Document:-
A/CN.4/179

Second Report on Special Missions by Mr. Milan Bartoš, Special Rapporteur

Topic:
Special missions

Extract from the Yearbook of the International Law Commission:-
1965 , vol. II

SPECIAL MISSIONS

[Agenda item 3]

DOCUMENT A/CN.4/179

Second Report on Special Missions, by Mr. Milan Bartoš, Special Rapporteur

[*Original text: French*]
[*21 April 1965*]

CONTENTS

CONTENTS (*continued*)

Preliminary note

1. In submitting this report, the Special Rapporteur considers it necessary to explain that:

(*a*) He has confined himself to making a few minor corrections to the draft on special missions adopted by the International Law Commission at its sixteenth session, while observing the rule that these corrections and additions should consist only of those strictly necessary;

(*b*) In the present report he submits to the Commission the full revised text of those articles which it was unable to discuss during its sixteenth session. These articles form the fourth part of this second report;

(*c*) He is submitting to the Commission a proposal regarding the line to be followed with respect to the rules concerning so-called high-level special missions, and he hopes that the Commission, by expressing its opinion on the subject, will give him an opportunity to submit the final text of the rules relating thereto during the seventeenth session;

(*d*) He is unable to submit to the Commission a joint proposal by the Special Rapporteur on relations between States and inter-governmental organizations and the Special Rapporteur on special missions concerning the legal status of delegations to international conferences and congresses. For technical reasons, it was impossible to prepare such a joint report, even though the Commission had instructed the two Special Rapporteurs to do so.

History of the idea of defining rules relating to special missions[1]

2. At its tenth session, in 1958, the International Law Commission adopted a set of draft articles on diplomatic intercourse and immunities. The Commission observed, however, that the draft "deals only with permanent diplo-

[1] For the most part, this section is taken from the report of the International Law Commission on the work of its sixteenth session, 1964 (see *Yearbook of the International Law Commission, 1964*, vol. II, document A/5809, chap. III: Special Missions, paras. 25-35). These passages are reproduced since they contain information necessary to the reader of the second report on special missions.

matic missions. Diplomatic relations between States also assume other forms that might be placed under the heading of '*ad hoc* diplomacy', covering itinerant envoys, diplomatic conferences and special missions sent to a State for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and requested the Special Rapporteur to make a study of the question and to submit his report at a future session."[2] The Commission decided at its eleventh session (1959)[3] to include the question of *ad hoc* diplomacy as a special topic on the agenda of its twelfth session (1960).

3. Mr. A. E. F. Sandström was appointed Special Rapporteur. He submitted his report[4] at the twelfth session, and on the basis of this report the Commission took decisions and drew up recommendations for the rules concerning special missions. The Commission's draft was very brief. It was based on the idea that the rules on diplomatic relations in general prepared by the Commission should on the whole be applied to special missions by analogy. The Commission expressed the opinion that this brief draft should be referred to the Conference on Diplomatic Intercourse and Immunities convened at Vienna in the spring of 1961. But the Commission stressed the fact that it had not been able to give this subject the thorough study it would normally have done. For that reason, the Commission regarded its draft as only a preliminary survey, carried out in order to put forward certain ideas and suggestions which should be taken into account at the Vienna Conference.[5]

4. At its 943rd plenary meeting on 12 December 1960, the United Nations General Assembly decided,[6] on the recommendation of the Sixth Committee, that these draft articles should be referred to the Vienna Conference with the recommendation that the Conference should consider them together with the draft articles on diplomatic intercourse and immunities. The Vienna Conference placed this question on its agenda and appointed a special Sub-Committee.[7]

5. The Sub-Committee noted that these draft articles did little more than indicate which of the rules on permanent missions applied to special missions and which did not. The Sub-Committee took the view that the draft articles were unsuitable for inclusion in the final convention without long and detailed study which could take place only after a set of rules on permanent missions had been finally adopted.[8] For this reason, the Sub-Committee recommended that the Conference should refer this question back to the General Assembly so that the Assembly could recommend to the International Law Commission further study of the topic, i.e., that it continue to study the topic in the light of the Vienna Convention on Diplomatic Relations which was then drawn up. At the fourth plenary meeting of the Vienna Conference on 10 April 1961, the Sub-Committee's recommendation was adopted.[9]

6. The matter was again submitted to the United Nations General Assembly. On 18 December 1961, the General Assembly, on the recommendation of the Sixth Committee, adopted resolution 1678 (XVI) in which the International Law Commission was requested to study the subject further and to report thereon to the General Assembly.

7. Pursuant to this decision, the question was referred back to the International Law Commission, which, at its 669th meeting on 27 June 1962, decided to place it on its agenda.[10] The Commission requested the United Nations Secretariat to prepare a working paper[11] which would serve as a basis for the discussions on this topic at its 1963 session. The Commission then placed this question on the agenda of its fifteenth session (1963).

8. During its fifteenth session, at the 712th meeting, the Commission appointed Mr. Milan Bartoš as Special Rapporteur for the topic of special missions.[12]

9. In that connexion, the Commission took the following decision:

> "With regard to the approach to the codification of the topic, the Commission decided that the Special Rapporteur should prepare a draft of articles. These articles should be based on the provisions of the Vienna Convention on Diplomatic Relations, 1961, but the Special Rapporteur should keep in mind that special missions are, both by virtue of their functions and by their nature, an institution distinct from permanent missions. In addition, the Commission thought that the time was not yet ripe for deciding whether the draft articles on special missions should be in the form of an additional protocol to the Vienna Convention, 1961, or should be embodied in a separate convention or in any other appropriate form, and that the Commission should await the Special Rapporteur's recommendations on that subject."[13]

10. In addition, the Commission considered again whether the topic of special missions should also cover the status of government delegates to congresses and conferences. On this point, the Commission at its fifteenth session inserted the following paragraph in its annual report to the United Nations General Assembly:

> "With regard to the scope of the topic, the members agreed that the topic of special missions should also cover itinerant envoys, in accordance with its decision at its 1960 session.[14] At that session the Commission had also decided not to deal with the privileges and immunities

[2] *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, para. 51.

[3] *Yearbook of the International Law Commission, 1959*, vol. II, document A/4169, para. 43.

[4] *Yearbook of the International Law Commission, 1960*, vol. II, document A/CN.4/129.

[5] *Ibid.*, document A/4425, para. 37.

[6] Resolution 1504 (XV).

[7] The Sub-Committee was composed of the representatives of Ecuador, Iraq, Italy, Japan, Senegal, USSR, United Kingdom, United States and Yugoslavia. See *Yearbook of the International Law Commission, 1963*, vol. II, document A/CN.4/155, para. 44.

[8] United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, document A/CONF.20/C.1/L.315, p. 45.

[9] *Ibid.*, document A/CONF.20/10/Add.1, resolution I, p. 89.

[10] *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, para. 76.

[11] Circulated as document A/CN.4/155, published in *Yearbook of the International Law Commission, 1963*, vol. II, pp. 151-158.

[12] *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, para. 65.

[13] *Ibid.*, para. 64.

[14] *Yearbook of the International Law Commission, 1960*, vol. I, 565th meeting, para. 26.

of delegates to congresses and conferences as part of the study of special missions, because the topic of diplomatic conferences was connected with that of relations between States and inter-governmental organizations. At the present session, the question was raised again, with particular reference to conferences convened by States. Most of the members expressed the opinion, however, that for the time being the terms of reference of the Special Rapporteur should not cover the question of delegates to congresses and conferences."[15]

11. The Special Rapporteur submitted his report,[16] which was placed on the agenda of the Commission's sixteenth session.

12. The Commission considered the report twice.[17] First, at the 723rd, 724th and 725th meetings, it engaged in a general discussion and gave the Special Rapporteur general instructions on continuing his study and submitting the rest of his report at the following session. Secondly, at the 757th, 758th, 760th-763rd, and 768th-770th meetings, it examined a number of draft articles and adopted sixteen articles, to be supplemented, if necessary, during its seventeenth session. These articles were submitted to the General Assembly and to the Governments of Member States for information.

13. Owing to the circumstances prevailing at the time of its regular session in 1964, the General Assembly did not discuss the report and consequently did not express its opinion to the Commission. Accordingly, the Commission will be resuming its work on the topic at the point it reached at its sixteenth session in 1964. The Special Rapporteur hopes that the reports on this topic submitted to the 1964 and 1965 sessions will be consolidated in a single report.

Questions of principle raised during the general debate in the International Law Commission

14. During the general debate at the 1964 Session of the International Law Commission (723rd, 724th and 725th meetings) on the report on special missions, several questions of principle arose. In the case of some of these, the Committee reached express decisions. In the case of others, while the Commission did not specifically endorse what its Chairman had said, the opinion of the majority of its members was clear, and in these cases the question can therefore be regarded as having been settled by the Commission. There was a third group of questions which were asked by certain members of the Commission but concerning which no decision was taken and no definite conclusions were reached by the other members of the Commission who took part in the discussion. Nevertheless, as the Special Rapporteur considers that all these questions touch on principle, they are referred to in this section.

15. The Commission requested the Special Rapporteur to confine himself to the views which had crystallized during the general debate, and he therefore regards these views as binding instructions. The present account will refer not only to these questions but also to the opinions of members of the Commission on which the Special Rapporteur has based his position. These opinions are cited from the provisional summary records of the above-mentioned meetings of the International Law Commission. The Special Rapporteur used the French text of the summary records, indicating, as regards each speaker, the number of the meeting and the paragraph number in the summary record. While, naturally, the Special Rapporteur was careful to reproduce faithfully the ideas and attitudes of each member of the Commission, a word of caution is indicated in two respects. First, many of these statements were made in English or Spanish, and possibly the French translation differs from the original thought. Secondly, as mentioned above, the passages cited are taken from the provisional summary records; no doubt, members of the Commission will have made certain corrections to the provisional records which probably altered the substance of what was originally recorded. The Special Rapporteur realizes that he, too, may have made some mistakes. Consequently, he regards this part of his second report as provisional and subject to correction later.

16. *The legal basis of the rules relating to special missions.* In view of the theoretical discussion in the literature as to whether the rules relating to special missions should be based on law or on international courtesy, the Special Rapporteur asked the Commission what it considered to be the legal basis of the rules on special missions which the Commission was drafting. The most categorical reply to this question was given by Mr. Tunkin, a member of the Commission. He said that the Commission's function was to codify or to draft rules of international law; consequently, the rules relating to special missions provided by the Commission were rules of law (SR.725, para. 32). Mr. Amado (SR.725, paras. 40-43), Mr. Yasseen (SR.725, para. 21), Mr. Verdross (SR.725, para. 18) and Mr. de Luna (SR.724, para. 40) took the same view.

17. Particular attention is drawn to the very clear answer given by Mr. de Luna, who said that the privileges and immunities of temporary missions were based on law, *ex jure*, and not on the comity of nations, *comitas gentium* (SR.724, para. 40). So far as *comitas gentium* is concerned, that view was shared by Mr. Verdross (SR.725, para. 18). Mr. Amado also opposed the notion that the legal basis of the rules was *comitas gentium* rather than law (SR.725, para. 40).

18. During the discussion, Mr. Briggs (SR. 725, para. 48), Mr. Castrén (SR.725, para. 23), Mr. Elias (SR.725, para. 29), Mr. El-Erian (SR.725, para. 37), Mr. Rosenne (SR.725, paras. 8 to 11 and 46), Mr. Tabibi (SR.725, paras. 12, 15 and 16), Mr. Tsuruoka (SR.725, para. 47) and Sir Humphrey Waldock (SR.725, para. 35) took the view that the status of special missions should be governed by rules of law. All these members of the Commission stated that the Commission's function was to draft legal rules without determining whether the whole question of special missions had hitherto been governed by rules of law or whether international relations of that kind were to some extent founded on *comitas gentium*.

[15] *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, para. 63.

[16] *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/166.

[17] The summary records of the sixteenth session will be found in *Yearbook of the International Law Commission, 1964*, vol. I.

19. The Commission therefore adopted the view that the rules it was drafting on special missions were rules of law and that they were not based on *comitas gentium*. No member of the Commission opposed that view.

20. *Relationship between the rules relating to special missions and customary international law.* Neither the Special Rapporteur nor the members of the Commission failed to realize that certain rules applicable to the legal status of special missions may be found in customary international law. That was Mr. Ago's opinion (SR.723, para. 55). Mr. de Luna also considered that supplementary rules on the subject were derived from international custom (SR.724, para. 40). Accordingly, in drawing up specific rules on legal institutions, the Commission applied the idea that the legal rules relating to special missions are influenced by customary international law and relied on the practice of customary law in cases where it was satisfied that a universally-recognized custom existed.

21. *Codification or progressive development.* It is the invariable practice of the Commission when drafting articles incorporating rules of international law to combine straightforward codification (if there are sufficient customary or written rules of international law) with the method of progressive development of international law (in cases where, although there are no such rules, certain trends exist in international relations, or in cases where it is necessary to make good a deficiency or to alter existing rules).

22. During the general debate on the rules relating to special missions, reference was made to the question of applying the method of the progressive development of international law. Mr. de Luna (SR.723, para. 63) was the first to mention this method and he was followed by Mr. Castrén (SR.724, para 10) and Mr. Amado, who considered that the Commission should feel its way step by step (SR.724, para. 21). No member of the Commission insisted that it should confine itself strictly to codification in drawing up these rules.

23. *The relationship between the rules on special missions drafted by the Commission and the Vienna Convention on Diplomatic Relations.*[18] At the time when the Special Rapporteur was asked to undertake this task, the Commission considered the preliminary question whether the instrument it would be drafting would be complementary to the Vienna Convention on Diplomatic Relations or a separate convention.

24. During the discussion on this point, a further preliminary question arose, namely whether the instrument to be drafted would be in the nature of a treaty or would be a set of model rules. The majority of the members was in favour of the idea that the purpose was to draft provisions.

25. The question whether the object should be to draw up a set of model rules was considered in particular by Mr. de Luna. He said that the history of diplomatic relations had shown that the method of drawing up model rules was not satisfactory, whereas a separate convention had an authoritative status, even if its ratification might cause some difficulties, and might serve as a model. Mr. de Luna went on to say, however, that those were simply preliminary remarks; the Commission would be better able to weigh the advantages of one solution against the other at a later stage in its work (SR.725, para. 28). Mr. de Luna's point of view was virtually adopted by the Commission, and all the subsequent comments, while subject to Mr. de Luna's proviso that the Commission would decide later on the final form of the instrument, were based on the tacit understanding that for the time being the Commission was drafting an instrument in the nature of a treaty.

26. Following up this idea, the Commission considered whether the rules to be laid down in the instrument should be regarded as *jus cogens* or *jus dispositivum*. Mr. Rosenne maintained that the draft articles should contain elements of both. He described *jus dispositivum* rules as "residual rules" which he defined as "a set of rules made available to States for incorporation in their own agreements as desired" (SR.725, paras. 8-10). Mr. Yasseen gave a much more stringent definition of these residual rules, since he made a reservation limiting the rights of States. In his view a State would be free to derogate from the general convention by means of bilateral agreements, to the extent that such derogations *did not conflict* with *jus cogens* rules (SR.725, para. 21). Mr. Castrén was also of this opinion; he said that only exceptionally could the rules be rules of *jus dispositivum* (SR.725, para. 23). Still more light was thrown on the subject by Mr. de Luna, who expressed a like opinion, saying that the articles which the Commission was drafting involved inviolable rules of *jus cogens*, or rules of *jus dispositivum* which ranked as residual rules in cases where States had not otherwise provided by bilateral agreement (SR.725, para. 26). Mr. de Luna's view therefore was that the text itself would decide from which rules it would be possible to derogate, whereas Sir Humphrey Waldock thought that the Commission should follow the example of the two Vienna Conferences and refrain from trying to determine which rules governing special missions were of the character of *jus cogens* (SR.725, para. 35). The Special Rapporteur considers that when the Commission drafted the rules in the operative part of the articles, it followed the course suggested by Mr. de Luna; a clear instance will be found in the language of article 9.

27. *Should the Commission draft an additional protocol to the Vienna Convention on Diplomatic Relations, 1961, or a separate instrument?* This was another of the preliminary questions, and three opinions were expressed during the general debate in the Commission.

28. The first of these was that the Commission should decide in favour of an additional protocol. Mr. Tabibi stated that the Commission was called upon to complete diplomatic law by adding a new chapter to the two Vienna Conventions (SR.725, para. 15).

29. Other members of the Commission, especially Mr. de Luna (SR.725, para. 27), expressed a different opinion, namely that the Commission was dealing with a separate topic and that a separate convention was therefore required.

30. This view was shared by Mr. Verdross, who held that the convention should be complementary to the two existing Vienna Conventions (SR.723, para. 62). Sir Humphrey

[18] For the text of this Convention, see United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II (United Nations publication, Sales No.: 62.XI.1), p. 82.

Waldock expressed a like opinion (SR.723, para. 68) but later changed his mind (see below).

31. Many members of the Commission who endorsed this second opinion thought that it might still be necessary, in drafting an independent instrument relating to special missions, to adhere as far as possible to the ideas, structure and terminology of the Vienna Convention on Diplomatic Relations. Statements to that effect were made by Mr. Ago (SR.724, para. 57), Mr. Castrén (SR.725, paras. 23, 24 and 25), Mr. Elias (SR.725, para. 30), Mr. El-Erian (SR.723, paras. 44 and 46; SR.725, paras. 38 and 39), Mr. Jiménez de Aréchaga (SR.723, para. 50), Mr. Rosenne and Mr. Briggs—more especially in the Drafting Committee but, as regards Mr. Rosenne, also in the general debate (SR.724, paras. 35, 63 and 64; SR.725, paras. 3, 4, 8 and 46). To some extent this was also Mr. Tunkin's opinion (SR.724, para. 50).

32. Mr. Amado's view was that the Commission should produce a self-contained draft and should not let itself be excessively preoccupied with existing conventions, especially the Vienna Convention on Diplomatic Relations, though there would be no objection to cross-references (SR.725, para. 42; SR.724, para. 61). Similarly, Mr. Yasseen thought that the Commission should draft a separate convention, though this would not preclude a reference to other conventions (SR.725, paras. 21 and 22).

33. The third point of view was that, for the time being, the Commission should deal with the substance of the topic; later, after completing its work, it might see whether the results showed that the rules relating to special missions corresponded with or, on the contrary, differed from the provisions of the Vienna Convention on Diplomatic Relations, and then decide whether it would adopt the first or the second of the opinions described above. This was the view put forward by Mr. Tunkin (SR.725, para. 44) and it was supported by Sir Humphrey Waldock (SR.725, para. 45) and Mr. Briggs (SR.725, para. 48). Mr. Tunkin gave the reasons for his attitude in another statement (SR.725, paras. 33 and 34), which was supported by Mr. Tsuruoka (SR.725, para. 47) and by Sir Humphrey Waldock (SR.725, paras. 35 and 36).

34. The Commission provisionally adopted the third solution, and the rules are being drafted as to substance, the decision concerning the formal relationship between those rules and the Vienna Convention on Diplomatic Relations being postponed.

35. *The relationship between the rules relating to special missions and the Vienna Convention on Consular Relations.*[19] During the general debate, members of the Commission also mentioned the 1963 Vienna Convention on Consular Relations as a source of legal rules which should be taken into account in the drafting of articles on special missions. All of these members, however, regarded that Convention either as part of the future code of diplomatic law or as a secondary instrument, and they considered the Vienna Convention on Diplomatic Relations to be more important.

36. In this connexion, Mr. Amado protested against any attempt to take the rules concerning consular immunities as a model in dealing with the question of the immunities of special missions, for (he said) the Commission's duty was precisely to take into account the development of modern diplomacy, which tended to make increasing use of special missions (SR.724, para. 61). Although Mr. Amado's view was that the rules relating to special missions should be drafted without undue preoccupation with existing conventions, his specific reference was to the Vienna Convention on Diplomatic Relations (SR.725, para.42) and not to the Convention on Consular Relations.

37. Mr. Elias made only an indirect reference to the Vienna Convention on Consular Relations; he considered that it would not be easy to assimilate the status of members of special missions to that of consuls because special missions differed so widely in their composition (SR.724, para. 37).

38. Mr. Castrén mentioned the Vienna Convention on Consular Relations only when comparing it with the Vienna Convention on Diplomatic Relations (SR.725, para. 24); he did not recommend that it should be used.

39. Mr. Jiménez de Aréchaga's view was that the privileges and immunities granted to members of purely technical missions should be limited to those necessary for the exercise of their duties: they should be similar to those enjoyed by consuls under the Vienna Convention on Consular Relations rather than to those enjoyed by diplomatic agents under the Vienna Convention on Diplomatic Relations (SR.723, para. 50).

40. Mr. Rosenne stated that, although certain special missions fulfilled quasi-consular functions, as, for example, when they dealt with migration problems, he had in no way wished to suggest in his statement at the 711th meeting[20] that there should be separate rules for special missions which fulfilled quasi-consular functions. He was of the opinion, however, that the Commission should not only draw inspiration from the Vienna Convention on Diplomatic Relations but should also bear in mind the contents of the Vienna Convention on Consular Relations (SR.724, para. 63).

41. Mr. Tabibi considered that the rules relating to special missions should complete diplomatic law, including the two Vienna Conventions (SR.725, para. 15).

42. The conclusion to be drawn from these comments, more especially from those of Mr. Ago (SR.724, para. 58), is that the Commission should not draw dangerous analogies with the position of consular missions. Accordingly, the position is that, although the Commission has not declined to use the Vienna Convention on Consular Relations, it attaches greater importance to the Vienna Convention on Diplomatic Relations as a source, and even then it will take into account the peculiar characteristics of special missions.

43. *The position of the rules relating to special missions in the general code of diplomatic law.* This question was raised by Mr. Verdross. His view was that the Commission should codify the whole of diplomatic law: if it wanted its

[19] For the text of this Convention, see United Nations Conference on Consular Relations, *Official Records*, vol. II (United Nations publication, Sales No.: 64.X.1), p. 175.

[20] *Yearbook of the International Law Commission, 1963*, vol. I, 711th meeting, para. 77.

work to be useful it should leave no point uncovered. In addition to the Convention on Diplomatic Relations and the Convention on Consular Relations, the field to be covered included relations between States and inter-governmental organizations and the other problems of special diplomacy in the broadest possible sense of the term (SR.723, para. 62). The same opinion was voiced by Mr. Castrén (SR.724, para. 12; SR.725, para. 23), Mr. Elias (SR.725, para. 30) and Mr. Yasseen (SR.725, para. 21). Mr. Tabibi (SR.725, para. 12), Mr. Rosenne (SR.725, paras. 3-11) and Mr. El-Erian (SR. 725, para. 37) held that all those rules were interrelated.

44. Several members who spoke in the discussion considered that the rules relating to special missions should, so far as possible, be drafted in such a way that the result would be the unification of the rules concerning special missions. It was not suggested, however, that the rules must be absolutely identical.

45. For instance, Mr. Yasseen, though supporting the unification of the rules, said that that did not mean that all special missions should be governed by identical rules (SR.723, para. 18). Special missions were so varied that it was impossible to draft uniform rules; the rules would have to differ in certain respects (SR.724, para. 34).

46. Mr Jiménez de Aréchaga took the same view as Mr. Yasseen (SR.723, paras. 49 and 50).

47. Mr. de Luna considered that all the rules should also apply to those special missions which were delegations to conferences (SR.723, para. 63).

48. Mr. Castrén's view was that the rules might certainly cover all sorts of official functions performed by special missions, but immediately afterwards he went on to say that the rules governing special missions might vary with their functions (SR.724, para. 10).

49. Mr. Cadieux, too, thought that it was impossible to envisage a single uniform status for all categories of special missions (SR.724, para. 45).

50. The statements cited above show that, despite opposing arguments, the members of the Commission have a common attitude. On the one hand, it is desired to achieve a uniform body of rules for all special missions—a *lex generalis*—and on the other hand it is held that there should be special rules—*lex specialis*—for certain types of mission that would derogate from the uniform rules.

51. *The relationship between the rules relating to special missions and the Convention on the Privileges and Immunities of the United Nations.*[21] Several members pointed out that, in addition to the Vienna Conventions on Diplomatic and Consular Relations, the Convention on the Privileges and Immunities of the United Nations should also be regarded as a source for the rules relating to special missions. The Convention in question was referred to by Mr. Jiménez de Aréchaga (SR.723, paras. 50 and 67), Mr. Elias (SR.723, para. 65), Mr. Rosenne (SR.723, para. 77) and Mr. Verdross (SR.724, para. 39). Some of these members pointed out that the Convention on the Privileges and Immunities of the United Nations imposed fewer restrictions on the territorial State.

52. In the course of its work the Commission, while giving priority to the Vienna Conventions, also took into account the Convention on the Privileges and Immunities of the United Nations.

53. *The law of conferences.* In discussing the question whether the rules relating to special missions should also cover the legal status of delegations of States to international conferences, several members of the Commission were in some doubt whether that subject should be included in the rules on special missions or whether it constituted a separate topic. Mr. Yasseen thought that the Commission might consider entrusting the entire question of conferences to a third special rapporteur; but there seemed to be no insurmountable obstacle to assigning it to the Rapporteur on special missions (SR.723, para. 76). Mr. Tunkin also took that view; referring to the rules concerning international conferences, he said that they were now becoming a separate subject in international law (SR.724, para. 19). Mr. Tabibi expressed the same opinion (SR.725, para. 17).

54. The Commission did not come to a decision to treat this as a different subject and to entrust it to a separate special rapporteur.

55. *The expressions "special missions" and "ad hoc diplomacy".* Mr. Cadieux suggested that the Commission should not use the expression "*ad hoc* diplomacy" since it was apt to offend career diplomats (SR.723, para. 28). The Commission adopted Mr. Ago's suggestion that it would be as well to drop the term "*ad hoc* diplomacy" altogether and to speak only of "special missions" (SR.723, para. 34).

56. The Commission accordingly refrained from using the expression "*ad hoc* diplomacy" and used only the expression "special missions". Proof of this will be found in the sixteen articles already adopted.

57. *Definition of "special mission".* Mr. Tunkin in particular dealt with this question. In his view, special missions formed part of diplomacy. The essential point was that they should represent the State; it was immaterial whether their task was political or technical. Special missions, he said, had varied tasks which were not always limited; often they were of a very general kind. The main point was that a special mission was temporary (SR.724, paras. 14 to 16).

58. A number of references to Mr. Tunkin's ideas were made by members of the Commission in the course of the discussion of articles 1 and 2 of the draft on special missions. The Commission's view was that special missions were temporary in character and had specific tasks.

59. *Temporary character of special missions.* All those who spoke in the general debate stressed that one of the essential characteristics of special missions was their temporary nature. This point was made for instance by Mr. Cadieux (SR.723, para. 26). Mr. Tsuruoka described the special mission as "sporadic and partial" (SR.724, para. 5). Mr. Tunkin made further reference to that characteristic in his statement and suggested therefore that the term "special mission" should be dropped in favour of "temporary mission" (SR.724, paras. 16 and 53). Mr. Amado made a distinction between permanent contacts through

[21] United Nations, *Treaty Series*, vol. 1, p. 15.

ordinary missions and temporary contacts through special missions (SR.724, para. 20). He said later that temporary diplomacy had become a tree in the forest of law (SR.725, para. 43). Mr. Verdross (SR.724, para. 39) and Mr. Ago (SR.724, para. 59) stressed the same characteristic.

60. It was evident that the Commission was unanimous in regarding special missions as temporary in character. It therefore endorsed with little discussion the Special Rapporteur's view that a distinction should be drawn between special missions which are temporary and specialized missions of a permanent character existing side by side with regular missions.

61. *Special missions of a political or technical character.* During the general debate many members of the Commission spoke on the question whether the expression "special missions" should be construed to mean only those of a definitely political character or also those which represented States in matters of a technical nature. Mr. Verdross was the first to speak on the subject. He considered that special missions of a technical character as well as those of a political character were employed in official relations between States and that the rules should therefore cover all special missions (SR.723, paras. 15 and 16). Mr. Yasseen expressed the same view (SR.723, para. 17). Mr. de Luna did not think that a distinction should be drawn between special missions of a political character and those of a technical character (SR.723, para. 19). Mr. Cadieux likewise considered that it was not so important to stress the political or technical character of the special mission as to take into account the level and importance of that mission (SR.723, para. 26). Mr. Pal said that there was no reason to restrict the concept of special missions to purely political activities; in the light of recent developments, it was clear that special technical missions should also be covered (SR.723, para. 29). Mr. Elias thought that it was difficult to differentiate in special missions between political and technical matters (SR.723, para. 30). Mr. Ago was even more categorical. He thought that it would be absurd to try to draw a distinction between a political special mission and a technical special mission (SR.723, para. 33). Mr. El-Erian agreed that it was not easy to draw a distinction between political special missions and other special missions (SR.723, para. 44). Mr. Jiménez de Aréchaga said that, while he agreed that technical special missions should be studied as well as political special missions, their inclusion did not mean that all special missions should be subject to the same body of rules (SR.723, para. 49). Mr. Tsuruoka thought that the distinction between political and technical missions was not very great in practice (SR.724, para. 7). Mr. Castrén was prepared to accept that view in principle but thought that rules governing special missions might vary according to the functions assigned to them (SR.724, para. 10). Mr. Tunkin agreed with the general view that it was immaterial whether a mission was to carry out a political or a technical task; the essential point was that it should represent the State in its relations with another State (SR.724, paras. 13 to 15). Mr. Amado, the last speaker in the debate on this point, drew a logical conclusion when he said with regard to the substance of the question: "The Commission was right to resist the idea that technical missions should be regarded as a special class, for in modern times sovereignty found expression in technical matters as much as in the traditional processes of politics" (SR.724, para. 20).

62. Thus all those who spoke in the general debate expressed their unanimous belief that special missions may have a purely political or technical character, but in either case they represent the same concept. At the same time, some speakers pointed out that the level, importance and particular function of special missions should be taken into account (Mr. Cadieux, Mr. Jiménez de Aréchaga, Mr. Castrén and Mr. Tunkin). Hence, in the case of certain missions there could be special rules (a view expressed by Mr. Cadieux, Mr. Jiménez de Aréchaga and Mr. Castrén).

63. *Relationship between special missions and other forms of diplomacy.* The Commission held that special missions were undoubtedly an instrument of a special character for the purpose of representing States. By reason of the temporary nature of special missions and the specific character of their tasks, this instrument differs from the instrument constituted by the regular permanent diplomatic missions. It differs from specialized resident diplomacy by its temporary character, in that specialized resident diplomacy, although having specific tasks, is in principle of a permanent character. Lastly, special missions also differ from consular representation, although they may from time to time perform quasi-consular tasks. The Commission further considered that in modern international life special missions are an instrument much employed by States at every level (which varies according to their composition) and for widely differing tasks.

64. The Commission did not, however, pursue the question of the line of demarcation between the competence of regular diplomacy and specialized resident diplomacy on the one hand and that of special missions on the other. Mr. Cadieux and Mr. Tsuruoka stressed the greater competence and responsibilities of traditional resident diplomacy, but the Commission neither adopted nor rejected their views. Similarly, when drafting article 7, the Commission rejected the efforts of the Special Rapporteur to initiate a discussion on the delimitation of the authority of special missions as compared with that of regular diplomatic missions. While the Special Rapporteur treats this attitude of the Commission as having the force of a binding direction, he must point out once again that the Commission did not indicate its views on the subject. He thinks that the Commission's attitude is accounted for by the great divergence in practice, the vagueness of views and the political character of the subject. This is perhaps one of the cases where the question cannot be considered ripe for codification.

65. *Unity of the will of the State.* During the general debate some members of the Commission said that great caution was needed in formulating rules on special missions, for if an equal right to represent the State was granted both to regular missions and to special missions, the unity of expression of the sovereign will of States might be jeopardized. Mr. Cadieux, in particular, drew attention to this point, saying that the Commission would have to be very tactful in its handling of diplomats of the traditional kind (SR.723, para. 28). Mr. Tsuruoka was even more explicit;

he said: "The co-existence of those two forms of diplomacy raised a question of responsibility. Conflict between the permanent diplomatic mission and a special mission of one State in another State was not inconceivable. However, the presumption was always that the will of the State was single: both missions had the same purpose and the special mission became part of the permanent diplomacy". He thought that even in the case of a visit by a head of State the responsibility in any case fell on the ambassador (SR.724, para. 6). Although the Special Rapporteur pointed out that the maintenance of the unity of the State's will was a question which should be settled within the State, whereas international legal relations required that statements made by special missions should have binding force, Mr. Tsuruoka insisted that such questions must be regulated by international law since the fact that the will of the State was expressed in two different ways might affect relations between two States (SR.724, para. 28). Mr. Ago, speaking as Chairman, agreed that the problem was an extremely delicate one which he thought was connected rather with the law of treaties, the attribution to the State of the will expressed by its representative. He suggested that for the time being the Commission consider only the question of privileges and immunities (SR.724, paras. 31 and 32).

66. Accordingly, no solution was found for this important problem in the general debate in the Commission. The uncertainty was the more marked on account of a divergence of fundamental views between the members of the Commission who had raised the question and the Special Rapporteur. The Special Rapporteur held that any organs or representatives of the State, acting within the scope of their competence or full powers, validly expressed the will of the State they represented and that the other contracting State had no obligation or need to verify whether the representative of a State acted according to internal rules on consultation or co-ordination so long as he acted within the limits laid down in his terms of reference or within those customary in international law. The Special Rapporteur indicated moreover in his statement of principle that the modern practice of special missions had met with opposition from the so-called regular diplomacy in different States, and that the problem of co-ordination was an internal matter for each State, not the concern of the State receiving the mission.

67. *Privileges and immunities.* The question of the extent and basis of the privileges and immunities of a special mission and its members and of the members of its staff was discussed at length in the Commission's general debate on special missions.

68. The first question to be inquired into was whether the functional or the representative theory should be the basis; this question is discussed in a separate section of this report.

69. Some members said that national parliaments were not prepared to enlarge the scope of privileges and immunities in general, and in particular were reluctant to enlarge those of special missions, their members and members of their staffs, and that accordingly the Commission should proceed cautiously, if it wished parliaments to adopt the rules drafted. Mr. Cadieux first drew attention to that point (SR.723, para. 28), and this tendency to restrict the immunities and privileges granted to special missions was also stressed by Mr. Verdross (SR.724, para. 39) and Mr. Elias (SR.724, para. 38).

70. Mr. de Luna mentioned, as a practical point not to be overlooked, the reluctance of parliaments and Governments to grant immunities (SR.723, para. 73).

71. Sir Humphrey Waldock also referred to the tendency to keep the privileges and immunities of special missions within certain bounds, a tendency evident even in the United Kingdom. He was however in favour of giving such missions the maximum protection necessary for the efficient performance of their functions while at the same time confining privileges within reasonable limits (SR.724, para. 56).

72. Mr. Amado agreed that States were very circumspect with regard to the extent of the privileges and immunities granted, but in his view States were chiefly concerned with their own interests. Hence they not only restricted the extent of privileges but at the same time they weighed their own interests and decided whether reciprocity would yield them the equivalent of what they granted to others. The concern of States should be interpreted in that light (SR.724, para. 62).

73. Some members of the Commission stressed that immunities and privileges should vary according to the various categories of missions and staff. That was the view expressed by Mr. Cadieux (SR.724, para. 46) and Mr. Castrén, who said that the rules governing special missions might vary with their functions (SR.724, para. 10).

74. Mr. Jiménez de Aréchaga said that States might be unwilling to grant immunities to the members of purely technical missions, for example to a mission for the control of animal diseases (SR.723, para. 50).

75. Mr. Yasseen thought that restrictions should not be excessive; the fundamental consideration should be the need to safeguard the normal and regular performance of functions (SR.724, paras. 33 and 34).

76. Mr. Tunkin said that in any discussion on limitations of privileges and immunities the functional needs of special missions should be considered. No limitations should be imposed that would hinder them in the performance of their tasks (SR.724, para. 53).

77. Mr. Ago, speaking as Chairman, said that States did not seem prepared to treat permanent diplomatic missions and special missions on an equal footing; he added, however, that special missions should have at least the minimum of privileges and immunities essential for the performance of their tasks (SR.724, paras. 30 and 57).

78. Some members of the Commission thought that uniform rules should govern privileges and immunities in general. Mr. Elias thought that identical rules should be made in the matter for members of special missions and United Nations experts (SR.723, para. 65). Mr. El-Erian pointed out that a like problem arose in connexion with special missions to international organizations (SR.723, para. 70). The same point was also raised by Mr. Jiménez de Aréchaga, who opposed a difference in treatment as between special missions in bilateral relations and special missions participating in conferences convened by international

organizations. Mr. de Luna said that the Commission would have to prepare rules covering delegations to conferences convened by States (SR.723, para. 73).

79. Mr. Rosenne thought that the problem of the unification of the rules governing immunities and privileges for special missions and for all international conferences should be settled within the framework of the United Nations and at the highest level (SR.723, para. 77). He pointed out that, although they appeared similar in substance, there was a difference between the rules laid down for privileges and immunities in the Vienna Convention on Diplomatic Relations and the various conventions on the privileges and immunities of international organizations. There might be a close similarity between the two sets of rules but their legal basis was entirely different (SR.723, para. 79). Later, however, he stressed the need to consider, in the drafting of rules concerning privileges and immunities, their effectiveness in the protection of functions, which meant that the legal regulation should draw a distinction between the different categories of persons composing a mission (SR.724, paras. 63 and 64).

80. Mr. Yasseen also thought that special missions were so varied that it was impossible to draft uniform rules for all of them. In his view, criteria should be found by which special missions could be differentiated according to their importance and their tasks. He thought therefore that rules should be drafted which would differ in certain respects (SR.724, para. 33).

81. From all the statements made in the debate it was evident that the Commission was convinced of the need to provide special missions with the facilities, privileges and immunities essential to the efficient performance of their functions, including not only the accomplishment of their tasks but also the function of representing the State. Nevertheless, the Commission realized that it was not necessary to grant identical facilities, privileges and immunities to all members of mission staffs or even to all special missions, for these differ in their respective tasks, importance and levels.

82. *Functional theory or representative theory.* In the general debate the question arose whether the legal status of special missions should be regulated on the basis of the functional or on that of the representative theory.

83. In his statement Mr. Tunkin made a decisive contribution to the solution of the problem. He pointed out that the Vienna Convention on Diplomatic Relations should be taken as a starting-point. In the first place, he said, the Vienna Conference of 1961 had based its conclusions not only on the functional theory but also on the representative theory; that was clear from the fourth paragraph of the preamble to the Convention adopted at the Conference. Secondly, special missions might also, by reason of their tasks, have a representative character (SR.724, paras. 50-54). Mr. Ago thought that in order to find a solution the Commission should look to both theories (SR. 724, para. 57). Mr. Rosenne also supported Mr. Tunkin's view (SR. 724, para. 64). Sir Humphrey Waldock considered that the Commission should find a practical solution and avoid taking a stand on theoretical issues (SR.724, para. 55).

84. Mr. de Luna based his views on the functional theory, adding that even in the case of special missions there were, in addition to what was necessary for the performance of their functions, additional privileges and immunities deriving from international custom with regard to the position of the head of the special mission (SR.724, para. 40).

85. Other members of the Commission also spoke on this question.

86. Mr. Castrén said that, in devising solutions and establishing legal rules for special missions the Commission should bear in mind the importance of the function of such missions (SR.724, para. 10).

87. Mr. Elias also supported the functional theory. (SR. 723, para. 32).

88. Mr. El-Erian, who based his views on the functional theory, pointed out, however, that at the Vienna Conference on Diplomatic Intercourse and Immunities (1961) it had been thought necessary to couple the theory of functional necessity with that of the representative character of diplomatic missions (SR.723, para. 46).

89. Mr. Yasseen thought that the functional theory should especially be followed (SR.724, para. 34).

90. Despite the diversity of views held by members of the Commission on this question, the Commission may be said to have combined the two theories in drawing up and adopting the first sixteen articles of the draft.

91. *Level of the special mission.* A number of members suggested that the Special Rapporteur should, in the body of the articles, stress the idea that not all special missions could receive identical treatment, owing to the difference in the levels of heads of mission. Mr. Cadieux, who first drew attention to this point, said that the concept of uniformity of treatment for all special missions according to the tasks assigned to them could not be taken as a basis, and he quoted as an especially important criterion the level of the special mission or rather the level of its head (SR.723, paras. 27 and 28). He concluded that the rank of the head of the mission also contributed to the importance of the mission, particularly if it had a political character, which should influence the treatment due to the mission (SR.724, para. 46). In that connexion, Mr. Elias also stressed the question of the rank of the head of the mission (SR.724, para. 37). Mr. Tunkin suggested that such rank should be taken into account in the drafting of the rules governing special missions (SR.724, para. 53). Sir Humphrey Waldock endorsed Mr. Tunkin's view (SR.724, para. 55). Mr. Ago likewise thought that the rank of the head of the mission should be considered but added that the status of the head of the mission should not be given too much weight (SR.724, para. 59). Mr. Amado also spoke on the question of the rank of the head of the mission (SR.724, para. 61).

92. In view of this attitude prevailing in the Commission, the Special Rapporteur concluded that it would be necessary to revise the draft articles, with special reference to the level of the mission.

93. *Classes of special missions and their staff.* The opinion which emerged during the Commission's general debate was that not all missions and not all the mission staff could

have the same legal status, but that this status depends on the specific class of the mission and its staff.

94. Mr. Yasseen pointed out that the classes of missions were, by virtue of their respective tasks, numerous and varied. He did not, however, reach the conclusion that separate rules were needed concerning the status of each (SR.724, para. 33). He was even opposed to any tendency to impose excessive restrictions, by reason of the functional theory concerning special missions (SR.724, para. 34).

95. Mr. Elias thought that special provision would have to be made for subordinate members of special missions (SR.724, para. 37).

96. Mr. Verdross favoured the idea of introducing a different set of rules for members of special missions, especially in view of the general tendency to restrict the immunities and privileges of special missions (SR.724, para. 39).

97. Mr. de Luna thought that as many immunities as possible should be accorded to members of special missions but that they should be limited to those necessary for the performance of their functions without prejudice to the accomplishment of the mission (SR.724, para. 40).

98. Mr. Cadieux thought that the Commission should classify special missions according to their functions and in particular should draw a distinction between State agents and their assistants in special missions, with due regard to the level (SR.724, paras. 45 and 46).

99. Mr. Tunkin thought it might prove difficult to draft a single text which would cover every category of special mission and that it might be better to distinguish between the various categories and to accord them different status (SR. 724, para. 54).

100. Mr. Rosenne agreed that a distinction should be drawn between the different categories of persons serving on a special mission; such a distinction would serve as a basis for the legal regulation of privileges and immunities along the lines of the two Vienna Conventions (1961 and 1963) (SR.724, para. 64).

101. Mr. Ago, speaking as Chairman, said it would be difficult to classify missions according to the level of their head (SR.724, para. 59).

102. The Special Rapporteur considers that the Commission accepted in principle the division of mission staff into categories, as is evident from article 6, paragraph 2, as adopted. It is therefore his task to formulate the facilities, privileges and immunities of the members of the staff of special missions in different ways according to the categories of staff.

103. *Position of third States.* During the general debate it was pointed out on several occasions that the rules concerning the legal status of special missions should also, in certain cases, apply to third States as well as to the States sending and receiving special missions. That was emphasized by Mr. Rosenne (SR.723, para. 23) and Mr. Ago (SR. 723, para. 35).

104. The idea received expression in article 16, as adopted, of the rules relating to special missions. The Special Rapporteur hopes that this idea will be supplemented and developed by the additions to be made to the text already accepted by the Commission.

105. *Delegations to conferences and congresses.* In establishing the terms of reference of the Special Rapporteur for the topic of special missions the Commission decided that the question of the legal status of delegations to international conferences and congresses would not be dealt with in the report on special missions but would be within the scope of the work of the Special Rapporteur on relations between States and inter-governmental organizations (Mr. Abdullah El-Erian).[22]

106. In making his report on special missions the Special Rapporteur asked the preliminary question: should the rules governing special missions cover the regulation of the legal status of delegations and delegates to international conferences and congresses? He was of the opinion that such delegations were by their nature and characteristics special missions, whether the international conferences and congresses were convened by a single State, several States, a group of States or an international organization.[23]

107. The question was fully discussed in the Commission, which considered whether it was possible to distinguish in substance between such delegations and delegates and special missions, and whether it was in fact necessary to give different treatment to those delegations according to the identity of the convener of the international congress or conference. Opinions differed on the subject and the Commission therefore decided to postpone the question and to invite two Special Rapporteurs to study it. Mr. El-Erian and the present Special Rapporteur were asked to come to an agreement in this respect and to report to the Commission. In their report they were to state which of them would make himself responsible for drafting the section relating to this particular subject.

108. The present Special Rapporteur has to inform the Commission that for practical reasons it was not possible for the two Rapporteurs to concert their work. Mr. El-Erian was unable to study the question in detail on account of the excessively long duration of the regular session of the United Nations General Assembly of 1964 which he attended as a representative of the United Arab Republic. Moreover, Mr. El-Erian's numerous commitments at the time when the present Special Rapporteur arrived at Cairo (visits of three Heads of State and Mr. El-Erian's participation in the negotiations conducted during those visits) made it impossible for the two Special Rapporteurs to prepare their joint report. They hope to be able to do so during the seventeenth session of the International Law Commission (1965) and to submit the report in question to the Commission before the end of the session.

109. *Special missions in connexion with visits by foreign Heads of State.* The Special Rapporteur did not cover in his report on special missions (A/CN.4/166) the special missions which take place in connexion with the visit of a foreign Head of State, on the ground that, in the opinion

[22] See *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, para. 63.

[23] See *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/166, paras. 20 *et seq.*

of learned authors, such missions are governed by international custom. Nevertheless, during the discussion on the report several members of the Commission expressed the opinion that the question should be covered in the part of the report dealing with special aspects of special missions.

110. Mr. Yasseen proposed that special missions should also include visits by Heads of State and Ministers for Foreign Affairs (SR.723, paras. 18 and 40).

111. Mr. Rosenne said he was not convinced that visits by Heads of State, Heads of Government and Ministers should be covered by the rules since few important practical legal problems arose in connexion with such visits (SR.723, para. 24).

112. Mr. Elias thought that the rules relating to visits by Heads of State and Ministers should be included in the system of legal rules on special missions (SR.723, para. 31). In his view, special rules were needed in the case of such missions according to whether they were led by the Head of State, the Head of Government, the Minister for Foreign Affairs, some other head of department or permanent secretary. The rules would depend on the level and the rank of the head of mission (SR.724, para. 37).

113. Mr. Cadieux was unwilling to exclude the visits of Heads of State from a definition of special missions, since Heads of State had the right to enter into commitments binding the State (SR.723, para. 27). He stressed the same idea in speaking of the level of the special mission (SR.724, para. 46).

114. Mr. Jiménez de Aréchaga said that Heads of Government, Heads of State and Ministers often led special missions and that the difference in rank of the heads of the mission had to be taken into account, but in his view the Commission could go no further than put forward rules governing precedence (SR.723, para. 51).

115. Mr. Tsuruoka also referred to such visits (SR.724, para. 6).

116. Mr. Tunkin stressed particularly the importance of such visits and thought that appropriate rules should perhaps be inserted in the draft (SR.724, para. 17).

117. Mr. de Luna thought that there were special international customs covering the position of the Head of State who acted as head of a special mission (SR.724, para. 40).

118. Mr. Amado said that while, in modern times, Heads of State and other high-ranking personages frequently made journeys, they did so not as envoys but always as Heads of State (SR.724, para. 61).

119. Mr. Tabibi thought that the question of visits by Heads of State was outside the scope of the study of special missions and their legal status. In his view Heads of State did not carry out negotiations; that task was usually left to the specialists who accompanied them (SR.725, para. 14).

120. Mr. Castrén considered that the question of official visits was worth examining in greater detail (SR.724, para. 11).

121. Mr. El-Erian thought that the status of visiting Heads of State and Ministers should be excluded from the scope of the present study. The question was regulated by general international law (SR.723, para. 45). It was not advisable to discuss visits by Heads of State, Heads of Government and Ministers for Foreign Affairs in conjunction with special missions. It was true that the position of the members of the suite of such a visiting personage probably needed regulation, but the status of the Head of State or the Head of Government was governed by general international law and there was no reason to codify the relevant rules within the framework of the articles on special missions (SR.724, paras. 47 to 49).

122. Mr. Ago, speaking as a member of the Commission, had some doubts about the identification of visits by Heads of State or Heads of Government with special missions in general and, speaking as the Chairman of the Commission, expressed the view that the Commission should decide later whether the rules governing such visits ought to be included in the system of special missions (SR.723, paras. 52, 53 and 57). He noted that the Commission had agreed to postpone its decision (SR.723, par. 57).

123. *Other questions raised during the general debate.* During the general debate some members raised certain other questions which were not discussed at great length. Those questions concerned:

124. Envoys of States—Mr. de Luna (SR.723, para. 64).

125. Possibility of special missions between States when diplomatic relations are severed or suspended—Mr. Rosenne (SR.725, paras. 5 and 6).

126. Regional conferences—Mr. de Luna (SR. 723, para. 64).

127. Powers of special missions—Mr. El-Erian (SR.723, para. 45).

128. Relationship between the rules governing special missions and the law of treaties—Mr. El-Erian (SR.723, para. 45).

129. Special missions at international ceremonies—Mr. Castrén (SR.724, para. 11).

130. The consent of the receiving State as a condition of the acceptance of the special mission (other speakers referred to this during the discussion on the definition of "special mission")—Mr. Cadieux (SR.723, para. 26).

131. Observers at conferences or negotiations—Mr. de Luna (SR.723, para. 64).

132. Waiver of immunities—Mr. Rosenne (SR.723, para. 77).

133. Several other legal institutions mentioned frequently during the general debate have probably escaped the attention of the Special Rapporteur. The reason why he has not given prominence to those questions is that he did not draw from the discussion any conclusion which he might have taken to be instructions from the Commission for his future work. Nevertheless, he feels bound to mention that some of those questions were raised again during the discussion on individual articles, and that the Commission then came to a decision concerning them either in the text of the articles adopted or in their commentaries, or else the decision is reflected in the fact that those institutions are not mentioned either in the text or in the commentaries.

Draft articles prepared at the Commission's sixteenth session

(Articles 1 to 16 and commentary)

134. At its sixteenth session, the Commission adopted the first sixteen articles, with commentary, of the draft on special missions. The Special Rapporteur considers it unnecessary to reproduce the text here, for it has been published.[24] When adopting those articles and the commentary the Commission reserved the right to supplement them, if necessary.[25]

135. The Special Rapporteur considered it his duty to review the articles as adopted, with a view to supplementing and revising them. In so doing, he took it as his guiding principle that what had been adopted should be changed as little as possible. Accordingly, he confines himself to:

Making a few suggestions for supplementing the articles or the commentary;

Requesting the Commission to take his comments into account ; and

Requesting the members of the Commission likewise to suggest emendations to the articles or to the commentary, though without reopening questions that were settled during the Commission's sixteenth session.

136. The Special Rapporteur offers the following suggestions to supplement the articles and the commentary.

ad *article 2*

137. He considers that the following paragraph should be added to the commentary on article 2 as adopted:

"(7) It happens in practice that, in conformity with the processes of international relations, the fact of sending and receiving a special mission whose task is not specified but whose field of activity is known is regarded as tantamount to a mutual agreement concerning that mission's task. An example would be the sending and receiving of a special mission of hydro-engineering experts at a time when an area liable to flooding is threatened by floods, the States concerned not having entered into prior conversations concerning the sending and receiving of a special mission of this sort. In such a case, the fact that such a mission is sent and received is regarded as sufficient evidence *per se* of a tacit agreement concerning that special mission's task. The mission is presumed to be authorized to carry out whatever work is generally within the competence of special missions of this kind. On the other hand, this practice is not to be recommended, for, in the Commission's opinion, disputes are apt to arise during the special mission's activity concerning the limits of its field of activity, inasmuch as each State judges unilaterally what is considered usual and normal for special missions of this type."

138. The Special Rapporteur proposes this addition to the commentary in the light of a case of like nature which has occurred in practice.

ad *article 7*

139. The Special Rapporteur proposes that the following paragraph 3 should be added to article 7.

"3. The head of the special mission may also authorize a specified member of the staff to perform certain acts and to send and to receive communications."

140. The Special Rapporteur considers this addition necessary. In this respect, there is a discrepancy between *the body of article 7* and the commentary.

141. Article 6 as adopted draws a distinction between the members of a special mission (paragraph 1) and the members of its staff. As article 6 does not treat the members of the staff as members of the special mission, there is a risk that article 7, paragraph 2, may be construed as referring only to the members of the special mission properly so called, to the exclusion of the members of the staff, and hence as meaning that the head of the special mission cannot delegate his powers to the staff. It is, however, current practice for the head of a special mission to delegate powers of this nature to members of its staff; indeed, most of the mission's acts are in practice performed by the secretary to the delegation. This is also the practice described in the commentary to article 7 as adopted, paragraph (11) of which refers to this possibility. This paragraph is, however, in contradiction with the literal terms of article 7, paragraph 2. This patent contradiction ought, accordingly, to be removed. For this purpose, the best method would be to add another paragraph (paragraph 3) to article 7 (or, possibly, to make the appropriate correction in paragraph 2 of article 7, though this would, in the Special Rapporteur's opinion, be the less elegant and even less advisable method, for its effect would be in some way to place the members of the special mission and the staff on a footing of equality).

ad *article 12*

142. The Special Rapporteur considers it his duty to mention that, according to his original proposal, the authority given to the head or to particular members of a special mission was expressed to be for a limited term. Accordingly, upon the expiry of that term, the special mission does not, from the formal and legal point of view, cease to exist; yet, if the authority of all the members of the special mission came to an end at its term, does such a special mission continue to exist? Neither article 12 nor the commentary thereto make provision for such a case, and the question therefore remains unanswered.

143. The Special Rapporteur wonders whether the article in question, and hence also the commentary, ought to be supplemented on the lines described above, or whether it would suffice simply to mention such a case in the commentary.

144. The Special Rapporteur considers that, for the sake of completeness, some such addition would be desirable. It would hardly affect in any way the subject-matter dealt with in article 12 as the substantive rule. The purpose of article 12 is to determine objectively the end of the functions of the special mission as such. It is, however, arguable that the expiry of the term of all the members of the special

[24] *Yearbook of the International Law Commission, 1964*, vol. II, document A/5809, pp. 210-226.

[25] *Ibid.*, para. 35.

mission is only a subjective moment. In reply to such a possible argument the Special Rapporteur would say that such a moment, while seemingly subjective (duration of assignment of particular persons, e.g. the head or members of the special mission), is in reality an event which produces an objective effect on the actual existence of the special mission. Despite the difference between two situations (disappearance of the person of the head or of the members of the special mission and disappearance of the special mission itself), the Special Rapporteur feels bound to point out that, in such a case, a virtually objective phenomenon occurs, with the consequence that the question whether the special mission as such, as an institution, continues or does not continue to exist remains in suspense. To hold that in such a case the special mission continues to exist would be an unnecessary abstraction.

ad *article 16*

145. The Special Rapporteur considers it his duty to point out once again that it is necessary to express clearly, in the body of article 16, the idea of the revocability of the approval given by a third State in whose territory the special mission is carrying on its activity. At its sixteenth session, the Commission adopted the idea that the territorial State (the third State) has the right to revoke the approval given but did not consider it necessary to state this idea expressly in the body of the article, on the ground that it would suffice simply to mention it in the commentary (see paragraph (8) *in fine* of the commentary to article 16). In view of the reaction of legal circles to this provision, the Special Rapporteur considers that article 16 would become clearer if this idea found expression in the body of the article.

Draft articles on special missions not considered by the Commission at its sixteenth session

(Articles 17 to 40)

146. At its sixteenth session, the Commission discussed the first fifteen articles of the draft rules relating to special missions on the basis of the report on special missions submitted by the Special Rapporteur.[26] This discussion led to the adoption by the Commission of articles 1 to 16, which were submitted to the General Assembly of the United Nations in the Commission's report on the work of its sixteenth session (11 May-24 July 1964).[27]

147. The Commission requested its Special Rapporteur to continue his work on the remaining articles, to revise their style and terminology in the light of the general discussion at the Commission's sixteenth session and, if necessary, to amplify and improve the text. In accordance with these instructions, the Special Rapporteur submits to the Commission the new text of these rules, the introduction to the rules and the commentaries. The new text differs appreciably from the previous one, and the Special Rapporteur has accordingly considered it advisable to set forth the whole of the new revised and amended text in this section, in order to save the Commission the trouble of having to consult the previous text during its discussions on these articles.

148. The new text is set out below:

Introduction on facilities, privileges and immunities

General considerations

(1) In the literature, in practice, and in the drafting of texts *de lege ferenda* on the law relating to special missions, apart from matters of rank and etiquette, special attention has been given to the question what facilities, privileges and immunities are enjoyed by a special mission. Even on this fundamental question, however, opinions are not unanimous. While the drafts of proposed rules (Institute of International Law, London, 1895; International Law Association, Vienna, 1924; Sixth International Conference of American States, Havana, 1928; International Law Commission of the United Nations, Geneva, 1960) all agree that special missions have in the past been entitled to facilities, privileges and immunities by juridical custom, and should in the future—it is believed—be entitled to them under a law-making treaty, the literature and the practice are still uncertain about the question whether at the present time such privileges attach to special missions as of right or by virtue either of the comity of nations, or of mere courtesy. One school of thought goes so far to assert that the recognition of this juridical status in the case of special missions rests entirely on the good will of the receiving State or even, perhaps, on mere tolerance. Fortunately, the International Law Commission re-affirmed, at its sixteenth session, that facilities, privileges and immunities attach *ex jure* to special missions.

(2) The question of the legal right of special missions to the enjoyment of facilities, privileges and immunities is, of course, one of substance. It arises perhaps more in connexion with the consequences which may ensue in the rare cases where they are denied or refused than in regular practice. So long as they are granted, no one asks on what grounds; but if they are refused, the first question which arises is on what basis and to what extent the *ad hoc* representative in question is entitled to them. At the same time a further question arises: does this right attach to the *ad hoc* representative himself or to his State? For this reason, the Special Rapporteur feels obliged to consider all the arguments relating to the grounds on which the juridical status of special missions is based. He will begin with those which he considers least sound and will emphasize, in the case of each, the following points: the obligation of the receiving State, the right of the *ad hoc* representative, and the right of the sending State.

(3) If mere tolerance is taken as the basis, the whole structure becomes precarious. In this case, the *ad hoc* representative has no right to the enjoyment of facilities, privileges and immunities. Indeed, the receiving State may at any time declare or hold that no such tolerance exists (although some authorities maintain that it must be presumed to exist until such time as the receiving State expresses a contrary intention) or else, if the tolerance has been practised in the past, whether in general or in a specific instance, that it may be discontinued. In other words, according to

[26] See *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/166, p. 67.

[27] *Ibid.*, document A/5809, pp. 210-226.

this view, the receiving State has no obligation in this respect towards an *ad hoc* representative, and the latter has no ground for asserting his rights *vis-à-vis* the receiving State. In these circumstances, the sending State can clearly have no legal authority either to demand the enjoyment of such facilities, privileges and immunities or to protest against their denial. All it can do in such a case is to make political representations or objections, according to the benefit or the harm which might accrue to good, normal international relations from such action.

(4) As will be indicated below, the Special Rapporteur has no hesitation in rejecting this theory summarily, for it is not in conformity with the principles essential to the maintenance of international relations—respect for State sovereignty, safeguarding of the normal functioning of a special mission and safeguarding of the freedom and security of its members. This conception of *ex jure* safeguards was also adopted by the International Law Commission during the general discussion on special missions at its sixteenth session.

(5) The case is similar, though by no means identical, if the enjoyment of these facilities, privileges and immunities by a special mission is based on the good will of the receiving State. In this case the good will displayed—provided that the other party has been notified of it—at least constitutes a right created by the independent will of a State that is operative even in the sphere of public international law; and it can be invoked by foreigners and by foreign States. This is an action by the receiving State falling within the category of unilateral juridical acts operative in public international law.[28] Consequently, a State is obliged to keep such unilateral promises, at least for such time as the special missions with respect to which the sending State has been notified that such good will exists, in the form of a unilateral act, remain in its territory. This does not mean that a unilateral promise of this kind could not have been revoked, but such revocation would have no effect on situations already created and established; at the very most, it might have effect as regards future cases.

(6) Thus a special mission may invoke a promise made by unilateral act, regardless of whether the mission or its State was notified of the act. Similarly, in this case the sending State has the legal right to demand the fulfilment of the unilateral promise.

(7) The Special Rapporteur must reject this theory also, even though it is less precarious than that of mere tolerance. His reasons for doing so are the same as in the preceding case. Nevertheless, he is prepared to accept, at least in part, the application of the theory of the unilateral good will of the receiving State, though only in cases where a unilateral promise of the kind referred to improves the position of the special mission, and to the extent that it does so effectively by granting the mission more than is necessary to conform to the principles essential to the maintenance of international relations, mentioned above, and to existing juridical customs in the matter (although there is some doubt as to their true scope). A sovereign State may grant to other States more than the minimum it is obliged to grant under positive international law, but it may not of its own accord deny them this minimum.

(8) The theory of international courtesy does not differ in any respect from the foregoing. In this case also, it depends on the good will of the State whether the rules of international courtesy should be applied, and to what extent. There is, however, a shade of difference in the way in which this good will is formed. Convenience is not the sole criterion, as in the preceding case (para. 5). Here again, the receiving State acts in accordance with its own notions of international courtesy, which usually lead it to the conclusion that the comity of nations is obligatory, at least between States maintaining good relations with each other. In this case, however, there is a presumption of reciprocal observance of the rules of the comity of nations, and a presumption of the right of the receiving State not to apply those rules if its expectations of reciprocity are not fulfilled.

(9) The Special Rapporteur is convinced that in this instance both the special mission and the sending State may demand the enjoyment of facilities, privileges and immunities, and if they are denied, may challenge this breach of the rules of international courtesy by protesting in moderate terms. In the Special Rapporteur's view, such complaints and protests would be of a purely diplomatic and, one might say, political nature. Considerations of law enter into the matter in two cases, namely:

(*a*) If the sending State grants the same facilities, privileges and immunities in its own territory to special missions of the receiving State. Where this is the case, the sending State may consider that the reciprocal granting of facilities, privileges and immunities has established a *modus vivendi* and that the two States have, by practice, adopted the rule *do ut des;* consequently, the denial of such facilities, privileges and immunities is regarded as an infringement of the *modus vivendi* and as a breach of the international obligation to requite what has been received. In this instance, the State whose representative has not been allowed such facilities, privileges and immunities is entitled to demand, by virtue of a legal title, what is its due;

(*b*) If the receiving State does not give identical treatment, from the standpoint of international courtesy, to all the special missions of various States. In this case, the legal ground for the complaint and protest is not a breach of the rules of international courtesy, but the violation of the general principle of non-discrimination between States.[29] In this case, however, the sending State must offer the same facilities, privileges and immunities (principle of reciprocity) since, according to the general principle, there is no discrimination if a State does not grant to other States the facilities, privileges and immunities which it claims for itself, even in cases where the receiving State grants them to other States observing the principle of reciprocity.

(10) The Special Rapporteur believes that this system also is unacceptable in principle. One can speak of international

[28] Eric Suy, *Les actes juridiques unilatéraux en droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1962).

[29] This principle was adopted, as regards diplomatic law in the Vienna Convention on Diplomatic Relations, 1961, and its application to *ad hoc* diplomacy was provided for by the International Law Commissioni n its draft rules on special missions.

courtesy only if the range of facilities, privileges and immunities is to be extended, whereas the basic facilities, privileges and immunities are granted *ex jure* and not by the comity of nations.

(11) A superior basis would be a bilateral treaty between the States concerned, and this undoubtedly the juridical basis frequently applied in this connexion. However, the agreements of this kind known to the Special Rapporteur are either very brief (containing references to the general rules of diplomatic law on facilities, privileges and immunities) or very specific, in which case they lay down the particular powers given to the special missions or itinerant envoys in question (for instance, an agreement between Italy and Yugoslavia on the joint use of an aqueduct having its sources in Yugoslav territory and operated by a Yugoslav State organ specifies the rights of the Italian inspectors in the performance of their functions on Yugoslav territory; various bilateral conventions concerning the interconnexion of electricity networks specify the rights of delegates of the respective States with respect to checking the quality and quantity of electric power, etc.). Accordingly, two series of legal questions arise:

(*a*) What is meant by the right of special missions to the enjoyment of diplomatic facilities, privileges and immunities? Does it mean the right to a status identical with or similar to, that of permanent diplomatic missions? In the Special Rapporteur's view, it simply implies the reciprocal recognition by States of the application to special missions of the general treatment accorded as a rule to resident diplomacy. The whole matter, however, even in a case explicitly provided for in a treaty, depends on the nature of the special mission's functions.

(*b*) Where the treaty grants certain exceptional rights to special missions without mentioning the general code of treatment, does this mean that special missions enjoy only the rights specified in the treaty, and not other rights also? The Special Rapporteur's view is that in this case special missions, in addition to being covered by the normal rules relating to the status of diplomats, enjoy facilities, privileges and immunities which are not usually granted to permanent missions but are essential to the performance of the functions of special missions.

(12) The Special Rapporteur is convinced that in either case both the *ad hoc* representative and the sending State are entitled to demand of the receiving State *ex jure* the application of the existing rules on facilities, privileges and immunities which are valid for special missions and, in addition, of the provisions specifically laid down in the agreement. This, however, leaves unresolved the main question what these general rules of international law are and what their scope is by analogy to the rules governing the treatment of the head and members of a permanent diplomatic mission. Thus, there is a certain vagueness about this whole question.

(13) There still remains the fundamental question—what is the general legal custom (since codified rules are as yet lacking) with regard to the legal status of special missions as regards the enjoyment of facilities, privileges and immunities? On this point theory, practice and the authors of the draft for the future regulation of this question are in agreement. The International Law Commission took as its starting-point the assumption that special missions composed of State representatives are entitled to diplomatic facilities, privileges and immunities.[30] This does not, however, answer the question; for it has not yet been determined, either by the Commission or in practice, precisely to what extent a special mission enjoys these diplomatic facilities, privileges and immunities. In 1960, the Commission itself wavered between the application of the *mutatis mutandis* principle and the direct (or analogous) application of the relevant rules applicable to permanent diplomatic missions. In any case, it was realized that this point could not be settled without further studies, for the purpose either of codifying the cases where practice is undetermined and vague (such as matters not yet ripe for codification) or of applying by rational solutions the method of progressive development of international law.

(14) Whichever course is chosen, however, it is necessary to decide on the method of approach. What concept should be followed—the representative theory or the functional theory?

(15) The representative nature of diplomacy in general, which was recognized in the Regulation of Vienna (1815)[31] in the case of ambassadors, has lost some of its significance with the passage of time. The Head of State is no longer the absolute repository of the diplomatic capacity of his State. Democratic methods of exercising the authority of the State, irrespective of the varied forms of democracy, link the process of the representation of the State in international relations to the constitutional order of the sending State. Diplomats represent the State, not the Head of State. Consequently, the Vienna Convention on Diplomatic Relations (1961)[32] did not entirely dismiss the concept of the representative nature of resident diplomacy, yet—while preserving the idea of the representative nature of permanent diplomatic missions in the fourth paragraph of its preamble—it nevertheless stresses the functional nature of diplomacy, thereby recognizing the combined application of the representative theory and the functional theory. It would therefore be logical to assume that if this is so in the case of permanent missions, it must be even more so in the case of special missions. The Special Rapporteur considers that this is correct in principle; but here again the concept of relativity in legal matters re-emerges, for there is no rule without an exception. Special ambassadors appointed for certain occasional ceremonial or formal missions are the exception. Although, even in these cases, it is increasingly being made clear that all acts are performed on behalf of the State, and not on behalf of the Head of State, there still remain vestiges of the former representative nature of such special ambassadors, and this is reflected, in the law, in certain norms of custom and protocol. However, as an increasing number of special missions have taken on an essential character by reason of their political or technical functions, the approach based on the representative theory can no longer serve as the

[30] See *Yearbook of the International Law Commission, 1963*, vol. II, document A/CN.4/155 (working paper on special missions prepared by the Secretariat), para. 11.

[31] The text of the Regulation of Vienna is quoted in *Yearbook of the International Law Commission, 1958*, vol. II, p. 93, footnote 29.

[32] See United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, p. 82.

sole basis for determining the extent of the facilities, privileges and immunities granted to special missions.

(16) On the other hand, the functional theory of facilities, privileges and immunities which the Vienna Conference (1961) took as one of the starting-points for understanding and determining the status of resident diplomacy, together with the concept underlying the Convention on the Privileges and Immunities of the United Nations (1946)[33] and the Convention on the Privileges and Immunities of the Specialized Agencies,[34] indicate the correct approach to determining the extent of the facilities, privileges and immunities which the receiving State is legally obliged to grant to special missions and itinerant envoys. Special missions and itinerant envoys represent a sovereign State, its dignity and its interests. They perform certain specific tasks on behalf of that State, and they should enjoy all the safeguards they need in order to carry out, freely and without hindrance, the mission entrusted to them. For this reason, the receiving State is required *ex jure* to grant them all the facilities, privileges and immunities appropriate to their mission and to accord to them all the privileges and immunities which are conferred on such representatives of the sending State and all the safeguards and immunities without which a mission of this kind could not be accomplished in a free and normal manner. All these facilities, privileges and immunities, however, are not granted by the receiving State to special missions for the personal benefit of their head and their members; they enjoy these advantages only because this assists them in the discharge of their duties and is necessary to their State. It is for this reason that there exists, through the combined application of the representative theory and the functional theory, a direct juridical relation between the receiving State and the sending State. It is only by reflection that the heads and members of special missions enjoy such rights and such facilities, privileges and immunities, their status depending on the right which belongs to their State and on the latter's willingness to ensure their enjoyment of them (the State is entitled to waive the immunity enjoyed by the *ad hoc* representative, since such immunity attaches to the State and not to the representative in question).

(17) Thus, there is a general legal rule concerning the duty to grant facilities, privileges and immunities to special missions; but in view of the combined representative and functional basis on which this legal custom is applied, legal rules have to be drafted specifying to what extent and in what circumstances the enjoyment of such rights is necessary to special missions, for the existing rules are imprecise and the criteria are uncertain.

(18) In establishing this basis, the Special Rapporteur believes that he has provided guide-lines for a solution that is correct in substance. The juridical nature of these privileges, the legal relationship between States in matters affecting their mutual respect, the linking of these privileges to function in international relations, and the effect of these rules *ex lege* and *ipso facto*, are the criteria on which the study and determination of the particular forms of facilities, privileges and immunities applicable to special missions should be founded. This view was accepted by the International Law Commission during the general discussion at its sixteenth session.

Article 17.—General facilities

The receiving State shall offer a special mission all the facilities necessary for the smooth and regular performance of its task, having regard to the nature of the special mission.

Commentary

(1) Proceeding from the fundamental principle that the direct effect of the rules on the facilities due to special missions depends on the nature and level of the special mission in question, the Special Rapporteur considers that what must be ensured is the regular functioning of special missions and itinerant envoys. In this connexion, he does not share the view expressed by the International Law Commission in 1960 that all the provisions applicable to permanent diplomatic missions should also be applied to special missions. He is more inclined to follow the fundamental idea underlying the resolution adopted by the Vienna Conference on Diplomatic Intercourse and Immunities,[35] namely, that the problem of the application of the rules governing permanent missions to special missions deserves detailed study in the light of the Vienna Convention on Diplomatic Relations. In his opinion, this means that these rules may not all be applicable to the same extent, and that each type of mission must be considered separately.

(2) It is undeniable that the receiving State has a legal obligation to provide a special mission with all the facilities necessary for the performance of its functions. In the literature, this rule is generally criticized on the ground that it is vague. The Special Rapporteur considers that its content changes according to the task of the mission in question, and that the facilities to be provided by the receiving State vary. Accordingly, the legal issue concerns not only the obligation to make such facilities available, but also the adequacy of the facilities provided, which depends not only on the special mission's task, but also on the circumstances in which it is performed. Consequently, the assessment of the extent and content of this obligation is not a question of fact but an *ex jure* obligation, whose extent must be determined by the special mission's needs, which depend on the circumstances, nature, level and task of the specific special mission. There remains the legal question whether the extent is determined fairly by the receiving State and thus matches what is due.

(3) The Special Rapporteur is of the opinion that the difficulties which arise in practice are due to the fact that some special missions consider the receiving State obliged to provide them with all the facilities normally given to regular diplomatic missions. He is more inclined to agree with the approach of those States which in practice offer a special mission only such facilities as are necessary, or at

[33] United Nations, *Treaty Series*, vol. I, p. 15.

[34] *Ibid.*, vol. 33, p. 261.

[35] United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, document A/CONF. 20/10/Add.1, resolution I, p. 89.

least useful, according to some objective criterion, for the performance of its task, whether or not they correspond to the list of facilities granted to permanent diplomatic missions as enumerated in the Vienna Convention on Diplomatic Relations. Special missions may, however, in some cases, enjoy more facilities than regular diplomatic missions, when this is necessary for the performance of their special tasks outside the field of competence of regular diplomatic missions. This argument is consistent with the resolution on special missions adopted by the Vienna Conference on Diplomatic Intercourse and Immunities.

(4) The Special Rapporteur believes that, as often happens in practice, the parties may specify in treaties what facilities should be provided for special missions. When this is done, the receiving State has the further duty to offer to special missions any other facilities they need for the performance of their tasks, even if these other facilities are not listed in the treaties. The fact that facilities are listed in a treaty simply means that the facilities mentioned in the treaty must be made available to the special mission as an obligation; it does not follow that the parties have waived all other facilities that may be needed if the special mission's task is to be performed in a smooth and regular manner. Facilities that are not listed may be required and due under the general norms of international law.

(5) The facilities offered to a special mission should include those which are essential to the normal life of its members. They must be enabled to lead a civilized life, since a special mission cannot be regarded as being in a position to perform its task properly if the receiving State makes it impossible for its members to enjoy civilized standards in such matters as hygiene. For example, they should have the right to medical care and personal services (e.g. hairdressing) of the highest quality available in the receiving State, due allowance being made for the specific circumstances, and at least of the customary quality by world standards.

(6) It is open to question whether these facilities should include everything which constitutes courteous treatment of the special mission and its members, even if not essential to the performance of its task. The Special Rapporteur believes that a special mission should also receive this special consideration.

Article 18.—Accommodation of the special mission and its members

1. The receiving State shall facilitate the accommodation of the special mission at, or in the immediate vicinity of, the place where it is to perform its task.

2. If the special mission, owing to the nature of its task, has to change the site of its activities, the receiving State shall enable it to remove to other accommodation at any place where its activities are to be pursued.

3. This rule also applies to the accommodation of the head and the members of the special mission, and of the members of the staff of the special mission.

Commentary

(1) This article relates in substance to the problem dealt with in article 21 of the Vienna Convention on Diplomatic Relations and in article 30 of the Vienna Convention on Consular Relations. However, the text proposed is not identical with the provisions of those articles. In the first place, the Special Rapporteur is of the opinion that the sending State cannot claim, by reason of the fact that it is sending special missions, the right either to acquire land for the construction of accommodation for special missions or to acquire the premises required for accommodating them, as is provided for by the above-mentioned articles of the Vienna Conventions in regard to regular diplomatic missions and permanent consulates. The Special Rapporteur considers that in this connexion it is sufficient to ensure the provision of temporary accommodation for special missions which are temporary in character. The rules on the status of special missions should not go further than that.

(2) Special missions should, however, have their accommodation guaranteed, and the accommodation should be adequate for the special mission in question. In this respect, the same rules should in principle apply as in the case of permanent diplomatic missions. In view of the Special Rapporteur, however, there is no obligation upon the receiving State to permit the acquisition of the necessary premises in its territory on behalf of the sending State, although this does not rule out the possibility that some sending States may purchase or lease premises for the accommodation of a number of successive special missions. But this is an exception.

(3) According to the normal criteria, if there is a sufficient number of hotels in the places where the special mission has its seat, the question does not arise in practice. If, however, the hotel facilities are inadequate, then—in the Special Rapporteur's opinion—the receiving State is obliged to ensure comfortable accommodation for special missions in a hotel with the usual amenities. This question has arisen on several occasions recently in the United States of America in connexion with special missions whose members were not of the white race, and the State Department has had to obtain accommodation for these delegates in hotels normally occupied by other special missions of this kind.

(4) This question is of particular importance, however, in places where there are not enough hotels, for example, in the case of special missions concerned with frontier demarcation, or where negotiations are held in small towns. When several special missions from different States meet for the same purpose, the rules of non-discrimination must be observed. On such occasions, in the absence of special agreements, each mission is provided with an equal number of rooms in hotels of specific classes so that the staff of the missions are accommodated according to the rank they hold in their own country.

(5) In some cases the cost of the accommodation may constitute a legal question. Is the receiving State obliged to prevent overcharging?

(6) A similar question arises with regard to food and other services needed by the special mission, if they are not available or are not of the desired standard at the place where the meeting is held. The Special Rapporteur considers that the receiving State has a legal obligation to supply all these needs.

(7) This rule does not exclude some differentiation with regard to the custom of providing special missions with courtesy accommodation in luxuriously appointed villas and the like. There is no legal obligation in this connexion, but it would be considered an infringement of the law if any appreciable discrimination were shown in bestowing such honours on different special missions.

(8) In article 2 of its draft articles on special missions (1960), the International Law Commission took this case into account and took the view that the rules applicable to permanent diplomatic missions should apply.[36]

(9) There is a difference between what is proposed in this article for special missions and the fundamental idea underlying article 21 of the Vienna Convention on Diplomatic Relations and article 30 of the Vienna Convention on Consular Relations. Both those Conventions are based on the idea that for permanent diplomatic missions and consulates the receiving State is required to facilitate the acquisition of the necessary premises only in the locality where the permanent diplomatic mission or consulate has its seat. In the case of special missions, however, their task may be such that they need more than one seat. This is clear from paragraph 5 of the commentary to article 13 as adopted by the Commission at its sixteenth session.[37] In particular, cases occur in practice where either the special mission as a whole or a section or group of the mission has to travel frequently in the territory of the receiving State. Such travel often involves a swift change in the seat of the special mission or the arrival of groups of the special mission at specific places, and the mission's or group's stay in a particular locality is often very brief. These circumstances generally make it impossible for the sending State itself to arrange accommodation for its special mission or a section thereof. For this reason, in practice it is generally the authorities of the receiving State which arrange accommodation.

Article 19.—Inviolability of the premises of the special mission

1. The premises of a special mission shall be inviolable. This rule shall apply even if the special mission is accommodated in a hotel or other public building, provided that the premises used by the special mission are identifiable.

2. The receiving State has a duty to take all appropriate steps for the protection of the premises of the special mission, and in particular to prevent any intrusion into or damage to those premises, any disturbance of the special mission in its premises, and any impairment of its dignity.

3. Agents of the receiving State shall not enter the said premises without the special consent of the head of the special mission or the permission of the head of the regular diplomatic mission of the sending State accredited to the receiving State.

Commentary

(1) The text proposed for this article corresponds in substance to the ideas set forth in article 22 of the Vienna Convention on Diplomatic Relations and article 31 of the Vienna Convention on Consular Relations. However, the Special Rapporteur has been obliged to depart to some extent from those provisions and to adapt them to the requirements imposed by the nature and practice of special missions.

(2) In 1960 the International Law Commission considered that, even in this matter, the rules applicable to permanent diplomatic missions should also apply to special missions. The Commission's previous Special Rapporteur, in his first draft, took the view that "The official premises of... a special mission... shall enjoy... inviolability...".[38]

(3) The present Special Rapporteur cannot agree with that view, and he believes that special provisions are necessary for special missions, primarily because their position so far as accommodation is concerned is not always comparable to that of regular diplomatic missions. In addition, the premises of a special mission are often together with the living quarters of the members and staff of the special mission. It is for these reasons that special provisions are needed.

(4) Generally, the offices of special missions are not installed in special premises (they are usually located in the premises of the ordinary or specialized permanent diplomatic mission, if there is one at the place). If, however, the special mission occupies special premises, the guarantee of inviolability must be respected, in order that it may perform its functions without hindrance and in privacy, irrespective of the location of the premises in question. This inviolability is distinct from that of the domicile. It follows that, in cases where the mission premises are installed in a hotel, the conduct of certain local authorities which claim that the inviolability does not apply to hotel rooms is unjustifiable. This argument made it necessary to amplify paragraph 1 of this draft article.

(5) In practice, the head of a special mission sometimes refuses, with or without good reason, to allow representatives of the authorities of the receiving State to enter the premises of the special mission. In such cases, the Ministry of Foreign Affairs of the receiving State asks the head of the regular diplomatic mission of the sending State for permission to enter the premises occupied by the special mission. This practice of seeking the consent of the head of the sending State's permanent diplomatic mission is already written into paragraph 2 of article 31 of the Vienna Convention on Consular Relations. Its justification lies in the fact that what is at issue here is the protection of the interests of the sending State, and not those of the special mission itself. The Special Rapporteur therefore considers that the necessity of obtaining such permission is a sufficient safeguard for the sending State.

(6) The protection of the premises of a special mission is more important in practice than the protection of the premises of a regular diplomatic mission, for several reasons. In particular, a special mission, unless it is accommodated in the permanent mission's building, has less means at its disposal for its own protection and is less able itself to exercise effective control (for instance, in a hotel);

[36] *Yearbook of the International Law Commission, 1960*, vol. II, pp. 117, 179-180.

[37] *Yearbook of the International Law Commission, 1964*, vol. II, p. 224.

[38] *Yearbook of the International Law Commission, 1960*, vol. II, p. 112.

in addition, a special mission does not often have settled premises (if its task involves travel). For this reason, sending States rent or purchase private buildings in certain centres, particularly where they have no permanent diplomatic mission or where their permanent diplomatic mission's premises are inadequate, in order to ensure the inviolability of the premises of special missions. Immediately after the Second World War, the great Powers rented entire floors in large hotels for this purpose and protected their own security by denying any outsider entry to these premises. This is still being done, but more discreetly.

(7) The question arises in practice whether it is possible to distinguish between the official premises of a special mission and the living quarters of its members and staff, since in most cases both are in the same premises. The Special Rapporteur considers that this is a question of fact.

(8) A separate question is that of secret intrusion into the premises of a special mission—in other words, the installation of special listening devices which are used by the intelligence service of the receiving State. The Special Rapporteur considers that, from the legal standpoint, this is a breach of the inviolability of the special mission's premises. He deems it his duty to bring this point to the Commission's notice but he is not convinced that it should receive prominence in the body of the article.

Article 20.—Inviolability of archives and documents

The archives and documents of a special mission shall be inviolable at any time and wherever they may be. Documents in the possession of the head or members of the special mission or of members of its staff or in the rooms occupied by them shall likewise be deemed to be documents of the special mission.

Commentary

(1) This article is drafted in the light of the provisions of article 24 of the Vienna Convention on Diplomatic Relations and article 33 of the Vienna Convention on Consular Relations.

(2) In this case, too, the International Law Commission took the view in 1960 that the rules applicable to permanent diplomatic missions apply also to special missions, which otherwise would scarcely be able to function normally.

(3) It is important, in this connexion, to bear in mind that the archives and documents of special missions are often in the possession of certain members of the special mission, or of members of its staff, and that in such cases the rule included in both Vienna Conventions, that archives and documents are inviolable wherever they may be, must apply.

(4) Because of various controversies which arise in practice, the Special Rapporteur considers it particularly important to stress the point concerning documents in the possession of the members or of the staff of a special mission. This is especially pertinent in the case of a special mission which does not have premises of its own and in cases where the special mission or a section or group of the special mission is itinerant. In such cases, the documents transported from place to place in the performance of the special mission's task are mobile archives rather than part of the mission's baggage.

(5) In article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations and article 31, paragraph 4, of the Vienna Convention on Consular Relations there are some provisions relating to the safeguards concerning "furnishings and other property... and the means of transport". The Special Rapporteur has taken the view that it is inappropriate to insert these provisions in the present article, but he has introduced them in the article entitled "Inviolability of the property of the special mission".[39] His main reason is that the above-mentioned provisions of the Vienna Conventions relate to property owned by the sending State and situated in the permanent premises of a permanent diplomatic mission or consulate, which is not the case with the property to be protected in the interest of special missions.

Article 21.—Freedom of movement

1. The head and members of a special mission and the members of its staff shall have the right to freedom of movement in the receiving State for the purpose of proceeding to the place where the special mission performs its task, returning thence to their own country, and travelling in the area where the special mission exercises its functions.

2. If the special mission performs its task elsewhere than at the place where the permanent diplomatic mission of the sending State has its seat, the head and members of the special mission and the members of its staff shall have the right to movement in the territory of the receiving State for the purpose of proceeding to the seat of the permanent diplomatic mission or consulate of the sending State and returning to the place where the special mission performs its task.

3. If the special mission performs its task by means of teams or at stations situated at different places, the head and members of the special mission and the members of its staff shall have the right to unhindered movement between the seat of the special mission and such stations or the seats of such teams.

4. When travelling in zones which are prohibited or specially regulated for reasons of national security, the head and members of the special mission and the members of its staff shall have the right to freedom of movement, if the special mission is to perform its task in precisely those zones. In such a case, the head and members of the special mission and the members of its staff shall be deemed to have been granted the right to freedom of movement in such zones, but they shall be required to comply with the special rules applicable to movement in such zones, unless this question has been settled otherwise either by mutual agreement between the States concerned or else by reason of the very nature of the special mission's task.

Commentary

(1) The draft of this article is based on the ideas expressed in article 26 of the Vienna Convention on Diplomatic Relations and article 34 of the Vienna Convention on Consular Relations. However, in applying these ideas to the

[39] Article 24.

present draft, the Special Rapporteur has made substantial changes reflecting the special circumstances in which the task of special missions is performed. This article includes certain provisions which do not apply to either permanent diplomatic missions or consulates. This question will be dealt with in greater detail in the succeeding paragraphs of this commentary.

(2) The Special Rapporteur does not share the view expressed by the International Law Commission in 1960, namely, that special missions must be given the same treatment as permanent diplomatic missions in this respect. General freedom of movement in the territory of the receiving State (except in prohibited zones) is granted to permanent diplomatic missions because permanent diplomatic missions are authorized to observe events in the country. Special missions, on the other hand, have limited tasks. From this derives the rule that they should be guaranteed freedom of movement only to the extent necessary for the performance of their tasks (this does not mean that they cannot go also to other parts of the territory of the receiving State, subject to the normal conditions applicable to other aliens). It is considered, however, that the receiving State has a legal obligation to ensure freedom of movement to special missions in so-called prohibited zones (e.g., along the border or in military zones) if this is necessary for the performance of their task. Thus, certain exceptions, both negative and positive, are allowed in the case of special missions.

(3) In view of the difference between the conception taken as his starting-point by the Special Rapporteur and the conception underlying the Vienna Conventions (special missions, including their heads and members and the members of their staffs, to be guaranteed freedom of movement in the territory of the receiving State only to the extent required to ensure the smooth performance of their tasks, contrary to the principle adopted in the Vienna Convention on Diplomatic Relations which recognizes as a diplomatic privilege the right to travel throughout the territory of the receiving State), it will be necessary for the Commission to decide in advance whether it opts in principle for the one or for the other of these conceptions and to indicate its choice.

(4) This difference in status between special missions and permanent diplomatic missions is particularly important with respect to States which impose restrictions on the movement of aliens in their territories. In such countries, special missions are in effect confined to the areas in which they perform their functions.

(5) To cite a practical illustration, special missions which have functions to perform at the United Nations are considered in the United States of America to have the right *ex jure* to freedom of movement only in the New York area, and between New York and Washington for the purpose of maintaining contact with their embassies (Section 15 of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, signed at Lake Success on 26 June 1947).[40] Travel in other parts of the United States is not guaranteed, although it is not prevented in practice. Special permits are issued for such journeys, but they are seldom applied for.

(6) Guaranteed freedom for special missions to proceed to the seat of the sending State's permanent diplomatic mission to the receiving State and to return to the place where the special mission performs its task is in practice not only a daily occurrence but also a necessity. The reasons for this are that the special mission usually receives its instructions through the regular diplomatic mission and that the latter is the protector of the special mission and has a direct interest in being kept informed of the progress of the special mission's work.

(7) One of the peculiarities of special missions is that they may operate through stations or teams situated in different places or responsible for specific tasks in the field. Because of the need for constant liaison between the different sections of a special mission—a need which permanent diplomatic missions do not experience—there should be freedom of movement between the main body of the mission and the individual stations or the seats of the special teams.

(8) Another specific characteristic of special missions which has been noted in practice is that they are often in touch with their own country across the frontier. Thus, special missions often perform their task in a neighbouring country during the day and return to their own country at night. They also return to their own country on days when they are not working, unlike regular diplomatic missions.

(9) The bilateral treaties under which States agree on the *modus operandi* of special missions frequently make provision for the right of the special missions to freedom of movement in the territory of the receiving State. In practice, such clauses are a regular feature of agreements concerning special missions appointed to demarcate frontiers or maintain frontier markers and demarcation lines, to inquire into frontier incidents, and to settle matters relating to territorial servitudes, hydro-engineering works and other border questions. However, these agreements should also be regarded as enlarging upon the general rules relating to the rights of special missions and the right to movement in the area where the special mission performs its task, without affecting the validity of the general rules themselves.

(10) These rules concerning freedom of movement apply also in cases where the special mission performs its task in the territory of a third State.

(11) The Special Rapporteur has specified in the draft article that the members and staff of the special mission are also entitled to freedom of movement for the purpose of proceeding to the seat of the sending State's consulate within whose jurisdictional territory the special mission or a section or group of the special mission is performing its task (or to the seat of the sending State's nearest consulate). He is of the opinion that the same rules should apply as in the case where the special mission proceeds to the seat of the permanent diplomatic mission.

Article 22.—Freedom of communication

1. The receiving State shall permit and protect free communication on the part of the special mission for all

[40] United Nations, *Treaty Series*, vol. II, p. 11.

official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the special mission may employ all appropriate means, including its couriers. However, the special mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the special mission shall be inviolable. Official correspondence means all correspondence relating to the special mission and its functions.

3. The bag of the special mission shall not be opened or detained.

4. The packages constituting the bag of the special mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the special mission.

5. The courier of the special mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. Special missions shall have, first and foremost, the right to permanent contact with the permanent diplomatic mission of their State accredited to the country in which they are performing their task and with the consuls of their own State within whose jurisdictional territory they are exercising their functions.

7. Special missions shall not have the right to send messages in code or cipher unless they have been accorded this right by an international agreement or by an authorization of the receiving State.

8. Only members of the special mission or of its staff may act as couriers of the special mission.

Commentary

(1) The text proposed for this article is based on article 27 of the Vienna Convention on Diplomatic Relations, with changes corresponding to the nature of special missions and to the nomenclature used so far in the present draft.

(2) In 1960 the International Law Commission took the position that special missions enjoy the same rights as permanent diplomatic missions in this respect. In the Special Rapporteur's view, this is correct in principle.

(3) It should be noted, however, that in practice special missions are not always granted the right to use messages in code or cipher. For this reason, the Special Rapporteur has not embodied in the text proposed the provision concerning the use of messages in code or cipher. Instead, he has included in paragraph 7 of the proposed text the stipulation that special missions may not use this means of communication unless they are accorded the right to do so by an international agreement or are authorized to do so by the receiving State.

(4) For the most part, information and correspondence for special missions are forwarded through the permanent diplomatic missions of the sending State, if there is one in the receiving State. If there is no permanent diplomatic mission, complications may arise. It is customary for the special mission to conduct all its relations through the permanent diplomatic mission of the sending State. For this reason, the special mission has the right to send and to receive the courier who maintains relations between it and the permanent diplomatic mission.

(5) If the special mission performs its task in a frontier area, it is in practice generally accorded the right to maintain relations through its own couriers with the territory of its own country, without the intermediary of the permanent diplomatic mission.

(6) Special missions are not usually allowed to use wireless transmitters, unless there is a special agreement on the subject or a permit is given by the receiving State. This prohibition is generally very strict in frontier zones.

(7) The head and members of a special mission and the members of its staff do not always travel by normal public transport. They often use motor-cars or special buses, but these means of transport must be duly registered in the sending State and their drivers must be in possession of the regular papers required for crossing the frontier and driving abroad. If the special mission uses special aircraft—particularly helicopters—for its movements in the field, or if it uses special sea-going or inland waterway vessels, there is, in practice, a requirement that notice should be given of the use of such means of transport in good time and that permission for their use should be obtained from the receiving State or at least that the latter should not have objected to their use after receiving such notice. The Special Rapporteur wonders whether the rule on this point should be included in the draft article.

(8) The Vienna Convention on Diplomatic Relations (article 27, paragraph 3) lays down the principle of the absolute inviolability of the diplomatic bag. Under this provision, the diplomatic bag may not be opened or detained by the receiving State. The Vienna Convention on Consular Relations, on the other hand, confers limited protection on the consular bag (article 35, paragraph 3). It allows the consular bag to be detained if there are serious reasons for doing so and provides for a procedure for the opening of the bag. The question arises whether absolute inviolability of the special mission's bag should be guaranteed for all categories of special missions. The Special Rapporteur has been unable to decide whether the guarantees in this respect should be limited in the case of particular categories of special missions. He therefore requests the Commission to give its attention to this matter. His personal opinion is that it would be dangerous to decide summarily to limit the guarantees in the case of all special missions of a technical nature. Such limitation might, he believes, constitute a threat to good relations between States, to preservation of the dignity of the State whose special mission is affected by it and to the smooth performance of such a mission's task.

(9) In view of the nature of special missions, the Special Rapporteur has made no provision for the possibility of the special mission's using couriers *ad hoc* (article 27, paragraph 6 of the Vienna Convention on Diplomatic Relations) or for the possibility of its employing as courier a national or resident of the receiving State. He considers, however, that the courier might be any person, irrespective of his nationality, who forms part of the special mission

under the terms of article 14 as already adopted. He believes that it is not necessary to insert a special rule on this point in the draft.

(10) Nor has the Special Rapporteur included any provisions on the use of the captain of a commercial aircraft (article 27, paragraph 7 of the Vienna Convention on Diplomatic Relations and article 35, paragraph 7 of the Vienna Convention on Consular Relations) or the captain of a ship (article 35, paragraph 7 of the Vienna Convention on Consular Relations) as courier for the special mission. Such persons are not generally used for these purposes. However, this is not an absolute rule in practice. It has been observed recently that in exceptional cases special missions employ such persons as couriers *ad hoc*. For this reason, the provision of article 35, paragraph 7 of the Vienna Convention on Consular Relations should perhaps also be inserted in the present article.

Article 23.—Exemption of the mission from taxation

1. The sending State, the special mission, the head and members of the special mission and the members of its staff shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the special mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the special mission.

3. The special mission may not, as a general rule, levy any fees, dues or charges in the territory of the receiving State, except as provided by special international agreement.

Commentary

(1) The drafting of this article is based on a combination of articles 23 and 28 of the Vienna Convention on Diplomatic Relations. Article 23 is taken over as a whole *mutatis mutandis*, whereas the sense of the provision of article 28 is reversed, since special missions do not as a general rule levy any kind of due. The sole exception would occur where the levying of dues had been provided for in advance under an agreement. The ideas expressed in articles 32 and 39 of the Vienna Convention on Consular Relations have also been taken into account.

(2) The International Law Commission took the view in 1960 that, in this respect all the provisions of the legal rules relating to diplomatic relations were applicable to special missions. The Special Rapporteur considers this correct as regards the matter dealt with in paragraphs 1 and 2 of the above article, which simply reproduces article 23, paragraphs 1 and 2, of the Vienna Convention on Diplomatic Relations.

(3) Despite the considerations and views set forth by the International Law Commission regarding the application of the Vienna Convention on Diplomatic Relations (at that time in the draft stage) to special missions, the Special Rapporteur believes that article 28 of the Vienna Convention on Diplomatic Relations cannot be applied in principle to special missions. As a general rule, special missions have no authority to levy any fees, dues or charges in foreign territory except as provided in special cases by international agreements. However, it would be incorrect to deduce from this that special missions do not charge such dues; they do so in certain exceptional cases provided for in international agreements.

Article 24.—Inviolability of the property of the special mission

All property used in the operation of the special mission, for such time as the special mission is using it, and all means of transport used by the special mission, shall be immune from attachment, confiscation, expropriation, requisition, execution and inspection by the organs of the receiving State. This provision shall likewise apply to property belonging to the head and members of the special mission and to property belonging to the members of its staff.

Commentary

(1) After consulting article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations and article 31, paragraph 4, of the Vienna Convention on Consular Relations, the Special Rapporteur came to the conclusion that it was not possible to adopt those provisions for the draft articles on the status of special missions. However, in preparing this draft article, he was guided by some of the ideas contained in those provisions.

(2) The Special Rapporteur is of the opinion that a broader approach to the inviolability of property should be adopted in the case of special missions than in that of permanent diplomatic missions, since it is very difficult in practice to determine what belongs to the special mission and what belongs to its members and staff.

(3) In this connexion, the International Law Commission took the view in 1960 that the rules applicable to permanent diplomatic missions apply also to special missions. The Special Rapporteur believes that this is correct in practice; but in view of the temporary nature of special missions, this guarantee must be limited to property which is linked to the performance of the special missions's task and to the personal needs of its members while they are carrying out their functions. He therefore considers that this guarantee should be limited to articles which are necessary to the accomplishment of the mission (e.g. office equipment, seals and books), personal baggage, articles required for personal needs, means of transport (e.g. motor-cars and boats) and money.

(4) If frequently happens in practice that measures of execution are taken under regular court orders, for the purpose of harassment, against property leased by the special mission for the performance of its functions. A guarantee must therefore be provided with respect to such property also, and it is logical likewise that a similar guarantee should extend to property which may belong to third parties, so long as it is being used by members of the special mission (e.g. the furniture in their bedrooms).

Article 25.—Personal inviolability

The head and members of the special mission and the members of its staff shall enjoy personal inviolability. They shall not be liable to arrest or detention in any form. The receiving State shall treat them with respect and shall take appropriate steps to prevent any attack on their person, freedom or dignity.

Commentary

(1) Although this article merely reproduces the ideas contained in article 29 of the Vienna Convention on Diplomatic Relations, the Special Rapporteur considered it necessary to give his own wording of this provision. However, he considers that he has not departed in this respect from the ideas and the conception expressed in the said article 29.

(2) With regard to the Vienna Convention on Consular Relations, the Special Rapporteur deems it his duty to point out that the text proposed for this article corresponds to article 40 of that Convention but that he has deliberately refrained from incorporating articles 41 and 42 of that Convention, which provide for incomplete immunity from criminal jurisdiction. He is of the opinion that it is very difficult to adopt the so-called minor consular immunity for the head and members of special missions and the members of their staffs, although he is under the impression that some members of the Commission argued in favour of that approach during the general discussion. The Special Rapporteur believes that the technical and administrative staff of special missions should be guaranteed personal freedom. For further details on this point, see below the article on immunity from jurisdiction.[41]

(3) The principle of the inviolability of the head and members of the special mission and the members of its staff is respected in practice. This was also the view taken by the International Law Commission in 1960, to which the Special Rapporteur has nothing to add. The only question is to what extent the receiving State treats these persons with the respect due to them. The respect accorded is generally less than in the case of career diplomats who are members of permanent diplomatic missions. This general rule, however, does not always operate to the advantage of the career diplomat, for receiving States frequently pay greater honours to the head and members of a special mission than to the heads of permanent diplomatic missions in the case of what are known as high-level special missions.

Article 26.—Inviolability of residence

The residences of the head and members of the special mission and of the members of its staff shall enjoy inviolability and the protection of the receiving State, whether they reside in a separate building, in certain parts of another building, or even in a hotel.

Commentary

(1) This article reproduces the idea expressed in article 30, paragraph 1, of the Vienna Convention on Diplomatic Relations. Paragraph 2 of that article is not incorporated because, in the Special Rapporteur's view, the point is already covered in the article entitled "Inviolability of archives and documents".[42] An explanation is given in paragraph 4 of the commentary on that article.

(2) The question arises whether the above solution is correct, for it goes beyond article 30 of the Vienna Convention on Diplomatic Relations, which limits these guarantees to "diplomatic agents" alone, whereas the text here proposed extends the guarantee to all members of the staff of the special mission, including those who cannot perhaps be treated on the same footing as diplomatic agents. The Special Rapporteur wishes to point out in this connexion that draft article 6 as already adopted by the Commission states that the special mission may include diplomatic staff, administrative and technical staff and service staff. He believes, however that this guarantee is also required for the inviolability of the residence of all the members of the staff of the special mission in order to ensure the normal functioning of the special mission, and that it should therefore cover all the members of the staff of the special mission, regardless of the place where their residence is situated.

Article 27.—Immunity from jurisdiction

1. The head and members of the special mission and the members of its staff shall enjoy immunity from the criminal jurisdiction of the receiving State.

2. They shall also enjoy immunity from its civil and administrative jurisdiction in respect of acts performed in the exercise of their functions in the special mission.

Commentary

(1) The International Law Commission took the view in 1960 that the rules of immunity from jurisdiction which apply to members of permanent diplomatic missions[43] are also applicable to special missions and itinerant envoys. While in principle this should be the case, in practice the matter gives rise to certain problems. The first and most important problem is whether this rule applies equally to all special missions, regardless of the nature of their task. In practice, it was formerly the custom to make a distinction between political (diplomatic) missions and technical missions. The former were in principle accorded complete immunity, while the latter were granted only what is known as minor (functional) immunity, which means that a member of such a mission is not subject to the jurisdiction of the receiving State in respect of any act committed by him in connexion with the exercise of his functions. In the Special Rapporteur's view, however, this point became unimportant once the difference in the enjoyment of privileges and immunities between diplomatic agents on the one hand and the administrative and technical staff of permanent diplomatic missions on the other was eliminated. Since these two groups have been put on an equal footing, there is no longer any reason to make distinctions among special missions according to the nature of their task.

(2) Another question arises in principle: should the members of special missions be granted complete and unlimited

[41] Article 27.

[42] Article 20.

[43] See article 31 of the Vienna Convention on Diplomatic Relations (1961).

immunity from jurisdiction, or only to the extent necessary to the performance of their functions? United Nations practice inclines towards this latter point of view, which was not adopted by the International Law Commission in 1960.

(3) In the Special Rapporteur's view, the proper solution would be to grant functional immunity in principle to all special missions. He believes that there should be no deviation from this rule, except in the matter of immunity from criminal jurisdiction; for any interference with the liberty of the person, on whatever grounds, prevents the free and unfettered accomplishment of the mission's tasks. He appreciates, however, that there are arguments of some validity and weight in favour of the notion that members of special missions of a technical nature should not enjoy more extensive guarantees than those accorded to consuls (who may be arrested if they have committed a grave crime not connected with their functions).[44]

(4) There is perhaps some basis for the idea, put forward by some members of the Commission during the general discussion at the sixteenth session, that the immunity of the members and staff of special missions should, in certain cases, be determined in accordance with or by analogy with the rules governing consular relations rather than in accordance with those applicable to diplomatic relations. It would probably be excessive and wrong that, in matters within the competence of consuls, special missions should enjoy greater privileges and guarantees than consuls themselves. However, the Special Rapporteur cannot go into this matter more deeply until the Commission has come to a decision regarding the criterion for distinguishing between special missions of a diplomatic nature and those of a consular nature. The Special Rapporteur has been unable to find such criteria in practice. In certain bilateral conventions, however, there are elements of a functional limitation of immunities, and in such cases the members of special missions are guaranteed only minor functional immunity.

(5) The above text gives no details concerning immunity from the civil and administrative jurisdiction of the receiving State.

The Special Rapporteur, guided by the idea that allowance should be made for the sensitiveness of receiving States to the limitation of their sovereignty through the granting of far-reaching immunities to special missions, has reviewed present practice and the exigencies of the representative character and functional nature of special missions. In the light of his researches, he has revised his opinion on immunities so far as civil and administrative jurisdiction is concerned. He considers that, because a special mission remains for only a short time in the territory of the receiving State and because there is little likelihood that its members and staff will become involved in complicated legal relationships during their temporary stay in the receiving State, it is a sufficient safeguard if these persons are guaranteed immunity from civil and administrative jurisdiction solely in respect of acts relating to the exercise of their functions within the special mission. For this reason, he has gone no further in assimilating them to diplomatic agents.

(6) Nor does the text mention the question of giving evidence as a witness. This means that the question arises whether it is justifiable to apply the rule laid down in article 31 of the Vienna Convention on Diplomatic Relations. However, in the Special Rapporteur's view it should be mentioned that a member of a special mission, while exercising his functions, ought not to be summoned for questioning or called as a witness by organs of the receiving State, since this might affect the performance of his task and his personal psychological condition.

(7) Finally, the Special Rapporteur also considers that measures of execution should not be taken against the property of the special mission, of the head and members of the special mission and of the members of its staff. Such property, as stated above, enjoys the guarantee of inviolability. Such a guarantee is necessary to protect these persons against harassment and in this connexion the question arises whether there is any need to go beyond what has already been stipulated in the article entitled "Inviolability of the property of the special mission".[45] The Special Rapporteur is of the opinion that the said article confers full protection on the special mission and its members and that it is not necessary to reproduce expressly in the present article the provisions of article 31, paragraph 3 of the Vienna Convention on Diplomatic Relations.

(8) It goes without saying that the member of a special mission should also enjoy immunity from any measures which would impair his right of communication or the confidential nature of information and documents (it is for this reason that any kind of search, whether of his person or of his property, is prohibited).

(9) The Special Rapporteur also considers the fact that the mission is a temporary one to be of particular importance in determining the proper extent of immunity from jurisdiction, as is the further fact that its members, as a general rule, have their domicile in the sending State and actions may be brought against them there.

(10) Another question which arises in this connexion and which has not been settled even as regards resident diplomacy concerns the obligation of the sending State either to waive immunity or to undertake to bring the matter before its own courts. The Special Rapporteur is inclined to favour the broader use of the waiver of immunity for all acts of members of special missions and members of their staffs which are not of a functional character. He believes that, under the terms of his proposed text, this question is dealt with in accordance with article 32 of the Vienna Convention on Diplomatic Relations.

(11) In the draft article proposed above, the Special Rapporteur has not referred to the question of measures of execution, as he considers this matter to be covered by the article entitled "Inviolability of the property of the special mission". The special mission, its members and its staff need the same guarantees as permanent diplomatic missions. But this means that only the movable property of

[44] Article 41 of the Vienna Convention on Consular Relations (1963). The question arises whether the territorial State should intervene in the case of a murder committed by a member of a special mission.

[45] Article 24.

the head of the special mission and of its members and its staff which is used in the performance of their task, and their personal baggage, enjoy protection.

Article 28.—Exemption from social security legislation

1. The head and members of the special mission and the members of its staff shall be exempt, while in the territory of the receiving State for the purpose of carrying out the tasks of the special mission, from the application of the social security provisions of that State.

2. The provisions of paragraph 1 of this article shall not apply to nationals or permanent residents of the receiving State regardless of the position they may hold in the special mission.

3. Locally recruited temporary staff of the special mission, irrespective of nationality, shall be subject to the provisions of social security legislation.

Commentary

(1) This article does not entirely correspond to article 33 of the Vienna Convention on Diplomatic Relations, but it reflects the actual conditions usually encountered in special missions. The proposed text likewise does not fully correspond to article 48 of the Vienna Convention on Consular Relations.

(2) Exemption from social security legislation is one of the privileges concerning which in 1960 the International Law Commission laid down in principle the rule that what is valid for permanent diplomatic missions is also applicable to special missions. In view of the fact that the special mission's stay in the territory of the receiving State is temporary, this question is not of great importance for the actual members of special missions, and hardly arises even as regards persons domiciled in the receiving State who are employed by the special mission or by its members.

(3) In practice, it is found necessary, for a number of reasons, not to exempt from the social security system of the receiving State persons locally employed for the work of the special mission. The Social Security Department in Yugoslavia suggests the following reasons: the short duration of the special mission; the great danger to life and health frequently presented by the difficulty of the special mission's tasks, especially in the case of special missions working in the field; and the still unsettled question of insurance after the period of employment and the termination of the special mission, if the employee was not engaged through and on the responsibility of the permanent diplomatic mission. In addition, difficulties have arisen with regard to the collection of insurance contributions. Consequently, it has been decided that a Yugoslav national or a person permanently domiciled in Yugoslavia is personally responsible for paying these contributions while employed by a special mission. Experience shows that owing to the short duration of its stay in the country, the special mission is, furthermore, not in a position to comply with the formalities connected with making the necessary reports for the social security record of such persons.

(4) Many countries, and especially the United Kingdom and nearly all the socialist countries, consider that the head, the members and the staff of a special mission are automatically entitled (subject to reciprocity) to medical assistance during their stay in the territory of the foreign State, irrespective of any bilateral agreements on the matter which, in practice, are becoming more and more frequent. Yugoslavia, for example, has concluded fourteen such agreements. Some countries offer this protection to the entire special mission, if necessary, as a matter of courtesy. There are two categories of countries in this respect: those which defray the cost of such protection, and those which present a bill for the cost later unless it has been paid in the interval. Since this practice is becoming increasingly common, the question arises whether it should be made a rule of international law that the receiving State is required to offer this protection to the entire special mission. The Special Rapporteur considers that the granting of this protection is a humanitarian obligation and, since it is becoming increasingly the practice for the receiving State to defray the cost of medical assistance, he thinks that this should be included as a new rule. The Special Rapporteur requests the Commission to take a decision on this point.

Article 29.—Exemption from personal services and contributions

1. The head and members of the special mission and the members of its staff will be exempt from personal services and contributions of any kind, from any compulsory participation in public works and from all military obligations relating to requisitioning, military contributions or the billeting of troops on premises which are in their possession or which they use.

2. The receiving State may not require the personal services or contributions mentioned in the preceding paragraph even of its own nationals while they are taking part in the activities of the special mission.

Commentary

(1) Although this question was barely touched upon on that occasion, the International Law Commission took the view in 1960 that special missions should enjoy the same exemptions as members of permanent diplomatic missions. That is quite understandable, since special missions would be limited in their personal freedom if they rendered personal services and contributions.

(2) In drafting this article the Special Rapporteur started with the ideas underlying article 35 of the Vienna Convention on Diplomatic Relations, but he has expanded the article in the following way:

(*a*) He has extended these exemptions to the entire staff and not merely to the head and members of the special mission. In his view, it is not possible otherwise to ensure the special mission's smooth operation;

(*b*) It is also his view that exemption from personal services and contributions must also be accorded to locally recruited staff regardless of nationality and domicile. Otherwise the special mission would be placed in a difficult position and would not be able to carry out its task until it succeeded in finding other staff exempt from such services and contributions. Calling on special mission staff to render such services or contributions could be used as a powerful weapon by the receiving

State to harass the special mission. On the other hand, the receiving State would not be imperilled by these exemptions, since special missions generally are of very short duration and have very small staffs.

(3) In spite of the above rules, the question arises in practice whether the head, the members and the staff of the special mission have an obligation to furnish personal services and contributions dictated by humanitarian considerations. The Special Rapporteur is aware of a conflict of this kind in practice. Is the head of the special mission bound to take into his motor car a person who has been injured on the road if instructed to do so by the traffic police, refusal to comply with such an order generally being considered in all countries as an offence? The Special Rapporteur has not dealt with this question in the draft of this article, because he is not sure that a special mission should tolerate such a limitation of its freedom, although he is convinced that no one is exempt from obligations of a humanitarian nature, regardless of the legal penalty, which in this case would not apply. He considers, however, that in the case described, depending on its gravity, the receiving State is entitled to declare the individual concerned *persona non grata*.

Article 30.—Exemption from customs duties and inspection

The receiving State shall grant exemption from the payment of all customs duties, all taxes and other duties—with the exception of loading, unloading and handling charges and charges for other special services—connected with the import and export and permit the free import and export of the following articles:

(*a*) Articles for the official use of the special mission;

(*b*) Articles for the personal use of the head and members of the special mission and of the members of its staff which constitute their personal baggage, as well as articles serving the needs of family members accompanying the head, the members and the staff of the special mission, unless restrictions have been specified or notified in advance on the entry of such persons into the territory of the receiving State.

Commentary

(1) The Special Rapporteur has taken as his starting point article 36 of the Vienna Convention on Diplomatic Relations, but he has been unable to incorporate the entire text of that article. He considers that that text would grant too much in the way of facilities and privileges to special missions.

(2) In this case, too, the International Law Commission took as its basis in 1960 the rule that all the privileges granted to permanent diplomatic missions and their members are applicable to the members of special missions. Actually, such privileges are less broad in the case of a special mission, according to the nature of the task. In general, the exemption amounts in normal practice to no more than an exemption from customs duties on articles used by the mission in the performance of its task and on the personal baggage of its members.

(3) Baggage is not usually inspected, except in cases where the baggage of members of permanent diplomatic missions is also inspected. In a number of countries, however, the inspection of baggage in the case of the staff of special missions depends on the type of passport issued to the members and staff of the special mission. Persons who do not hold a diplomatic passport are not exempt from the ordinary inspection. For this reason, the Special Rapporteur has not included in the text the provision contained in article 36, paragraph 2, of the Vienna Convention on Diplomatic Relations. This is a matter for the Commission to decide.

(4) The question of applying to special missions the rules exempting permanent diplomatic missions and their members from the payment of customs duties on articles imported for the establishment of the mission, its members or its staff seldom arises, although it may do so (e.g., in the case of special receptions or special machine installations). In view of the rarity of such cases, the Special Rapporteur considers that a special provision on this point should not be included in the text but that this eventuality should be clearly brought out in the commentary, as a warning to Governments of the existence of such situations, which they ought to settle in favour of special missions by means of special decisions.

(5) While provision must be made for exemption from customs duties and other taxes on the importation, and for the free import and export, of articles for the official use of the special mission—as is often done in practice, particularly in the case of missions with technical tasks—the Special Rapporteur believes that no provision should be made for any facilities for the importation of household articles. As a general rule, the head of the special mission, its members and its staff are usually only temporarily resident at the place where the special mission performs its task. This should therefore be the general rule, any departures from it being specified either in agreements between the States concerned or through the diplomatic channel in each individual case; for the Special Rapporteur appreciates that such needs may exist.

(6) Customs facilities should also normally be granted to members of the families of the head of the special mission, its members and its staff, apart from the cases—admittedly rare—in which restrictions on the entry of the family members have been notified or specified in advance, as is done in practice in respect of certain delicate missions or because of difficult local conditions.

(7) The Special Rapporteur has not specified what articles may be exported from the country by the special mission or by its head, its members or its staff. Here again, in his view, the rule that the customs and police regulations of the receiving State must be observed applies, but no restrictions may be placed on the mission's right to import and export articles used for the performance of its tasks. In this case, the rule of international law which guarantees the right of the special mission to exercise its function fully and without impediment prevails over the rule of domestic law.

(8) The claims of certain special missions that they themselves, or their members, are exempt from the payment of customs duties on the importation of consumer goods, specially of beverages and foodstuffs for use in official

entertainment, and cigarettes, have been challenged in practice. There are differences of opinion on this subject, the special missions claiming that these are articles for the use of the mission itself and for the performance of its task. The Special Rapporteur has deliberately refrained from proposing a solution for this case.

(9) In most countries, the Ministry of Foreign Affairs and the central customs administration determine whether the importation of such articles is justified and impose restrictions on the amount to be imported, in the light of the size of the mission, the length of its stay in the country, and the type of official receptions it holds. Most receiving States do not allow the importation of articles for presentation as gifts to nationals of the receiving State or for use in advertising goods produced in the sending State. As a matter of courtesy, however, the category of articles enjoying exemption is permitted to include gifts which the special mission presents officially to certain specified persons, provided that the persons in question are known in advance.

(10) It has been noticed that the rules concerning customs privileges for special missions find little application in the actual practice of the customs administration of receiving States, because special missions generally channel their imports and exports through the permanent diplomatic missions, limiting their direct imports in most cases to their personal baggage. Practice does not prohibit the free movement of uncustomed goods between the permanent diplomatic mission and special missions of the same sending State in the territory of the receiving State. This procedure is therefore regarded as more advantageous to both parties and as removing causes of dispute.

Article 31.—Status of family members

1. The receiving State may restrict the entry of members of the families of the head, members and members of the staff of the special mission. If such restriction has not been agreed upon between the States concerned, it must be notified in due time to the sending State. The restriction may be general (applying to the entire mission) or individual (some members are exempt from restriction), or it may relate only to certain periods of the special mission's visit or to access to certain parts of the country.

2. If such restriction has not been agreed upon or notified, it shall be deemed to be non-existent.

3. If the special mission performs its task in military or prohibited zones, family members must be in possession of a special permit from the receiving State authorizing them to enter such zones.

4. If the entry of members of the families of the head, members or members of the staff of the special mission is not subject to restrictions, and in areas where restrictions on entry do not apply, family members accompanying the head, members or members of the staff of the special mission shall enjoy privileges and immunities as specified below:

(*a*) The members of the families of the head and members of the special mission and of those members of its staff who belong to the category of diplomatic staff (article 6, paragraph 2, of these articles) shall enjoy the privileges and immunities which are guaranteed by these articles to the persons whom they are accompanying;

(*b*) Members of the families of the administrative and technical staff shall be entitled to the privileges and immunities which are guaranteed by these articles to the persons whom they are accompanying.

5. Family members shall enjoy the above-mentioned privileges and immunities only if the provisions of these articles do not limit their right of enjoyment and if they are not nationals of or permanently resident in the receiving State.

Commentary

(1) The Special Rapporteur has taken as the basis of this provision article 37 of the Vienna Convention on Diplomatic Relations, but he considers that that article cannot be applied in its entirety to special missions and that some major changes are called for.

(2) During its discussion in 1960, the International Law Commission took as its starting-point the idea that it was here dealing with a matter to which the rules applicable to permanent diplomatic missions could be applied as they stood. In practice, however, the question arises whether these privileges and immunities also attach to family members accompanying the head and members of the special mission or members of its staff. One school of thought maintains that there can be no grounds for limiting the enjoyment of privileges exclusively to the head and members of the special mission and members of its staff unless, owing to the nature of the work they will be doing (involving travel) or by prior arrangement, the presence of family members in the territory of the receiving State is ruled out in advance. Consequently, unless the restriction is agreed upon or notified in advance—and such cases are exceptional—the legal rule is that the head of the special mission, its members and its staff may be accompanied by members of their families.

(3) The Special Rapporteur has not undertaken the task of determining what persons are covered by the expression "members of the family". At both of the Vienna Conferences (in 1961 and 1963), attempts to enumerate these persons ended in failure. His personal view is that only the closest relatives should be counted among the members of the family, but in the case of temporary residence he does not consider it important that the relative concerned should be a regular member of the household of the person he or she is accompanying. A married daughter often accompanies her father to look after his health.

(4) Restrictions may be general (applying to all members and staff of the mission), individual (excepting certain persons who usually belong to the family of the head of the mission), or applicable to all but a specified number of family members (usually the wife or one member of the family); they may apply to certain periods of the special mission's visit (during its work in the field) or to access to certain parts of the territory (it is usually considered that a general permit has been given to members of the family, authorizing them to enter prohibited or military zones which the special mission visits in the performance of its task). Even if there are restrictions, family members may still be able to be present in the territory in question on

other grounds, but they cannot then claim *ex jure* any facilities, privileges or immunities.

(5) There has been some debate, in practice, about whether such restrictions are a breach of courtesy or even an infringement of the rights of the special mission, by analogy with the provisions of the Convention on the Privileges and Immunities of the United Nations,[46] which provides that family members enjoy the same privileges and immunities as the representatives of States whom they are accompanying. It is difficult, however, to base this right on an analogy, because of the circumstances which may arise in bilateral relations. In many cases, States cannot provide for family members accommodation, other facilities and means of transport when the special mission is travelling in the field, and so forth. Nevertheless, it would be discourteous to deny such persons entry into the territory of a country if the regulations generally applied in that country to aliens allow free entry. Where this is so, however, such persons, if there are restrictions, cannot claim more extensive rights than are accorded to all aliens under the general regulations.

Article 32.—Status of service staff and personal servants

1. Members of the service staff of the special mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and exemption from the social security provisions of the receiving State.

2. Personal servants of the head, members and members of the staff of the special mission may be received in that capacity in the territory of the receiving State, provided that they are not subject to any restrictions in this connexion as a result of decisions, prior notifications or measures by the receiving State.

3. If personal servants are admitted to the territory of the receiving State and are not nationals of that State or permanently domiciled in its territory, they shall be exempt from payment of dues and taxes on the emoluments they receive by reason of their employment.

4. The receiving State shall have the right to decide whether, and to what extent, personal servants shall enjoy privileges and immunities. However, the receiving State must exercise its jurisdiction over such persons in such a manner as not to interfere unduly with the performance of the functions of the special mission.

Commentary

(1) As regards the members of the service staff of the special mission, the Special Rapporteur has taken the view that these persons, in view of their status and the scope of their privileges and immunities, should be distinguished from family members, whose legal status is dealt with in the preceding article. In the first place, this course is necessary because the scope of the privileges and immunities granted to the service staff of the special mission is very limited. They are granted only the minor functional immunity, exemption from dues and taxes on their emoluments and exemption from the compulsory application of the receiving State's social security provisions. Secondly, courtesy towards these persons demands that they should be dealt with separately and not at the end of the article governing the status of members of the families of the other (higher grade) staff of the special mission. This is all the more important from the standpoint of courtesy towards the members of the service staff as no privileges and immunities are granted to members of their families. For this reason, it is logical, in the Special Rapporteur's view, to abandon the fictitious association between the two classes which was created in the provisions of article 37 of the Vienna Convention on Diplomatic Relations. This question must be dealt with in a separate article.

(2) Notwithstanding the remarks in paragraph (1) of this commentary, paragraph 1 of the draft article merely reproduces in substance the text of article 37, paragraph 3, of the Vienna Convention on Diplomatic Relations. The Special Rapporteur is convinced that such a provision also meets the needs of special missions and reflects the opinion of the members of the Commission that proper bounds must be set to the extent of the immunities, in order that their scope should not make excessive inroads on the rights of the sovereign State in whose territory the special mission is performing its task.

(3) For paragraphs 2, 3 and 4 of the draft article the Special Rapporteur has taken as his starting-point the idea expressed in article 37, paragraph 4, of the Vienna Convention on Diplomatic Relations, but the formulation has been changed to conform with the basic idea that the receiving State is not required to admit such persons to its territory. The reasons mentioned in connexion with the article on "Status of family members" apply in this case also.

(4) In 1960 the International Law Commission took as its starting-point the idea that the head, members and members of the staff of the special mission should be allowed to bring with them persons of this kind, who in many cases might be essential to their personal comfort or health, or even to the regular performance of the special mission's functions. There is some logic in this reasoning, and more attention should perhaps be given to this notion than has been done by the Special Rapporteur in his proposed article. This is a point to be decided by the Commission.

(5) In practice, however, the question arises whether the special mission is entitled *de jure* to bring such persons with it. As mentioned above, the Special Rapporteur considers that a decision on this point is within the discretionary power of the receiving State, which may therefore impose restrictions. However where there are no such restrictions or where the receiving State grants permission, the question arises, in practice, whether the privileges and immunities extend also to personal servants. There are no special rules on this subject. In 1960 the International Law Commission favoured the notion that the rules relating to permanent diplomatic missions apply in this case also. Thus, such persons are entitled only to immunity from

[46] United Nations, *Treaty Series*, vol. 1, p. 15; text also in United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations* (ST/LEG/SER.B/10), United Nations publication, Sales No.: 60.V.2, p. 184.

taxation, and then solely in respect of the remuneration they receive for their services; in all other respects, they are in the hands of the receiving State.

(6) The Special Rapporteur is of the opinion that these persons should also be guaranteed minor immunity from criminal jurisdiction in respect of acts performed in the course of the duties they normally carry out on the orders of their employers, e.g., in ejecting an undesirable guest from a protected residence with the use of sufficient force to overcome whatever resistance may be offered.

(7) The Special Rapporteur has considered it unnecessary to retain article 37, paragraphs 2 and 3, of the Vienna Convention on Diplomatic Relations, since the subject matter is already covered by the fact that no distinction has been made between the diplomatic staff of the special mission and the administrative and technical staff, identical treatment being given to all staff members in every article where mention is made of the staff of the special mission. This applies also to the service staff of the special mission, which is often of exceptional importance to the functioning of the special mission (e.g., drivers, personnel handling equipment, etc.).

Article 33.—Privileges and immunities of nationals of the receiving State and of persons permanently resident in the territory of the receiving State

1. Nationals of the receiving State and persons permanently resident in its territory who are admitted by the receiving State as the head, as members or as members of the staff of the special mission shall enjoy in the receiving State only immunities from jurisdiction, and inviolability, in respect of official acts performed in the exercise of the functions of the special mission.

2. Certain other privileges and immunities may also be granted to such persons by mutual agreement or by a decision of the receiving State.

3. The receiving State shall itself determine the nature and extent of the privileges and immunities granted to any personal servants of the head, the members and the members of the staff of the special mission who are its own nationals or are permanently resident in its territory.

4. Jurisdiction over the persons mentioned in this article must in all cases be exercised by the receiving State in such a manner as not to interfere unduly with the performance of the functions of the special mission.

Commentary

(1) This article is based on article 38 of the Vienna Convention on Diplomatic Relations, but the texts are not identical. The Special Rapporteur has taken as his starting-point the idea that the receiving State is not obliged to admit, as head, member or member of the staff of the special mission, its own nationals or persons permanently domiciled in its own territory. This idea has been set forth in this draft in the article entitled "Nationality of the head and the members of the special mission and of members of its staff", adopted as article 14 at the Commission's sixteenth session. [47]

(2) The International Law Commission, in taking a decision on this point in 1960, took the view that, in this case also, the rules relating to permanent diplomatic missions ought to apply in their entirety. In practice, however, there are other opinions on this question; it is maintained, in particular, that persons whose duties with the special mission do not place them in the category of senior (diplomatic, administrative and technical) staff should not, if they are nationals of the receiving State or are permanently domiciled in its territory, enjoy any privilege or immunity as of right, but only at the discretion of the receiving State. The Special Rapporteur believes that any person belonging, in whatever capacity, to the special mission should enjoy such immunities from the jurisdiction of the receiving State as relate to official acts performed in the exercise of the functions of the special mission, and also personal inviolability. Otherwise the very freedom of operation of the special mission would be placed in jeopardy.

(3) The difference between the article entitled "Nationality of the head and the members of the special mission and of members of its staff", adopted as article 14 at the Commission's sixteenth session, and the present article is that, in the latter, persons permanently domiciled in the territory of the receiving State are treated in precisely the same manner as nationals of the receiving State.

(4) During the discussion in the Commission and the preparation of article 14, the Commission did not adopt the Special Rapporteur's view that nationals of the receiving State and persons permanently domiciled in its territory should be treated in identical fashion. In taking that decision, the Commission based itself on the fact that article 8 of the Vienna Convention on Diplomatic Relations had not identified permanent residents of the receiving State with nationals of that State. However, in regard to the enjoyment of privileges and immunities, the Vienna Convention on Diplomatic Relations treats these two groups in identical fashion in article 38. On the strength of that fact, the Special Rapporteur considers that the same course should be adopted in the present article. He accepts the argument of the majority in the Commission that the rules on special missions should not worsen the status of the staff of special missions and should not limit it to any greater extent than was done in the provisions of the Vienna Convention on Diplomatic Relations. However, it was also argued in the Commission that in settling the status of special missions the Commission should take care not to establish any further limitations on the sovereignty of receiving States. The Special Rapporteur considers that it would not be logical for certain members of special missions or of their staffs to be favoured to the detriment of the interests of the receiving State. One such detriment undoubtedly consists in granting privileges and immunities to persons permanently resident in the receiving State by reason of the fact that they temporarily form part of the special mission of a foreign State. In the discussions at the two Vienna Conferences (1961 and 1963) it was pointed out that foreign nationals permanently resident in national territory were generally a source of serious embarrassment. The Special Rapporteur considers that this is one of those cases where expression should be given to the idea, voiced during the general debate at the

[47] *Yearbook of the International Law Commission, 1964*, vol. II, p. 224.

Commission's sixteenth session, that consideration ought to be shown for the susceptibilities of receiving States and that the guarantee of facilities, privileges and immunities to persons belonging to special missions should be subject to reasonable limitations.

(5) In the light of constant practice, the Special Rapporteur has made it clear that the privileges and immunities of the persons mentioned in this article may be expanded, not only by a decision of the receiving State, but also by a mutual international agreement between the States concerned. Such agreements frequently provide guarantees of this kind, according to the nature of the special mission's task.

(6) The Special Rapporteur lays particular stress on his view that it is better that this question should be settled by mutual agreements rather than that general international rules should be laid down on the subject. He is convinced that States would be more affected if general rules were proposed for expanding the privileges and immunities of the persons mentioned in this article. It is also much better from the practical point of view that this question should be settled by mutual agreements, for in that case the States are able to judge for themselves how far it is possible to make concessions in the light of the specific circumstances. These agreements need not even be formal ones, but might be made *ad hoc* without formality, as happens in practice.

Article 34.—Duration of privileges and immunities

1. The head and members of the special mission, and the members of its staff and members of their families, shall enjoy facilities, privileges and immunities in the territory of the receiving State from the moment when they enter the territory of the receiving State for the purpose of performing the tasks of the special mission or, if they are already in its territory, from the moment when their appointment as members of the special mission is notified to the Ministry of Foreign Affairs.

2. The enjoyment of facilities, privileges and immunities shall cease at the moment when they leave the territory of the receiving State, upon the cessation of their functions with the special mission or upon the cessation of the activities of the special mission (article 12 of these rules).

Commentary

This article merely reproduces in substance the language of article 39, paragraphs 1 and 2, of the Vienna Convention on Diplomatic Relations. In the present draft the subject matter of the other two paragraphs (3 and 4) of the said article 39 is dealt with in a separate article entitled "Death of the head or of a member of the special mission or of a member of its staff", which follows immediately after the present article. The Special Rapporteur therefore considers that no further commentary on the present article is necessary, since the Commission must base itself on the same reasons as determined the drafting and adoption of article 39 of the Vienna Convention on Diplomatic Relations.

Article 35.—Death of the head or of a member of the special mission or of a member of its staff

1. In the event of the death of the head or of a member of the special mission or of a member of its staff who is not a national of or permanently resident in the receiving State, the receiving State shall be obliged to permit the removal of his remains to the sending State or decent burial in its own territory, at the option of the family or of the representative of the sending State. It shall also facilitate the collection of the movable effects of the deceased, and shall deliver them to the representative of the family or of the sending State, permitting them to be exported without hindrance.

2. This provision shall apply also in the event of the death of a member of the family of the head of the special mission, of one of its members, or of a member of its staff, who has been allowed to accompany the person in question to the territory of the receiving State.

Commentary

This article merely reproduces the ideas expressed in paragraphs 3 and 4 of article 39 of the Vienna Convention on Diplomatic Relations and contains no more than is needed in the case of special missions, which are not of the same nature as permanent diplomatic missions.

Article 36.—Enjoyment of facilities, privileges and immunities while in transit through the territory of a third State

1. If the head or a member of the special mission or a member of its staff passes through or is in transit in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to the place where he is to perform the functions assigned to the special mission or when returning from such place to his own country, the third State shall accord him such inviolability and immunities as may be required for his unhindered transit through its territory. The same shall apply in the case of family members who accompany the head or a member of the special mission, or a member of its staff.

2. During such transit, such persons shall enjoy the right to inviolability of official correspondence and of other communications in transit.

3. The third State shall be bound to comply with these obligations only if it has been informed in advance, either in the visa application or by notification, of the purpose of the special mission, and has raised no objection to such transit.

4. Subject to the provisions of the preceding paragraph, the State shall also accord the necessary guarantees and immunities to the courier of the special mission and to the bag of the special mission in which correspondence and other official communications in transit are carried, in either direction, for the purpose of maintaining contact between the special mission and the Government of the sending State.

5. All the provisions set forth above shall also apply to the persons mentioned in paragraph 1 of this article, to the courier of the special mission and to the bag of the special

mission if their presence in the territory of the third State is due to *force majeure*.

Commentary

(1) The above text corresponds to that of article 40 of the Vienna Convention on Diplomatic Relations. The difference is that whereas facilities, privileges and immunities must be granted to the head and the staff of the permanent diplomatic mission in all circumstances, in the case of special missions the duty of the third State is restricted entirely to cases where it does not object to the transit through its own territory of the entire special mission.

(2) One point in dispute is whether the third State has the right to request information concerning the task of the special mission to which it grants free transit through its territory. It is noted that the sending State often gives no information concerning the true purpose of the task and that the third State should not interfere in the relations between other States, as it might be doing if it considered itself entitled to evaluate the special mission's task.

Article 37.—Professional activity

The head and members of the special mission and the members of its staff shall not, during the term of the special mission, practice for personal profit any professional or commercial activity in the receiving State, and they may not do so for the profit of the sending State unless the receiving State has given its prior consent.

Commentary

(1) This provision corresponds to the rule laid down in article 42 of the Vienna Convention on Diplomatic Relations. It differs from that rule in requiring the prior consent of the receiving State even in the case of professional or commercial activity practised for the profit of the sending State; for special missions very often take advantage of their presence in the territory of the other State to transact certain business for the profit of their own State, without the receiving State's having been informed in advance.

(2) There is no merit in the argument that permanent diplomatic missions do not ask for prior consent and that therefore special missions do not need prior consent either. Permanent diplomatic missions and their staffs operate within more or less established limits, and the institution of *persona non grata* is available as a sanction against them. Special missions are in the territory of the receiving State only temporarily and, consequently, this sanction (although a provision permitting the receiving State to declare someone *persona non grata* was adopted by the Commission at its sixteenth session—see article 4 of the rules adopted)[48] is quite ineffectual in their case, since the head and members of the special mission and the members of its staff are ready at any moment to leave the receiving State. It is known, furthermore, that certain States attach to special missions persons who have a special task unconnected with that of the special mission; such persons must realize beforehand that they are liable to removal from the territory of the receiving State if that State objects to this practice, which is in fact an abuse of their position with the special mission.

Article 38.—Obligation to respect the laws and regulations of the receiving State

1. Without prejudice to their privileges and immunities, it is the duty of all persons belonging to special missions and enjoying these privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of the receiving State.

2. The special missions of the sending State shall be requested to conduct all the official business entrusted to them by the sending State with the organ, delegation or representative of the receiving State which has been designated in the mutual agreement on the acceptance of the special mission or to which they have been referred by the Ministry of Foreign Affairs of the receiving State.

3. Special missions may not, as a general rule, communicate with organs of the receiving State other than those specified in the preceding paragraph, but it is the duty of the receiving State to designate the liaison organ or officer through whom the special mission may, if necessary, make contact with other organs of the receiving State.

4. The premises used by the special mission must not be used for purposes other than those which are necessary for the exercise of the functions and for the performance of the task of the special mission.

Commentary

(1) This article corresponds in substance to the provisions of article 41 of the Vienna Convention on Diplomatic Relations. Some small changes have been made in the light of practice and of the nature of special missions.

(2) The provision proposed as paragraph 1 of this article corresponds entirely to the provisions of paragraph 1 of article 41 of the Vienna Convention on Diplomatic Relations and of article 55 of the Vienna Convention on Consular Relations. It is at present a standard rule of international law. The Special Rapporteur considers, furthermore, that this rule should be amplified by a proviso stating that the internal laws and regulations of the receiving State are not mandatory for the organs of the sending State if they are contrary to international law or at variance with the contractual rules which exist between the States. Such a proviso was discussed at both the Vienna Conferences (1961 and 1963) but was not inserted in the relevant articles, for it was presumed that as a general rule the receiving State would observe its general international obligations and the duties arising out of international agreements. In addition, it was pointed out that it would be undesirable to refer the diplomatic or consular organs to the standard provision and that in each specific case they had the right to enter into discussions with the Government of the receiving State about the conformity of its internal law with the rules of international law. Such discussions and differences are not out of the question but represent disputes which should be handled at a higher level. In keeping with this principle, the Special Rapporteur has adopted

[48] *Yearbook of the International Law Commission, 1964*, vol. II, p. 213.

this rule for special missions as well, but has omitted the proviso mentioned above.

(3) The provision in paragraph 2 of the present draft article is based on paragraph 2 of article 41 of the Vienna Convention on Diplomatic Relations. No such provision appears in article 55 of the Vienna Convention on Consular Relations for the simple reason that consuls are allowed in principle to communicate direct with all the organs of the receiving State, as is required by the actual nature of their business. Consuls are not confined solely to communication with the central authorities of the receiving State. They may, without the intervention of the central organs, communicate with all the organs with which they have dealings in the performance of their tasks. Special missions are in a special position. As a general rule, they communicate with the Ministry of Foreign Affairs of the receiving State, but frequently the nature of their tasks makes it necessary for them to communicate direct with the competent special organs of the receiving State in regard to the business entrusted to them. These organs are often but not always local technical organs. It is also the practice for the receiving State to designate a special delegation or representative who establishes contact with the special mission of the sending State. This is generally provided for in the mutual agreement between the States concerned, or else the Ministry of Foreign Affairs of the receiving State informs the organs of the sending State with which organ or organs the special mission should get in touch. A partial solution to this question has already been provided in the commentary on article 11 of these rules.[49] Consequently, the text proposed for paragraph 2 is merely an adaptation of article 41, paragraph 2, of the Vienna Convention on Diplomatic Relations.

(4) Although the range of organs of the receiving State with which the special mission may establish contact in the conduct of its business has been widened in paragraph 2 of the proposed text, the resulting conditions are not those which apply to consuls. Consuls are allowed in principle to communicate, within the limits of their competence, with all organs of the receiving State. Special missions, on the other hand, may communicate only with the organs which have been specified in the agreement or to which they are referred by the Ministry of Foreign Affairs of the receiving State. For this reason, it was necessary to include the provision of paragraph 3 in the draft and to stress, firstly, that in all probability special missions need to communicate also with other organs in performing their task and, secondly, that they are not allowed to make contact with these other organs of the receiving State direct and of their own accord but must for this purpose either approach the Ministry of Foreign Affairs of the receiving State or communicate with those organs through the particular organ to which the receiving State refers them. In most cases the receiving State appoints one of these organs as liaison officer through whom such communication is conducted. In practice this liaison officer is a very important link in such communication, and his action in establishing contact is regarded as expressing the consent of the Government of the receiving State to the special mission's approaching the other organs. But it is also considered that the liaison officer is placed at the special mission's disposal and has the duty to establish such contact between the special mission and the other organs of the receiving State whenever the performance of the special mission's task so requires. The current view is that the liaison officer is not the compulsory intermediary for routine contacts and that it is not obligatory to use his services in such cases (though some States still insist on this even today).

(5) The provision proposed for paragraph 4 of this article corresponds to the provisions of paragraph 3 of article 41 of the Vienna Convention on Diplomatic Relations and paragraphs 2 and 3 of article 55 of the Vienna Convention on Consular Relations. The Special Rapporteur was convinced that it was sufficient to draft this provision in very succinct terms, so long as it satisfied the needs of the circumstances in which the functions of special missions are exercised. The role purpose of this provision in the proposed text is to remind special missions of their duty to ensure that what has been given to them for the performance of their tasks is not used for purposes other than those for which they have obtained, with or without the receiving State's assistance, the use of the premises. The lending, letting or sub-letting of these premises for use for other purposes, or their use for other purposes by the special mission itself, must be regarded as a malpractice.

Article 39.—Non-discrimination

1. In the application of the provisions of the present articles, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(*a*) Where the receiving State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its special mission in the sending State;

(*b*) Where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present articles.

Commentary

This provision corresponds entirely to article 47 of the Vienna Convention on Diplomatic Relations and to article 72 of the Vienna Convention on Consular Relations, which two articles are identical. In the Special Rapporteur's opinion, these rules now represent the standard provisions concerning the application of international law.

Article 40.—Relationship between the present articles and other international agreements

1. The provisions of the present articles shall not affect other international agreements in force as between States parties to those agreements.

2. Nothing in the present articles shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.

[49] *Ibid.*, p. 221.

Commentary

(1) This draft article is based on the terms of article 73 of the Vienna Convention on Consular Relations. There is no comparable provision in the Vienna Convention on Diplomatic Relations. At the Vienna Conference on Consular Relations (1963), article 73 was adopted to explain the Conference's opinion that the Vienna Convention on Consular Relations was a body of binding rules of law of general scope permitting States to conclude, within their framework, supplementary agreements, but that the provisions of that Convention were not rules of *jus dispositivum*.

(2) The Special Rapporteur is convinced that these articles, which should constitute the rules of law concerning the status of special missions, should likewise possess the quality and legal weight of a treaty of general interest. For this reason, he proceeds from the premise that the rules to be embodied in these articles should reflect the standard of public international law in this respect and that, hence, States acceding thereto cannot treat these rules as they see fit but rather than this instrument should be a law-making treaty.

(3) The Special Rapporteur shares the opinion of those of the Commission's members who consider that, except in so far as the provisions of the articles themselves allow for possible departures from these rules by mutual agreement among the States parties, these rules are not in principle rules of *jus dispositivum*. He considers that the States which accept these rules adopt them as general principles of international law and that in principle they cannot contract out of these rules.

(4) Nevertheless, even though they are general rules, fundamental rules of law, they should not debar States from elaborating, supplementing or adjusting them—in conformity with the terms of the rules—in the light of the demands of their international relations. States should be left free to supplement and adjust these rules, within and outside their framework, by international agreements, but not in a manner conflicting with the rules.

(5) On the basis of the foregoing, the Special Rapporteur proposes that the Commission should in principle adopt the view that the rules relating to the status of special missions contained in the future articles on this topic are, as a general rule, binding, subject to a certain elasticity as regards the limits laid down in article 73 of the Vienna Convention on Consular Relations. This means that these provisions, although general and binding, do not rule out the possibility of:

(*a*) Derogating therefrom, in cases where the rules themselves provide that they are applicable unless the States settle the particular question differently by treaty (e.g. article 3; article 6, paragraph 3; article 9; article 13, paragraph 1, of the articles on special missions as already adopted). In such a case, the rules in the articles are residual rules.

(*b*) Supplementing or adapting the provisions by bilateral or multilateral agreement. In such a case, although the rules in these articles are strict rules of law, they are not the only source for determining the relations between the States in the matter of the legal status of special missions. States are free to supplement these rules by other rules, on the condition, however, that the other rules must be in conformity with these strict rules of law. This means that, if the present articles do not refer to the possibility of derogating from a residual rule by international treaty, all the rules contained in the articles on the legal status of special missions are elastic, in the sense that the States acceding to these articles should regard them as binding rules of international law but that they may supplement or adapt them without touching on their fundamental substance, in other words the essential provisions.

(6) Consequently, if the Special Rapporteur's view as outlined in paragraph (5) is adopted as reflecting the purport of the proposed text, the articles would consist of three kinds of provisions:

(*a*) Binding provisions—and, as a general rule, all are binding;

(*b*) Provisions replacing the rules in these articles in that the articles themselves permit them (supplemental rules), in cases where the parties are authorized by the terms of the articles to lay down different rules by mutual agreement; and

(*c*) Additional rules, in cases where the parties by supplementary agreements, extend, supplement or adapt the existing rules, within the framework of the existing general rules, without touching on their essence, with the consequence that in such cases there would be the general rules and additional rules not conflicting with the general rules.

Final provisions

The International Law Commission has established the practice of not inserting final provisions in the draft rules which it has prepared in the past. It has taken the view that these provisions are of a dual nature, partly technical and partly political.

So far as the political provisions are concerned, it has been the Commission's opinion that the States which adopt the proposed rules either at diplomatic conferences or within international organizations reserved their right to settle the political questions forming the subject of the final provisions, for these affect political relations among the States. The Special Rapporteur is not convinced that this practice is always correct or justified. Often, certain questions which are not political but are rather legal in nature are settled as though they were political questions, as happened at the two Vienna Conferences (1961 and 1963) with regard to the right of States to accede to the rules of law there drafted and adopted.

So far as the technical rules are concerned, it is held that these should be prepared and proposed to States by the Secretariat of the United Nations, with a view to uniformity. The Special Rapporteur recognizes that in principle this practice is correct and sound, even though some of the drafts proposed by the Commission may, by reason of their nature, call for specific final provisions inserted in the body of the rules actually proposed.

Nevertheless, in conformity with the practice prevailing hitherto, the Special Rapporteur has refrained from drafting any final provisions.

Draft provisions concerning so-called high-level special missions

At its sixteenth session the International Law Commission decided to ask its Special Rapporteur to submit at its succeeding session articles dealing with the legal status of so-called high-level special missions, in particular special missions led by Heads of States, Heads of Governments, Ministers for Foreign Affairs and Cabinet Ministers.

Despite all his efforts to establish what are the rules specially applicable to missions of this kind, the Special Rapporteur has not succeeded in discovering them either in the practice or in the literature. The only rules he has found are those relating to the treatment of these distinguished persons in their own State, not only as regards the courtesy accorded to them but also as regards the scope of the privileges and immunities. Accordingly, the Special Rapporteur is prepared to propose the following rules:

Rule 1

Except as otherwise provided hereinafter, the rules contained in the foregoing articles are likewise applicable to special missions led by Heads of State, Heads of Government, Ministers for Foreign Affairs and Cabinet Ministers.

Rule 2

A special mission which is led by a Head of State shall be governed by the provisions of the said articles, subject to the following exceptions:

(*a*) In giving its approval to the special mission being led by the Head of State, the receiving State admits in advance that such a mission may perform the tasks to be agreed upon by the two States concerned in the course of their contacts (exception to article 2 as adopted);

(*b*) The Head of State, as head of the special mission, cannot be declared *persona non grata* or not acceptable (exception to article 4);

(*c*) The members of the staff of a special mission which is led by a Head of State may also be members of his personal suite. Such persons shall be treated as diplomatic staff (supplement to article 6);

(*d*) In the case of the simultaneous presence of several special missions, Heads of State who lead special missions shall have precedence over the other heads of special missions who are not heads of State. Nevertheless, in the case of the simultaneous presence of several special missions led by Heads of State, precedence shall be determined according to the alphabetical order of the names of the States (supplement to article 9);

(*e*) In cases where a Head of State acts as head of a special mission, the function of the mission is deemed to commence at the time when he arrives in the territory of the receiving State (special rule replacing article 11);

(*f*) The function of a special mission which is led by a Head of State comes to an end at the time when he leaves the territory of the receiving State, but the special mission may, if the sending State and the receiving State so agree, continue in being after his departure; in this case, however, the level of the special mission changes, and its level shall be determined according to the rank of the person who becomes head of the special mission (supplement to article 12);

(*g*) A special mission which is led by a Head of State shall have the right to display, in addition to the flag and emblem of the sending State, the flag and emblem peculiar to the Head of State under the law of the sending State (supplement to article 15);

(*h*) The receiving State has the duty to provide a Head of State who leads a special mission with accommodation that is suitable and worthy of him;

(*i*) The freedom of movement of a Head of State who leads a special mission is limited in the territory of the receiving State in that an agreement on this matter is necessary with the receiving State (guarantee of the personal safety of the Head of State);

(*j*) A Head of State who leads a special mission enjoys complete inviolability as to his person, property and residence and full immunity from the jurisdiction of the receiving State;

(*k*) A Head of State who leads a special mission enjoys full Customs exemption and exemption from Customs inspection by an agency of the receiving State;

(*l*) A Head of State who leads a special mission has the right to bring with him members of his family and persons attached to his personal service, who shall, for so long as they form part of his suite, be entitled to the same immunities as the Head of State;

(*m*) On his arrival in the territory of the receiving State and on his departure, a Head of State who leads a special mission shall receive all the honours due to him as Head of State according to the rules of international law;

(*n*) If a Head of State who leads a special mission should die in the territory of the receiving State, then the receiving State has the duty to make arrangements in conformity with the rules of protocol for the transport of the body or for burial in its territory.

Rule 3

A special mission which is led by a Head of Government shall be governed by the provisions of the said articles, subject to the following exceptions:

(*a*) In giving its approval to the special mission being led by the Head of Government, the receiving State admits in advance that such a mission may perform the tasks to be agreed upon by the two States concerned in the course of their contacts (exception to article 2 as adopted);

(*b*) The Head of Government, as head of the special mission, cannot be declared *persona non grata* or not acceptable (exception to article 4);

(*c*) In cases where a Head of Government acts as head of a special mission, the function of the mission is

deemed to commence at the time when he arrives in the territory of the receiving State (special rule replacing article 11);

(*d*) The function of a special mission which is led by a Head of Government comes to an end at the time when he leaves the territory of the receiving State, but the mission may, if the sending State and the receiving State so agree, continue in being after his departure; in this case, however, the level of the special mission changes, and its level shall be determined according to the rank of the person who becomes head of the special mission (supplement to article 12);

(*e*) A Head of Government who leads a special mission enjoys complete inviolability as to his person, property and residence and full immunity from the jurisdiction of the receiving State;

(*f*) A Head of Government who leads a special mission enjoys full Customs exemption and exemption from Customs inspection by an agency of the receiving State;

(*g*) A Head of Government who leads a special mission has the right to bring with him members of his family and persons attached to his personal service, who shall, for so long as they form part of his suite, be entitled to the same immunities as the Head of Government.

Rule 4

A special mission which is led by a Minister for Foreign Affairs shall be governed by the provisions of the said articles, subject to the following exceptions:

(*a*) In giving its approval to the special mission being led by the Minister for Foreign Affairs, the receiving State admits in advance that such a mission may perform the tasks to be agreed upon by the two States concerned in the course of their contacts (exception to article 2 as adopted);

(*b*) The Minister for Foreign Affairs, as head of the special mission, cannot be declared *persona non grata* or not acceptable (exception to article 4);

(*c*) The members of the staff of a special mission which is led by a Minister for Foreign Affairs may also be members of his personal suite. Such persons shall be treated as diplomatic staff (supplement to article 6);

(*d*) In cases where a Minister for Foreign Affairs acts as head of a special mission, the function of the mission is deemed to commence at the time when he arrives in the territory of the receiving State (special rule replacing article 11);

(*e*) The function of a special mission which is led by a Minister for Foreign Affairs comes to an end at the time when he leaves the territory of the receiving State, but the mission may, if the sending State and the receiving State so agree, continue in being after his departure; in this case, however, the level of the mission changes, and its level shall be determined according to the rank of the person who becomes head of the special mission (supplement to article 12);

(*f*) A Minister for Foreign Affairs who leads a special mission enjoys complete inviolability as to his person, property and residence and full immunity from the jurisdiction of the receiving State;

(*g*) A Minister for Foreign Affairs who leads a special mission enjoys full Customs exemption and exemption from Customs inspection by an agency of the receiving State;

(*h*) A Minister for Foreign Affairs who leads a special mission has the right to bring with him members of his family and persons attached to his personal service, who shall, for so long as they form part of his suite, be entitled to the same immunities as the Minister for Foreign Affairs.

Rule 5

A special mission which is led by a Cabinet Minister other than the Minister for Foreign Affairs shall be governed by the provisions of the said articles, subject to the following exceptions:

(*a*) The members of the staff of a special mission which is led by a Cabinet Minister may also be members of his personal suite. Such persons shall be treated as diplomatic staff (supplement to article 6);

(*b*) In cases where a Cabinet Minister acts as head of a special mission, the function of the mission is deemed to commence at the time when he arrives in the territory of the receiving State (special rule replacing article 11);

(*c*) The function of a special mission which is led by a Cabinet Minister comes to an end at the time when he leaves the territory of the receiving State, but the special mission may, if the sending State and the receiving State so agree, continue in being after his departure; in this case, however, the level of the special mission changes and its level shall be determined according to the rank of the person who becomes head of the special mission (supplement to article 12);

(*d*) A Cabinet Minister who leads a special mission enjoys complete inviolability as to his person, property and residence and full immunity from the jurisdiction of the receiving State;

(*e*) A Cabinet Minister who leads a special mission enjoys full Customs exemption and exemption from Customs inspection by an agency of the receiving State;

(*f*) A Cabinet Minister who leads a special mission has the right to bring with him members of his family and persons attached to his personal service, who shall, for so long as they form part of his suite, be entitled to the same immunities as the Cabinet Minister.

Rule 6

The sending State and the receiving State may, by mutual agreement, determine more particularly the status of the special missions referred to in rule 1 and, especially, may make provision for more favourable treatment for special missions at this level.

The Special Rapporteur is putting forward the foregoing rules as a suggestion only, in order that the Commission may express its opinion on the exceptions enumerated above. In the light of the Commission's decision he will submit a final proposal; he thinks he will be able to do so during the Commission's seventeenth session.