs substantially from that of the financial organizations in the IBRD Group, most of the following remarks also apply to ICSID.

<sup>a</sup> Study by the Secretariat, *Yearbook of the International Law Commission, 1967*, vol. II, p. 204, document A/CN.4/L.118 and Add.1 and 2, part one, annex.

part IV of the draft articles are unlikely to arise. With the exception of several groups of legal experts convened to assist in the formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [hereafter referred to as the SID Convention],<sup>18</sup> the members of the IBRD Group have established no special organs and have convened no conferences to which the draft articles would apply—though of course it is always possible that they will do so in the future. Finally, as the Bank has explained, the variety of posts held from time to time by its executive directors and the different ways in which individual directors perform their duties makes it inappropriate to treat them as being exclusively either "representatives" or "officials".<sup>19</sup>

3. Moreover, even to the extent that the draft articles are relevant to the operations of the IBRD Group, any impact of the proposed instrument is likely to be delayed for a considerable time because for the present most relevant questions appear to be adequately regulated by a number of existing instruments: the Articles of Agreement of IBRD,<sup>20</sup> IFC,<sup>21</sup> and IDA<sup>22</sup> (and the SID Convention in relation to ICSID), the Convention on the Privileges and Immunities of the Specialized Agencies and the United Nations Headquarters Agreement—the provisions of all of which are, by draft articles 3-5 and 79-81, to be preserved from supersession by the proposed instrument; in addition, reference must be made to national legislation, in particular the Bretton Woods Agreement Act and the International Organizations Immunities Act of the host State of the IBRD Group. However, in the long run it is likely that certain of these instruments may be interpreted or even altered to conform to the provisions of the proposed instrument, if, as is intended, that instrument comes to be accepted as expressing the consensus of the world community as to the questions to which it is to relate.

### Procedural observations

4. The World Bank understands that no decision has yet been reached on the procedure for formulating a definitive instrument on the basis of the draft articles. It is therefore hoped that, in whatever standing or *ad hoc* forum this is to be done, the substantial interest of organizations in the proposed instrument will be recognized by devising a procedure whereby these might participate actively in at least the final stages of the drafting process. While it may not be feasible to devise a mechanism allowing the organizations to vote in such a forum, it would be desirable if they could participate through representatives entitled to speak and to introduce proposals directly rather than only through observers whose restricted role is appropriate for most international legislative endeavours but would in this instance be inconsistent with the intention to formulate rules of direct relevance to the organizations.

5. Even more important than any arrangements for the effective participation of international organizations in the formulation of the proposed instrument, is to devise some procedure whereby each organization (i.e., its member States) could choose whether or not, or how, it should be covered by such instrument—which, as now formulated, would place several direct obligations on the organizations covered (see, for example, draft articles 22-24). While various means to this end could be proposed, it would seem that the pertinent

<sup>18</sup> United Nations, *Treaty Series*, vol. 575, p. 159. The groups referred to are the four regional Consultative Meetings of Legal Experts and the Legal Committee on Settlement of Investment Disputes (see ICSID, *History of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States—Analysis of Documents Concerning the Origin and the Formulation of the Convention* (Washington, 1970), vol. I, pp. 6 *et seq.*).

<sup>19</sup> Study by the Secretariat, *op. cit.*, p. 205, para. 71.

<sup>20</sup> United Nations, *Treaty Series*, vol. 2, p. 134.

<sup>21</sup> *Ibid.*, vol. 264, p. 117.

<sup>22</sup> *Ibid.*, vol. 439, p. 249.

provisions of the Convention on the Privileges and Immunities of the Specialized Agencies present the most useful model, which, with minor changes, could be incorporated into the proposed instrument as well as into subsequent ones having a similar scope:

(a) Each organization potentially within the ambit of the proposed instrument should be able to decide (presumably through its competent representative organ) whether or not it is to be covered by the proposed instrument. As with respect to the Specialized Agencies' Convention, this decision might be made and communicated in connexion with that foreseen in subparagraph *b* below.

(b) Each organization to be covered would be permitted to devise an "annex" to the instrument in which it would specify any deviations, with respect to it, of the terms of the principal instrument. This right, which is provided for in the Specialized Agencies' Convention, is somewhat analogous to the right of a party to a multilateral treaty to propose a reservation on becoming a party to it; however, if the right of an organization to choose whether or not to be covered by the instrument is admitted (see subparagraph *a*), it is not essential, though it may still be useful, that the right here proposed also be granted.

(c) States, on becoming parties to the instrument or at any subsequent time, would indicate the organizations with respect to which they are to be bound by the instrument. If an organization changes its annex (subparagraph *b*), such altered provisions would also have to be individually approved by the States already parties with respect to the organization.

(d) If reservations are formulated by a State, each organization affected could object thereto and prevent the application to it of the altered instrument.<sup>23</sup>

(e) Under the above-stated conditions, every intergovernmental organization might be permitted to choose coverage by the convention. Though there may be objections to abandoning all limitations, it should be considered that such a decision can only be effected with the concurrence of an appropriate majority of the member States of the organization (subparagraph *a*) and that no State (whether or not a member of an organization) could be bound without its consent with respect to any particular organization (subparagraph *c*). Alternatively, the General Assembly of the United Nations might be authorized to admit organizations to coverage by the Convention. One advantage of either of these approaches would be to eliminate any uncertainty about the automatic or potential coverage of the Convention resulting from any indefiniteness in the relevant definitions in the instrument.<sup>24</sup>

### *Observations relating to particular provisions*

6. Article 2, paragraph 1, would restrict the application of the Convention to "international organizations of universal character", which are defined by article 1 (*b*) as those "whose membership and responsibilities are on a world-wide scale". Since, in effect, none of the existing international organizations is truly universal in character as all have some provisions for accepting (and thus implicitly for excluding) and sometimes for expelling or permitting the resignation of member States, it may be preferable to refer in article 2, paragraph 1, to organizations having a "world-wide scope".

7. Because of the considerable variations in the legal instruments relating to, and the practices of, international organizations (even if only the specialized agencies are considered), IBRD attributes considerable importance to the maintenance of article 3 of the present draft, with an interpretation at least as broad as indicated in paragraph 5 of the related commentary.<sup>25</sup>

<sup>23</sup> By analogy to article 20, paragraph 4, of the Vienna Convention on the Law of Treaties.

<sup>24</sup> These definitions are now contained in draft articles 1, subparagraphs *a* and *b*, and 2, paragraph 1.

<sup>25</sup> See also para. 12 below.

8. Similarly, IBRD attributes considerable importance to the maintenance of draft articles 4, 5 and 79 (the last two of which might conveniently be consolidated), since it is highly desirable that States be permitted to make, with each other and with organizations, arrangements especially suitable to the requirements of particular organizations. It is of course recognized that international agreements formulated subsequent to the promulgation of the instrument here under consideration are likely to be, and indeed should be, influenced by it.

9. The proposed rule in articles 11, 56 and 85 that a State should in principle be represented by its nationals appears to enter an area that might best be omitted from the proposed instrument. Whether a State, particularly one newly independent with perhaps still unsettled rules of nationality and probably a severe shortage of trained officials, is able to place sufficient trust in a non-national and whether it finds among its own nationals one it considers suitable to represent it and who can be spared from other, perhaps more urgent assignments, would seem to be a question that each State should be able to resolve for itself, without extraneous considerations such as the preference that would be expressed by the proposed instrument. Similarly, whether a State permits one of its nationals to become an official or representative of another would also seem to be a matter in which it is not necessary to intervene. The Commission's obvious embarrassment with the proposed subject appears from the term "in principle"—one most unusual in an instrument of this type and in practice incapable of interpretation and enforcement.

10. Paragraph 1 of the commentary to article 33 quotes section 14 (article IV) of the Convention on the Privileges and Immunities of the United Nations, including the provision that

"a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded".

Though paragraph 2 of the commentary indicates that this commendable provision also appears in a number of other instruments, it is regrettable that it only appears in weakened form in article 34 (and therefore also article 71) and has tentatively been omitted from part IV of the draft articles.

11. Since part IV of the draft is restricted to "Delegations of States to organs and to conferences" and article 78 (*c*) makes it clear that a "delegation to an organ" is to represent the State "therein", no provision of the proposed instrument appears to cover delegations sent by States to negotiate with the organization itself. In the practice of the financial institutions of the IBRD Group (and probably of certain other international organizations) delegations of this type considerably outnumber those to which part IV is addressed, but international law is most deficient with respect to the former for they are referred to neither in the Articles of Agreement of any of the IBRD Group of organizations, nor in the Specialized Agencies' Convention or in other similar agreements. This would thus seem to be a significant lacuna in the existing international legal structure, to which the proposed instrument might well address itself.

12. Though part IV of the draft covers delegations to both organs and conferences, article 80 refers only to the rules of procedure of conferences. In the light of the commentary, it is assumed that a reference to rules of procedure of organs was omitted as these are considered to be covered by the "rules of the Organization" referred to in draft article 3.

### **7. International Development Association**

See paragraph 1 of the observation submitted by the International Bank for Reconstruction and Development, reproduced above.

## 8. International Finance Corporation

See paragraph 1 of the observations submitted by the International Bank for Reconstruction and Development, reproduced above.

## 9. International Monetary Fund

### (a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 26 NOVEMBER 1969  
FROM THE GENERAL COUNSEL AND DIRECTOR, LEGAL DEPARTMENT  
[Original text: English]

In the Study by the Secretariat<sup>26</sup> it was recognized that questions relating to permanent representatives or member delegations to international organizations are not applicable to IMF in the light of the Fund's organizational structure. It would appear that the draft articles are not intended to apply to IMF by virtue of the specific subject-matter of their coverage. Moreover, draft articles 3 and 4 may also be taken to lead to the same conclusion of non-applicability to IMF. The Special Rapporteur may wish to consider the desirability of explicitly stating that the draft articles are not applicable to IMF.

### (b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY A LETTER DATED 28 JANUARY 1971  
FROM THE GENERAL COUNSEL AND DIRECTOR, LEGAL DEPARTMENT  
[Original text: English]

Our observations on parts III and IV of the draft articles would not be very different from what we said in our letter dated 26 November 1969, concerning parts I and II. As mentioned in the Study by the Secretariat, questions relating to permanent representatives or member delegations to international organizations are not applicable to the Fund. The structure of the Fund precludes the application of the draft articles to the Fund. It might be useful, therefore, to make it clear that the draft is not applicable to IMF.

## 10. Universal Postal Union

### (a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 18 SEPTEMBER 1970  
FROM THE DEPUTY DIRECTOR-GENERAL OF THE INTERNATIONAL BUREAU  
[Original text: French]

1. My remarks refer, first and foremost, to the question of the application to the Universal Postal Union of the parts of the draft submitted for our consideration.

2. Up to now relations between UPU and the member countries have been conducted in principle, and in accordance with the Acts of UPU through the Postal Administrations. There is no written provision concerning permanent missions. Relations between the permanent missions and UPU have developed *de facto* and on the fringe, as it were, of the relations that the permanent missions maintain with the specialized agencies that have their headquarters at Geneva. This is due to the essentially technical nature of the activities of our organization. We have therefore deemed it necessary to explain the *de jure* situation of UPU, our practice and the reasons for it, in order that the problems to which the full application of the draft to UPU would give rise may be better understood.

3. The role of the various organs is at present as follows:

### (a) The International Bureau

Article 20 of the Constitution of UPU reads as follows:<sup>27</sup>

"A central office operating at the seat of the Union under the title of the International Bureau of the Universal Postal Union, directed by a Director-General under the general supervision of the Government of the Swiss Confederation, serves as an organ of liaison, information and consultation for Postal Administration."

This article therefore places the International Bureau at the disposal of the Postal Administrations which are the State bodies directly authorized by the Acts of UPU to ensure the execution of the international postal service.

In fact, one important task of the Bureau is to produce, with the help of information provided by the Postal Administrations, numerous publications concerning the various branches of the postal service. Another important part of the work of the International Bureau is its co-operation in the many studies undertaken in the small collective organs, namely the Executive Council and the Consultative Council for Postal Studies. These organs, which are composed of representatives of the Postal Administrations, require direct and continuous contact with those Administrations.

To complete the picture, it should be pointed out that the International Bureau does not assume the function of depositary of the Acts of the Union and has no part in the procedure for admission or accession to the Union. That is the function of the Swiss Government. Consequently, the International Bureau, unlike the secretariats of the other specialized agencies, has nothing to do with the diplomatic procedure required for the procedure of admission or accession.

### (b) Congress

The Congress, which is the supreme organ of UPU and which meets every five years in a different member country, deals mainly with the revision of the Acts of the Union. Although it is composed of plenipotentiaries authorized to sign the treaties thus revised, the members are for the most part representatives of Postal Administrations who are given *ad hoc* powers, for the discussions are essentially concerned with postal problems and require the participation and commitment of those who are responsible for postal services, especially as the proposals submitted to the Congress are drawn up and submitted on behalf of the Postal Administrations.

### (c) Executive Council and Consultative Council for Postal Studies

In the small collective organs, namely the Executive Council (EC) and the Consultative Council for Postal Studies (CCPS), the representative of each of the member countries must be appointed by the Postal Administration of his country and be a qualified official (General Regulations,<sup>28</sup> article 102, para. 3, and article 104, para. 2). The members of diplomatic missions or permanent missions may form part of the delegation, but if they are alone the Council has in the past granted them the capacity and rights of an observer, i.e. the possibility of participating without the right to vote.

4. We shall have occasion to revert to the organs referred to in subparagraphs *b* and *c* above when submitting our observations concerning part IV of the draft articles.

5. Despite what we have just said, we cannot fail to recognize that the intervention of permanent missions has developed and has been justified mainly in relation to the problems of technical assistance and to UNDP. Thus UPU, which is taking an increasing part in

<sup>27</sup> United Nations, *Juridical Yearbook*, 1964 (United Nations publication, Sales No.: 66.V.4), p. 195.

<sup>28</sup> UPU, *Constitution of Règlement général de l'Union* (Berne, Bureau de l'Union, 1965).

<sup>26</sup> Study by the Secretariat, op. cit., p. 206, paras. 76-78.

these programmes, cannot escape this general practice, since it has to do with questions in which State authorities other than Postal Administrations may be concerned. For that reason there must be a certain flexibility in the development of the relations between permanent missions and UPU.

6. In view of the above consideration, it is clear that the full application to UPU of the provisions drawn up by the International Law Commission would present a large number of legal and practical problems. We therefore consider that it would be useful, and indeed necessary, to refer more explicitly to the particular practice of international organizations than is done in certain articles in part I, especially in *article 3* (Relationship between the present articles and the relevant rules of international organizations). It is rightly stated in the commentary on this article that its first purpose is to detect the common denominator and lay down the general pattern which regulates the diplomatic law of relations between States and international organizations. The second purpose is to safeguard the particular rules which may be applicable in a given international organization. Consequently this is a matter not simply of the *structural* peculiarities of international organizations but also of the peculiarities in the *current practice* of one or another given organization. In our opinion, article 3 does not seem to provide a full guarantee of the autonomous development of relations between permanent missions and UPU, of a kind which would serve the interests of both parties, in accordance with the purpose of this international organization. Draft article 3 uses the same terminology as article 5 of the Convention on the Law of Treaties. We interpret this terminology as indicating respect for the *de jure* and *de facto* situation in regard to the subject-matter of part II of the draft articles. In our opinion, it would be desirable to expand the commentary on the article in question.

7. *Article 2* deals with the scope of the draft articles. Since the treaty now being drawn up lays down the rights and obligations not only of the States parties to the treaty but also of international organizations of universal character, being subjects of international law, the question arises of the procedure for establishing the legal relationship between the treaty in question and a given organization. It seems to us imperative that this question should be settled, for otherwise one would be forced to the conclusion that, in the case of an international organization for which no link has been established (in accordance with its constitutional rules) in relation to the treaty, the provisions of the treaty are *res inter alios acta*.

8. Lastly—although this is a secondary question—we think that the notification procedure laid down in *article 17*, paragraph 3, is somewhat cumbersome in cases where several organizations have their headquarters in the same host country. The host State is supposed to receive the same notification from each organization. This point is all the more valid in that, according to the commentary (para. 7), paragraph 4 of article 17 provides a supplement to, and not an alternative or substitute for, the procedure prescribed for international organizations.

#### (b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS TRANSMITTED BY LETTER DATED 27 JANUARY 1971  
FROM THE DEPUTY DIRECTOR-GENERAL

[*Original text: French*]

#### PART III.—Permanent observer missions to international organizations

##### *Article 52*

This article leaves the way open for the establishment of permanent observer missions to international organizations by non-member States. The practice of UPU does not correspond to the general scope of this provision, because there is certain reticence towards non-member countries. Admittedly the right is not un-

conditional but is dependent on the rules or practice of the organization. For these reasons, we wish to reiterate the need to settle the question of the establishment of the legal relationship between the proposed convention and international organizations (see paragraph 7 of the observations by UPU on the first two parts of the draft articles and paragraph 20 *in fine* of the report of the Sixth Committee to the General Assembly).<sup>29</sup>

##### *Article 53*

As we have already explained, the International Bureau deals directly with the Postal Administrations of member countries and only exceptionally with the permanent missions of member States. This is because of the nature of the activities of UPU and the regulations in force, which make the International Bureau serve the Postal Administrations (article 20 of the Constitution).

#### PART IV.—Delegations of States to organs and to conferences

##### *Article 83*

In connexion with this article, it should be pointed out that the regulations in force in UPU allow a delegation to represent only one member country other than its own (article 101, para. 2, of the General Regulations of UPU). For this reason, we share the reservations expressed by certain members of the Commission about this article and agree with the reasoning advanced by them.

Lastly, we are inclined to believe that, despite the reservation in article 80, some of the suggested provisions would complicate existing practice, without meeting any real need. In addition, so far as UPU is concerned, the regulations on the subject embodied in the Convention on the Privileges and Immunities of the Specialized Agencies (article V) and the Switzerland/United Nations agreement on the privileges and immunities of the United Nations<sup>30</sup> (article IV), which is applied *mutatis mutandis* to UPU, have not proved to be in any way inadequate or imperfect. Moreover, they cover the case of observers to organs and conferences, which is not dealt with in the draft articles.

#### 11. International Telecommunication Union

##### (a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 14 MAY 1970  
FROM THE LEGAL ADVISER

[*Original text: English/French*]

... Our practice is not entirely reflected in some of the draft articles, e.g. draft *articles 7, 12, 13 and 17*. For example: it is the United Nations which receives the credentials of permanent representatives accredited to the United Nations and ITU, and ITU addresses its official communications directly to the Telecommunication Administrations and not through the Permanent Missions. In so far, however, as any divergencies between the draft articles and our practice can be attributed to our rules, the situation would appear to be regulated by draft *article 3*. But, unless the phrase "relevant rules" can be interpreted to include "practice", we feel that there may be some differences that *article 3* does not cover.

We are in the process of negotiating a Headquarters Agreement with Switzerland to replace the exchange of letters of 1948 whereby we were granted the benefits of the Agreement between it and the United Nations. It may be of interest to know that the Confederation

<sup>29</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147.

<sup>30</sup> United Nations, *Treaty Series*, vol. 1, p. 163, and *ibid.*, vol. 509, p. 309.



has requested that the following article be included in the new Agreement:

*“Article 13—Objet des privilèges et immunités accordés aux représentants*

*“Les privilèges et immunités sont accordés aux représentants des membres de l’Union non à leur avantage personnel, mais dans le but d’assurer en toute indépendance l’exercice de leurs fonctions en rapport avec l’Union. Par conséquent, un membre de l’Union a non seulement le droit, mais le devoir, de lever l’immunité de son représentant dans tous les cas où, à son avis, l’immunité entraverait l’action de la justice et où elle peut être levée sans compromettre les fins pour lesquelles elle avait été accordée.”*

[Provisional translation:]

*“Article 13.—Purpose of the privileges and immunities accorded to representatives*

“Privileges and immunities are accorded to the representatives of members of the Union, not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connexion with the Union. Consequently, a member not only has the right but is under a duty to waive the immunity of its representatives in any case where, in the opinion of the member, the immunity would impede the course of justice, and where it can be waived without prejudice to the purpose for which the immunity is accorded.”

(b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 21 DECEMBER 1970  
FROM THE LEGAL ADVISER

[Original text: English]

PART III.—Permanent observer missions to international organizations

1. With regard to permanent observer missions (draft articles 51-77), I wish to state that under article 27 of the International Telecommunication Convention (Montreux, 1965),<sup>31</sup> each member of the Union reserves the right to fix the conditions under which it admits telecommunications exchanged with a State not party to the Convention. The Convention makes no other provision for relations between the ITU and non-member States, which are not admitted to conferences of the Union. The relationship between the General Secretariat of the Union and such States is regulated by resolution No. 88 of the Administrative Council of the Union.<sup>32</sup> The Secretary-General of the ITU is given no power to accept the accreditation of a permanent observer mission, nor the credentials of its permanent observer.

PART IV.—Delegations of States to organs and to conferences

2. The provisions of part IV of the draft articles are not entirely applicable to the pattern of work of the ITU, as is explained below.

3. Members of delegations to ITU conferences are not usually diplomats and in most cases do not hold diplomatic passports. If it may be assumed however that all persons who have been formally accredited by a sending State are to be considered as having diplomatic status and are therefore “members of the diplomatic staff” for the purposes of article 78 (h), it would seem that the definitions in

this article reflect the practice generally applied to delegations of States members of the ITU to plenipotentiary and administrative conferences of the Union. These definitions do not entirely correspond to those in the Convention.<sup>33</sup>

4. It may be remarked, however, that in addition to delegations of States the following may be admitted to ITU conferences:

- (a) Observers of the United Nations, the specialized agencies and IAEA;
- (b) Observers of certain other international organizations;
- (c) Representatives of certain recognized private operating agencies.

The provisions of the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies respectively accord the necessary facilities, privileges and immunities to persons in category *a* where the host State is a party to them.

There is no provision for any facilities for persons in categories *b* and *c* in the Headquarters Agreement between the United Nations and the Swiss Confederation which is applied by analogy to ITU, but in practice no difficulties have arisen in connexion with ITU conferences held in Switzerland.

The final draft of the Headquarters Agreement now under negotiation between the Union and the Confederation contains the following article which would be applicable in such cases:

“The Swiss authorities shall take the necessary measures to facilitate the entry into, sojourn in, and departure from Swiss territory of all persons, irrespective of nationality, summoned by the Union in their official capacity.” [Provisional translation.]

As for ITU conferences outside Switzerland, such observers and representatives could enjoy special status only by virtue of any relevant provisions which might be included in *ad hoc* agreements between the Union and host States.

5. In addition to its Administrative Council, the Union has two organs (hereinafter called the CCI’s for short) the meetings of which are attended by persons representing their Governments, namely:

- (a) The International Radio Consultative Committee (CCIR), and
- (b) The International Telegraph and Telephone Consultative Committee (CCITT).

6. Persons appointed by a member country to serve on the Council are accredited and would, according to the interpretation mentioned in paragraph 3 above, be included in the category of “members of the diplomatic staff” for the purposes of the draft treaty.

7. The CCI’s, however, do not seem to fit into the pattern envisaged in article 78 of the International Law Commission’s draft. As these bodies do not have the power to draw up treaties or regulations, but merely make recommendations, no system of formal accreditation for representatives of States is used. It would seem questionable therefore whether such persons enjoy diplomatic status for the purposes of article 78 although they have the same need for facilities, privileges and immunities as “members of the diplomatic staff” to ITU conferences. In actual practice, they are treated no differently from accredited representatives at conferences of the Union.

8. In addition to persons representing Governments, certain representatives of entities—usually non-governmental—attend CCI plenary assemblies and meetings of their study groups.

As will be seen from annex 2, the term “representative” as used in the Montreux Convention refers to a “person sent by a recognized private operating agency”. Such agencies may, with the approval of the members of ITU which have recognized them, become members of the CCI’s (Montreux Convention, No. 769) and, under certain circumstances, they may vote in Plenary Assemblies (*idem*, No. 789).

<sup>31</sup> United Nations, *Juridical Yearbook*, 1965 (United Nations publication, Sales No.: 67.V.3), p. 173.

<sup>32</sup> See annex 1 below.

<sup>33</sup> See annex 2 below.

Furthermore, scientific and industrial organizations engaged in telecommunication work may participate in an advisory capacity in meetings of the study groups of the CCI's (*idem*, No. 773).

These agencies and organizations contribute towards defraying the expenses of the CCI's (*idem*, No. 224).

International organizations which co-ordinate their work with ITU and which have related activities may be admitted to participate in the work of the CCI's.

9. Non-governmental representatives make a major contribution to the work of the CCI's. These persons need to enjoy most the privileges and immunities granted to representatives of States in order to perform their tasks. In practice, host Governments have always accorded them the necessary facilities but the situation is anomalous.

10. As article 79 and article 5 of the draft make allowance for the existence of different practices, we assume that nothing in the draft will affect the ITU. We wonder, however, whether the International Law Commission might not wish to consider making some treaty provisions for a special status for persons authorized by the basic instruments of international organizations to attend conferences or meetings of their organs but not sent by States, since this category of participant plays an important part in the work of many technical organizations.

11. The terms of article 82 conflict with the definition of "delegations" in the Montreux Convention<sup>34</sup> in which it is stated: "Each Member and Associate Member shall be free to make up its delegation as it wishes."

12. The terms of article 83 conflict with chapter 5, paragraphs 6, 7 and 8, of the General Regulations<sup>35</sup> annexed to the Montreux Convention, the texts of which are as follows:

"640 6. As a general rule, Members of the Union should endeavour to send their own delegations to conferences of the Union. However, if a Member is unable, for exceptional reasons, to send its own delegation, it may give the delegation of another Member of the Union powers to vote and sign on its behalf. Such powers must be conveyed by means of an instrument signed by one of the authorities mentioned in 629 or 630, as appropriate."

"641 7. A delegation with the right to vote may give to another delegation with the right to vote a mandate to exercise its vote at one or more meetings at which it is unable to be present. In such a case it shall, in good time, notify the Chairman of the conference in writing."

"642 8. A delegation may not exercise more than one proxy in any of the cases referred to in 640 and 641."

13. With reference to article 85, it is observed that it is the practice of some States members of the Union to include in their delegations from time to time nationals of other States.

14. With reference to article 86, it is the practice in ITU conferences that if a head of a delegation is going to be absent, he informs the President or Chairman of the Conference through the Secretariat and indicates which member of the delegation will act in his absence.

15. ITU does not follow, as regards representatives to CCI meetings, the practice laid down in paragraph 1 of article 87.<sup>36</sup>

16. We consider that paragraph 3 of article 88 is a useful clarification.

17. ITU does not accept responsibility for notifying to host States the information envisaged in paragraph 3 of article 89 and is not therefore interested to have information regarding arrival and departure of delegates and their families or the movements of other persons employed in delegations.

18. Article 90 is not in accordance with ITU practice, which is always to seat delegations in the alphabetical order of the French names of the countries represented (Montreux Convention, No. 658). It is in this order that the delegations are called in case of a roll-call vote. These are the only cases in which it is the practice of the Union to invoke an order of precedence between delegations.

19. ITU accepts no responsibility for finding premises and accommodation for delegations. The last sentence of article 93 would therefore be inapplicable to ITU conferences.

I have commented at some length on the draft articles as we feel that the International Law Commission should be aware of the extent to which the provisions of part IV depart from the practice in organizations such as the Union. We believe that the draft in its final form will be widely accepted and that difficulties may well arise in connexion with ITU conferences and meetings, despite the provisions of articles 5 and 79, if so great a discrepancy between its provisions and ITU practice remains.

### Annex I

#### Administrative Council resolution No. 88 (amended)<sup>37</sup>

RELATIONS OF THE GENERAL SECRETARIAT OF THE UNION WITH STATES OR ADMINISTRATIONS WHICH ARE NOT MEMBERS OR ASSOCIATE MEMBERS OF THE UNION

#### The Administrative Council

Considering that it is advisable to give precise instructions to the Secretary-General in regard to the attitude he must adopt in the event of receiving communications from States or administrations which are not Members or Associate Members of the Union, and also in regard to the dispatch of documents of the Union that such States or administrations might request.

#### Resolves that

1. With the exceptions specified below, the Secretary-General may correspond with or forward documents to the Members and Associate Members listed in annexes 1 and 2 of the Convention (Geneva, 1959)<sup>38</sup> and those that have become or will become Members or Associate Members in accordance with the procedures laid down in the Convention;

2. The Secretary-General is authorized to correspond with States or administrations not mentioned in paragraph 1 above, with a view to informing them on accession to the Union and the implementation of the Convention or Regulations, or in the case of formal requests to accede, transmitted in accordance with the procedure laid down in the Convention;

3. In respect of any other communication he may receive from a State or administration which is not a Member or Associate Member, the Secretary-General shall take the following steps:

(a) If the communication concerns a matter of policy that the Council should normally consider and resolve, or in the case of doubt, he shall restrict himself to acknowledging it, informing the sender that it will be referred to the Administrative Council;

(b) If the communication is clearly of a factual nature, connected with the telecommunication services, the Secretary-General shall acknowledge it, informing the sender that a copy will be sent to the Members and Associate Members of the Union for their information, and shall take action accordingly in each case;

<sup>34</sup> See annex 2 to these observations.

<sup>35</sup> ITU, *International Telecommunication Convention (Montreux, 1965)*, Geneva, General Secretariat of ITU, annex 4, p. 99.

<sup>36</sup> See para. 7 above.

<sup>37</sup> ITU, Supplement No. 2 (August 1967) to the *Volume of Resolutions and Decisions of the Administrative Council of ITU*.

<sup>38</sup> United States of America, Department of State, *United States Treaties and other International Agreements* (Washington, U.S. Government Printing Office, 1962), vol. 12, part 2 (1961), p. 1761.

4. (1) In cases referred to in paragraph 3 (b) above, the Secretary-General shall publish the communication received under the heading: "Information received from sources outside the Union", followed by a note to the effect that the publication of the information in question does not imply recognition of the status of the sender in relation to the Union;

(2) However, if the nature of the information received is such as to warrant its inclusion in official documents, it shall not be published separately but shall be incorporated in the appropriate documents, under the title and with the explanatory note referred to in paragraph 4 (1);

5. (1) Requests for documents, public sale of which is authorized, may be complied with in return for payment;

(2) All notifications, communications and circular letters distributed gratis by the Secretary-General to Members and Associate Members of the Union shall be furnished by him to any private individual or to any organization on request in return for payment at a price to be fixed by the Secretary-General;

6. Until Germany becomes a Member once again, the Secretary-General is authorized to correspond with the Allied Control Commission in Germany; he shall, as a practical measure, be provisionally authorized to correspond with the occupation zones of Germany, bearing in mind the practice at present in force.

*Ref.: Doc. 265/CA3—October 1948; Doc. 535, 542, 546 and 549/CA4—September 1949; Doc. 803/CA5—October 1950; and Doc. 1606/CA9—May 1954.*

## Annex 2

### *Definition of certain terms used in the International Telecommunication Convention and its annexes*<sup>39</sup>

...

**Delegate:** A person sent by the Government of a Member or Associate Member of the Union to a plenipotentiary conference, or a person representing a Government or an administration of a Member or Associate Member of the Union at an administrative conference, or at a meeting of an international consultative committee.

**Representative:** A person sent by a recognized private operating agency to an administrative conference, or to a meeting of an international consultative committee.

**Expert:** A person sent by a national scientific or industrial organization which is authorized by the Government or the administration of its country to attend meetings of study groups of an international consultative committee.

**Observer:** A person sent by:

- The United Nations in accordance with article 29 of the Convention;
- One of the international organizations invited or admitted in accordance with the provisions of the General Regulations to participate in the work of a conference;
- The Government of a Member or Associate Member of the Union participating in a non-voting capacity in a regional administrative conference held under the terms of article 7 of the Convention.

**Delegation:** The totality of the delegates and, should the case arise, any representatives, advisers, attachés or interpreters sent by the same country.

Each Member and Associate Member shall be free to make up its delegation as it wishes. In particular, it may include in its delegation in the capacity of delegates, advisers or attachés, persons belonging to private operating agencies which it recognizes or persons belonging to other private enterprises interested in telecommunications.

## 12. World Meteorological Organization

OBSERVATIONS COMMUNICATED BY LETTER DATED 30 OCTOBER 1970  
FROM THE DEPUTY SECRETARY-GENERAL

[Original text: English]

I have no comments of substance to submit concerning the texts of the draft articles adopted by the International Law Commission on "Relations between States and international organizations". I should like however to submit for the attention of the Commission some specific features governing the relations between WMO and its Members (States and territories). These observations are contained in a note attached to the present letter.

*Note on some aspects of the relations between the World Meteorological Organization and its Members as regards representation of Members in the Organization*

### (a) Permanent representatives

The basis for the nomination of permanent representatives with WMO by Member States and member Territories of WMO is stipulated in Regulation 6 of the WMO General Regulations<sup>40</sup> which contains a definition of the functions of the permanent representative. Regulation 6 reads as follows:

"Each Member shall designate by written notification to the Secretary-General a Permanent Representative who should be the Director of the Meteorological Service to act on technical matters for the Member between sessions of Congress. Subject to approval of their respective governments, Permanent Representatives should be the normal channel of communications between the Organization and their respective countries and shall maintain contact with the competent authorities, governmental or non-governmental, of their own countries on matters concerning the work of the Organization."

It should be noted that the main purpose for which these representatives were instituted was to provide a means of conveying to the Organization the position of its Members on technical matters falling within the sphere of competence of the Organization. In addition, Regulation 6 provides that, "subject to the approval of their respective governments", the functions of these permanent representatives could be extended so that they could represent their government before the Organization. In fact, about half of the WMO permanent representatives have been granted the right by the Minister of Foreign Affairs of their country to communicate with the Organization on behalf of their government on all matters. There are other cases, however, where the functions of the WMO permanent representative have been restricted to technical matters only. In such cases, the communications on non-technical matters are addressed to WMO by the government of the Member, either directly from the Minister of Foreign Affairs or through the permanent mission of the Member in Geneva.

In those cases where both a WMO permanent representative has been designated to act on behalf of his government on all matters concerning WMO and a permanent mission of a member in Geneva has been accredited to WMO, some difficulties have been experienced. In most of these cases, a *modus vivendi* has been found and, in general, communications of a non-technical nature are accepted from both sources.

<sup>39</sup> Annex 2 to the International Telecommunication Convention (Montreux, 1965) [for the reference to the Convention, see footnote 31 above].

<sup>40</sup> WMO, *General Regulations*, Offprint of *Basic Documents—Edition 1971* (WMO—No. 15), p. 32.

To complete the picture, it should be stressed that, with very few exceptions, the WMO permanent representatives are not entitled to designate and issue credentials for representatives of their country at sessions of the WMO Congress, regional associations and technical commissions of the Organization, and WMO technical conferences.

It should also be noted that the WMO permanent representatives exercise their functions at the seat of the government of their country and not, like the permanent mission, near the headquarters of the Organization. Therefore, if a word other than "permanent representative" could be used to designate the head of the permanent mission, it would, in the case of WMO, avoid a certain amount of confusion. It may perhaps be useful to mention in this connexion that some Governments when accrediting the head of a permanent mission in Geneva to WMO have designated him as the resident representative of their country in Geneva.

(b) *Permanent missions accredited to several organizations*

Most of the permanent missions established in Geneva are accredited to the Office of the United Nations and other international organizations in Geneva. In a few cases, a separate letter accrediting the permanent mission to WMO is addressed to the Organization. In other cases, a single letter of accreditation is addressed to the Office of the United Nations in Geneva indicating that the head of the permanent mission is accredited to the Office of the United Nations and "other international organizations in Geneva". It is not clear in this latter case whether WMO is included or not. Such difficulties could be avoided if the State accrediting the head of a permanent mission could notify separately each of the organizations to which he is accredited.

(c) *Representation of members by the permanent representative of another member*

Draft article 83 (Principle of single representation) states that a delegation to an organ or to a conference may represent only one State. This provision is contrary to the present practice of WMO. The principle of multiple representation in WMO can be based on the fact that a few Members of the Organization operate joint meteorological services with other Members. There have been several instances of one delegation representing two or three WMO Members at sessions of the WMO Congress, regional associations and technical commissions. In case one delegate represents more than one Member at such a session, he has all the rights of the delegate of each Member he represents with one exception, i.e., he can only vote for one Member in accordance with the provision of regulation 55 of the General Regulations of the Organization which reads: "... No person shall have more than one vote in sessions of constituent bodies". However, when a delegation which represents several Members has a total of delegates equal to or greater than the number of Members represented by the delegation, different delegates of this delegation have the right to vote each for one of the Members represented by the delegation.

### 13. International Atomic Energy Agency

(a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 16 SEPTEMBER 1970  
FROM THE DIRECTOR OF THE LEGAL DIVISION

[Original text: English]

1. Article 6 provides that "member States may establish permanent missions . . .", and articles 7, 15, 16, 20 to 25, 27, 29, 38, 45 and 49 specifically refer to the "permanent mission", whereas all other articles refer to the "permanent representative" or "members of the permanent mission". This distinction implies that the two concepts are different from each other. Thus, a permanent mission may exist without a permanent representative and vice versa (e.g. in the case of a permanent representative operating from his offices established

in a "third State"). Should this be the real intention of the International Law Commission, we wonder whether in article 6, where a principle is being established, a similar provision could not be introduced for permanent representatives. Such a provision may help avoid any ambiguity and possible derogation from the rights, privileges and immunities of permanent representatives, which, in fact, to our mind, are as important as the privileges and immunities of permanent missions, it not more so. (We would like to add that there have been some difficulties because of the provision in the IAEA Headquarters Agreement<sup>41</sup> [section 29, article XII] which provides that permanent missions to the IAEA of Member States shall enjoy the same privileges and immunities as are accorded to diplomatic missions in the Republic of Austria. This provision is separate and distinct from those relating to Governors and resident representatives, namely sections 30 to 32 (article XIII). At least in one instance, where the host Government refused to accept the accreditation of a resident representative on the grounds of incompatible professional activity or nationality, an attempt was made, and indeed succeeded, to obtain duty-free import privileges in the name of the "permanent mission".) If this proposal proved acceptable, consequential amendment may have to be made in other articles referred to above wherever it appears necessary.

2. We believe that in article 14 a third paragraph similar to paragraph 2 a of article 7 of the Vienna Convention on the Law of Treaties could be added, since Heads of State, Heads of Governments and Ministers for Foreign Affairs should also be able to conclude treaties with international organizations without having to produce full powers.

3. There is clearly a difference between the relations of "host States" with international organizations and the relation of other States with international organizations. This distinction seems to have been introduced in the draft by confining its part I to relations between States in general and the international organizations, while dealing mostly in part II with the relations between *host States* and international organizations. However, in view of the definition of the "host State" in article 1, subparagraph 1, on the one hand, and the provision on the possibility of establishing permanent missions in third States in accordance with article 20, paragraph 2, on the other, we have doubts on whether many of the rights and obligations regulated in part II should really be confined to "host States" (in the sense in which the expression is used in the draft articles) rather than be made applicable to all States. We wonder whether, for instance, the provision of article 22 should not extend to all member States, that of article 23 to any State which would give its consent pursuant to article 20, paragraph 2, etc. We therefore believe that the term "host State" may be used more restrictively, and the relations special to the "host State" be regulated more precisely in order to make them more distinguishable from the relations of other States with the organizations.

4. Although article 43 provides for the facilitation of transit of permanent representatives and staff through "third States", and article 48 for that of departure from the "host State", there appears to be no provision on the facilitation of the entry of permanent representatives and staff into the "host State". It would be desirable to introduce a provision on the facilitation of granting visas, wherever necessary, by the "host State" to the members of permanent missions. Furthermore, it may be borne in mind that "Host Government Agreements" concluded for holding meetings in the territories of member States contain such a provision.

5. Article 29 establishes the freedom of communication of the "permanent mission" with the government of the sending State, its diplomatic missions, its permanent missions, its consular posts and its special missions. Since the draft articles are intended to regulate relations between States and international organizations the question comes to mind whether the freedom of communication of the "permanent mission" with the organization to which it is accredited should not be ensured in the same manner. This question would

<sup>41</sup> United Nations, *Treaty Series*, vol. 339, p. 152.

have particular merits if a "permanent mission" is established in a "third State".

6. We also think that the following minor comments on details of drafting may be of some use to the drafters of the text:

(a) Paragraph 5 of the commentary to *article 12* gives the impression that in the IAEA's practice the Director-General reports to the Board of Governors on the credentials of all permanent representatives. The fact is that such reporting concerns only the credentials of Governors. There is no reporting on the credentials of permanent representatives.

(b) *Article 35* provides for exemption of the permanent representative and the diplomatic staff of the permanent mission from social security provisions of the "host State", both as employers and employees. However, the exemption of the employer of the permanent representative and the diplomatic staff has not been secured in the article.

(c) In subparagraphs *b*, *c* and *d* of *article 36*, the exemptions are specifically those from dues and taxes of the "host State". Does the omission of such specification in subparagraphs *a*, *e* and *f* mean that those particular exemptions are from dues and taxes of any State?

(d) *Article 14* casually mentions, and *article 47* regulates, the end of "the functions of the permanent representative" despite the fact that the draft articles do not regulate the *presence* of the permanent representative, or the *nature* or *commencement* of these functions, as was done in the case of the functions of "permanent missions".

(b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 2 MARCH 1971  
FROM THE DIRECTOR OF THE LEGAL DIVISION

[Original text: English]

Although there has never been any permanent observer accredited to IAEA, there have been instances of agreements involving non-

member States and the problem is certainly one of interest to the Agency.

1. With respect to *article 52*, we note that the phrase "in accordance with the rules or practice of the Organization" would appear to be somewhat repetitious as *article 3* of the draft articles provides that "the application of the present articles is without prejudice to any relevant rules of the Organization". On the other hand, we assume that the intent is to emphasize this point and to bring into play, in this particular context, the concept of "practice".

2. As concerns *article 53*, the distinction made between representing the State *at* the organization, as opposed to the concept of representing the State *in* the organization, seems to be an extremely fine one and might even lead to a certain confusion. Moreover, the concept of representing the State at the organization might be felt to prejudice the distinction between missions of Member States and non-member States. Perhaps this could be clarified by replacing the word "at" by the following words: "in its relations with".

3. With regard to *article 58*, the first paragraph, and in particular the concept that a permanent observer might "adopt" the text of a treaty without the necessity of having full powers, seems also to blur the distinction between the competence of permanent representatives and that of permanent observers. Might it not be preferable to use the word "negotiate" which is used in *article 53* and, in fact, repeated in the commentary to *article 58* itself? The first paragraph of *article 58* might then read as follows:

"A permanent observer in virtue of his functions and without having to produce full powers is recognized as being competent to negotiate the text of a treaty between his State and the international organization to which he is accredited."

4. Finally, with respect to *article 100*, we have a preference for alternative A since it is based on the Vienna Convention on Diplomatic Relations and the Convention on Special Missions which we assume to reflect more closely the current thinking on the subject than the earlier Convention on the Privileges and Immunities of the United Nations.

## ANNEX II

### Comparative tables of the numbering of the articles of the provisional draft (draft articles on the representatives of States to international organizations) and of the final draft (draft articles on the representation of States in their relations with international organizations) adopted by the Commission

#### NOTE BY THE SECRETARIAT<sup>1</sup>

In connexion with the topic "Relations between States and international organizations", the International Law Commission prepared a provisional set of draft articles and a final set of draft articles. The provisional set, entitled "Draft articles on representatives of States to international organizations", was adopted by the Commission at its twentieth, twenty-first and twenty-second sessions.<sup>2</sup> The final set, entitled "Draft articles on the representation

of States in their relations with international organizations", was adopted by the Commission at its twenty-third session.<sup>3</sup>

For the convenience of the Sixth Committee, the Secretariat has compiled the following two tables indicating the correspondence between the two sets of draft articles. It should be noted that in both tables where an article in one set has no corresponding article in the other set the relevant column is marked "-".

Articles 1-21: *Yearbook of the International Law Commission*, 1968, vol. II, pp. 196 *et seq.*, document A/7209/Rev.1.

Articles 22-50: *Ibid.*, 1969, vol. II, pp. 207 *et seq.*, document A/7610/Rev.1.

Articles 51-116: *Ibid.*, 1970, vol. II, pp. 276 *et seq.*, document A/8010/Rev.1.

<sup>3</sup> For the text of the "final draft", see above, pp. 284 *et seq.*

<sup>1</sup> Originally distributed as mimeographed document A/C.6/L.821 (of 8 October 1971) of the twenty-sixth session of the United Nations General Assembly, under agenda item 88 (Report of the International Law Commission on the work of its twenty-third session).

<sup>2</sup> For the text of the articles of the "provisional draft", see the following documents:

TABLE I

Articles of the provisional draft in numerical order  
and the corresponding articles of the final draft

<i>Number of article in the provisional draft</i>	<i>Number of article in the final draft</i>
1	1
2	2
3	3
4	4
5	4
6	5
7	6
8	8
9	—
10	9
11	72
12	10
13	11
14	12
15	13
16	14
17	15
18	16
19	17
20	18
21	19
22	20
23	21
24	22
25	23
26	24
27	25
28	26
29	27
30	28
31	29
32	30
33	31
34	31
35	32
36	33
37	34
38	35
39	73
40	36
41	37
42	38
43	78
44	80
45	75
46	39
47	40
48	77
49	41
50	81
51	1
52	5
53	7
54	8
55	9
56	72
57	10 and 11
58	12
59	13 and 74
60	14
61	15
62	16

TABLE II

Articles of the final draft in numerical order  
and the corresponding articles of the provisional draft

<i>Number of article in the final draft</i>	<i>Number of article in the provisional draft</i>
1	1, 51 and 78
2	2
3	3
4	4, 5 and 79
5	6 and 52
6	7
7	53
8	8 and 54
9	10 and 55
10	12 and 57
11	13 and 57
12	14 and 58
13	15 and 59
14	16 and 60
15	17 and 61
16	18 and 62
17	19
18	20 and 63
19	21 and 64
20	22 and 65
21	23 and 66
22	24 and 66
23	25 and 67
24	26 and 67
25	27 and 67
26	28 and 68
27	29 and 67
28	30 and 69
29	31 and 69
30	32 and 69
31	33, 34 and 71
32	35 and 69
33	36 and 69
34	37 and 69
35	38, 67 and 69
36	40 and 69
37	41 and 70
38	42 and 73
39	46, 76 and 113
40	47 and 77
41	49 and 77
42	—
43	84
44	87
45	81
46	82
47	89
48	86
49	90
50	91
51	92
52	93
53	92
54	94
55	95
56	92
57	96
58	97
59	98
60	99
61	100
62	101

TABLE I (concluded)

Articles of the provisional draft in numerical order  
and the corresponding articles of the final draft

<i>Number of article in the provisional draft</i>	<i>Number of article in the final draft</i>
63	18
64	19
65	20
66	21 and 22
67	23, 24, 25, 27 and 35
68	26
69	28, 29, 30, 32, 33, 34, 35 and 36
70	37
71	31
72	73
73	38
74	78
75	80
76	39 and 75
77	40, 41 and 77
78	1
79	4
80	—
81	45
82	46
83	—
84	43
85	72
86	48
87	44
88	—
89	47
90	49
91	50
92	51, 53 and 56
93	52
94	54
95	55
96	57
97	58
98	59
99	60
100	61
101	62
102	64
103	66
104	63, 65 and 73
105	67
106	68
107	74
108	69
109	69
110	78
111	80
112	75
113	39
114	70
115	77
116	71

TABLE II (concluded)

Articles of the final draft in numerical order  
and the corresponding articles of the provisional draft

<i>Number of article in the final draft</i>	<i>Number of article in the provisional draft</i>
63	104
64	102
65	104
66	103
67	105
68	106
69	108 and 109
70	114
71	116
72	11, 56 and 85
73	39, 72 and 104
74	59 and 107
75	45, 76 and 112
76	—
77	48, 77 and 115
78	43, 74 and 110
79	—
80	44, 75 and 111
81	50
82	—





## CHECK LIST OF DOCUMENTS REFERRED TO IN THIS VOLUME

NOTE. This list includes all United Nations documents identified in the text by their symbols for which no reference is given in a foot-note.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/285	Panama: Draft Declaration on the rights and duties of States	Mimeographed.
A/1410	Complaint by the Union of Soviet Socialist Republics regarding the violation of Chinese air space by the air force of the United States of America and the machine-gunning and bombing of Chinese territory by that air force, and against the bombardment and illegal inspection of a merchant ship of the People's Republic of China by a military vessel of the United States: Communication dated 27 September 1950 addressed to the Secretary-General by the Minister for Foreign Affairs of the Central People's Government of the People's Republic of China	<i>Idem.</i>
A/1777	<i>Idem</i> : Union of Soviet Socialist Republics: draft resolution	<i>Idem.</i>
A/5409	Legal problems relating to the utilization and use of international rivers: report of the Secretary-General [summary of legislative texts and treaty provisions]	Mimeographed. For the full text of the legislative texts and treaty provisions, see United Nations publication, Sales No. 63.V.4.
A/C.1/660	Complaint by the Union of Soviet Socialist Republics regarding the violation of Chinese air space by the air force of the United States of America and the machine-gunning and bombing of Chinese territory by that air force, and against the bombardment and illegal inspection of a merchant ship of the People's Republic of China by a military vessel of the United States: Union of Soviet Socialist Republics: draft resolution	Mimeographed. Reproduced in <i>Official Records of the General Assembly, Fifth Session, Annexes</i> , agenda item 75, document A/1774, para. 6.
A/CN.4/245	Survey of international law: Working paper prepared by the Secretary-General	Reproduced in volume II, part two.
A/CN.4/247 and Add.1	Fourth report on succession in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur—Draft articles with commentaries on succession to public property	Reproduced in this volume, p. 157.
A/CN.4/250	Report of the Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations	Reproduced in volume II, part two.
A/CN.4/L.104	Relations between States and intergovernmental organizations—Suggested list of questions as basis of discussion for the definition of the scope and mode of treatment: working paper prepared by Mr. Abdullah El-Erian, Special Rapporteur	Mimeographed. Largely reproduced in <i>Yearbook of the International Law Commission, 1964</i> , vol. II, pp. 226-227, document A/5809, para. 41.
A/CN.4/L.136	Relations between States and international organizations: working paper prepared by Mr. Abdullah El-Erian, Special Rapporteur	Mimeographed.
A/CN.4/L.151	Relations between States and international organizations: Temporary observer delegations and conferences not convened by international organizations: working paper prepared by Abdullah El-Erian, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.161 and Add.1-2	Question of treaties concluded between States and international organizations or between two or more international organizations: Working paper submitted by the Secretary-General, containing a short bibliography, a historical survey of the question and a preliminary list of the relevant treaties published in the United Nations <i>Treaty Series</i>	<i>Idem.</i>
A/CN.4/L.162/Rev.1 and Corr.1 [English only]	Observations and suggestions concerning the (English) text of the draft articles on representatives of States to international organizations: Working paper submitted by the Secretariat	<i>Idem.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.163 [French only]	<i>Idem</i> (French text)	Mimeographed
A/CN.4/L.164 [Spanish only]	<i>Idem</i> (Spanish text)	<i>Idem.</i>
A/CN.4/L.165 [Russian only]	<i>Idem</i> (Russian text)	<i>Idem.</i>
A/CN.4/L.167	Draft articles on representatives of States to international organizations— Differences in form between part II and part IV of the draft: note by the Secretariat	<i>Idem.</i> Largely reproduced in A/CN.4/241/Add.3, para. 38 (p. 38 above).
A/CN.4/L.177	Working Group on relations between States and international organizations— Consolidated draft articles: Text submitted by the Working Group on second reading: paragraph 2 of article 1	Reproduced in the summary record of the 1132nd meeting (vol. I).
A/CN.4/L.177/ Add.1	<i>Idem</i> : Articles 2, 4 and 11	<i>Idem</i> , 1134th and 1135th meetings (vol. I).
A/CN.4/L.177/ Add.2	<i>Idem</i> : Article 38 <i>bis</i> (formerly article 75)	<i>Idem</i> , 1138th meeting (vol. I).
A/CN.4/L.177/ Add.3	<i>Idem</i> : Articles 81 and 82	<i>Idem.</i>
S/1745/Rev.1	Union of Soviet Socialist Republics: draft resolution submitted at the 493rd meeting of the Security Council, 31 August 1950, concerning the statements of the Central People's Government of the People's Republic of China relating to the violation of the Chinese frontiers by United States Air Forces, and their bombing and strafing of buildings, railway stations and an aerodrome resulting in loss of life and property damage	Reproduced in <i>Official Records of the Security Council, Year, No. 35</i> , 493rd meeting.

# **CHECK LIST OF DOCUMENTS OF THE TWENTY-THIRD SESSION NOT REPRODUCED IN VOLUME II**

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/238 and Add.1-2	Observations of Member States on the draft articles on representatives of States to international organizations, adopted by the International Law Commission at its twenty-first session	Reproduced in A/8410/Rev.1, annex I
A/CN.4/239 and Add.1-3	Observations of Member States, Switzerland and the secretariats of the United Nations, the specialized agencies and the International Atomic Energy Agency on the draft articles on representatives of States to international organizations, adopted by the International Law Commission at its twentieth and twenty-first sessions	<i>Idem.</i>
A/CN.4/240 and Add.1-7	Observations of Member States, Switzerland and the secretariats of the United Nations, the specialized agencies and the International Atomic Energy Agency on the draft articles on representatives of States to international organizations, adopted by the International Law Commission at its twenty-second session	<i>Idem.</i>
A/CN.4/242	Provisional agenda	Mimeographed. For the agenda as adopted, see p. 275 above (A/8410/Rev.1, para.7).
A/CN.4/251	Letter dated 10 May 1971 from Mr. Shabtai Rosenne to the Chairman of the International Law Commission	Mimeographed.
A/CN.4/L.161 and Add.1-2	Question of treaties concluded between States and international organizations or between two or more international organizations: Working paper submitted by the Secretary-General, containing a short bibliography, a historical survey of the question and a preliminary list of the relevant treaties published in the United Nations <i>Treaty Series</i>	<i>Idem.</i>
A/CN.4/L.162/Rev.1 and Corr. 1 [English only]	Observations and suggestions concerning the (English) text of the draft articles on representatives of States to international organizations: Working paper submitted by the Secretariat	<i>Idem.</i>
A/CN.4/L.163 [French only]	<i>Idem</i> (French text)	<i>Idem.</i>
A/CN.4/L.164 [Spanish only]	<i>Idem</i> (Spanish text)	<i>Idem.</i>
A/CN.4/L.165 [Russian only]	<i>Idem</i> (Russian text)	<i>Idem.</i>
A/CN.4/L.167	Draft articles on representatives of States to international organizations—Differences in form between part II and part IV of the draft: note by the Secretariat	<i>Idem.</i> Largely reproduced in A/CN.4/241/Add.3, para. 5 (p. 38 above).
A/CN.4/L.168 and Corr.2 and 3	<i>Idem</i> —Text of articles adopted by the Drafting Committee: articles 6-27, 27 <i>bis</i> , 28-33, 35-44 and 46-49	Text of the articles reproduced in the summary records of the 1110th-1116th meetings (see volume I).
A/CN.4/L.168/ Add.1	<i>Idem</i> : Article 45	Reproduced in the summary record of the 1114th meeting (vol. I).
A/CN.4/L.168/ Add.2 and Corr.1 and 2	<i>Idem</i> : Articles 52-57, 57 <i>bis</i> , 58-62, 62 <i>bis</i> , 63 and 64	<i>Idem</i> , 1116th, 1118th and 1119th meetings (vol. I).
A/CN.4/L.168/ Add.3	<i>Idem</i> : Articles 49 <i>bis</i> and 77 <i>bis</i>	<i>Idem</i> , 1119th meeting (vol. I).

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.168/ Add.4	<i>Idem</i> : Articles 65, 66, 66 <i>bis</i> , 67, 67 <i>bis</i> and 68-77	<i>Idem</i> , 1122nd and 1123rd meetings (vol. I).
A/CN.4/L.168/ Add.5	<i>Idem</i> : Articles 81-86	<i>Idem</i> , 1123rd and 1124th meetings (vol. I).
A/CN.4/L.168/ Add.6	<i>Idem</i> : Articles 87 and 89-101	The text of articles 87, 89-91 and 93-101 is reproduced in the summary records of the 1124th-1126th meetings (vol. I).
A/CN.4/L.168/ Add.7	<i>Idem</i> : Articles 102-108, 110-116 and 116 <i>bis</i>	The text of articles 102, 103, 105, 106, 108, 110, 112, 114, 116 and 116 <i>bis</i> is reproduced in the summary records of the 1126th and 1127th meetings (vol. I).
A/CN.4/L.169	<i>Idem</i> —Amendments proposed by Mr. Kearney to articles 50, 50 <i>bis</i> , and 50 <i>ter</i>	The text of the amendments is reproduced in the summary record of the 1119th meeting (vol. I).
A/CN.4/L.170	<i>Idem</i> —Text of article 12 adopted on second reading by the Drafting Committee	Reproduced in the summary record of the 1114th meeting (vol. I).
A/CN.4/L.170/ Add.1	<i>Idem</i> —Texts of articles 25, 32 and 52 adopted on second reading by the Drafting Committee and recommendation concerning article 6	The texts of article 52 and of the recommendation concerning article 6 are reproduced in the summary record of the 1118th meeting (vol. I).
A/CN.4/L.170/ Add.2	<i>Idem</i> —articles 49 <i>bis</i> and 77 <i>bis</i> adopted on second reading by the Drafting Committee	The text of the articles is reproduced in the summary record of the 1121st meeting (vol. I).
A/CN.4/L.170/ Add.3	<i>Idem</i> —Text of article 81 adopted on second reading by the Drafting Committee and recommendation concerning article 83	<i>Idem</i> , 1124th meeting (vol. I).
A/CN.4/L.172	<i>Idem</i> —Report of the Drafting Committee on article 34	<i>Idem</i> , 1117th meeting (vol. I).
A/CN.4/L.175	<i>Idem</i> —Amendment proposed by Mr. Kearney to alternative A of article 100 as submitted by the Drafting Committee (A/CN.4/L.168/Add.6)	<i>Idem</i> , 1125th meeting (vol. I).
A/CN.4/L.176	Draft report of the International Law Commission on the work of its twenty-third session (chap. I)	Mimeographed. See below note concerning A/CN.4/L.178 <i>et seq.</i>
A/CN.4/L.177	Working Group on relations between States and international organizations—Consolidated draft articles: Text submitted by the Working Group on second reading: paragraph 2 of article 1	Reproduced in the summary record of the 1132nd meeting (vol. I).
A/CN.4/L.177/ Add.1	<i>Idem</i> : Articles 2, 4 and 11	<i>Idem</i> , 1134th and 1135th meetings (vol. I).
A/CN.4/L.177/ Add.2	<i>Idem</i> : Article 38 <i>bis</i> (formerly article 75)	<i>Idem</i> , 1138th meeting (vol. I).
A/CN.4/L.177/ Add.3	<i>Idem</i> : Articles 81 and 82	<i>Idem</i> .
A/CN.4/L.178 and Add.1-15 A/CN.4/L.179 and Add.1-4 A/CN.4/L.180 and Add.1-5	Draft report of the International Law Commission on the work of its twenty-third session (chap. II-V)	Mimeographed. For the final text, see A/8410/Rev.1 (p. 275 above).
A/CN.4/L.181 and Add.1	Draft articles on the representation of States in their relations with international organizations, with annex	Mimeographed.
A/CN.4/SR.1087- SR.1148	Provisional summary records of the 1087th to the 1148th meetings of the Commission	Mimeographed. For the final text, see vol. I.



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