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Third report on Special Missions, by Mr. Milan Bartoš, Special Rapporteur

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SPECIAL MISSIONS

[Item 2 of the agenda]

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Third Report on Special Missions, by Mr. Milan Bartos, Special Rapporteur

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Introduction

1. At its seventeenth session (1965), the International Law Commission decided that it would review the articles on special missions provisionally adopted during its sixteenth and seventeenth sessions, after receiving the observations and comments of governments.¹

2. Some delegations commented during the discussion of the Commission's report by the General Assembly. Their comments were made at the 839th-852nd meetings of the Sixth Committee of the General Assembly, held between 29 September and 14 October 1965. During these discussions, certain delegations requested that their oral remarks should be considered as the comments of their respective countries on the Commission's draft, since the time available for formulating written comments was very short and their chancelleries were busy with other United Nations work. Although this is not the best way of formulating comments, the Special Rapporteur has taken their remarks into account.

¹ *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009, para. 47.

3. On the other hand, few States sent in their comments on the draft in writing. This prevented the Special Rapporteur from submitting his third report on special missions in good time, as he was expecting a greater number of observations from which he could draw wider experience and more useful suggestions. Up to 15 May 1966, the United Nations Secretariat had, indeed, received written comments from the following States only: Belgium, Czechoslovakia, Israel, Sweden, Upper Volta and Yugoslavia.² The Governments of Malawi and Nigeria have also considered the draft, but without making any concrete observations. The fact that only a small number of Governments have stated their views on the draft is rather discouraging, but in any case this cannot be taken to mean that the other Governments have no comments to make on the subject or on the solutions proposed in the draft.

² Later, the Secretariat also forwarded to the Special Rapporteur the observations of certain other Governments. They have not been included in this part of the report, but are dealt with in addendum 2.

4. In this report the Special Rapporteur has drawn attention to the opinions expressed during the discussion in the General Assembly, and to the comments by Governments which the United Nations Secretariat has made available to him.

5. In addition, the Commission asked the Special Rapporteur to draft and submit to it an introductory article on the use of terms in the draft, so as to make it possible to simplify and condense the text. The Special Rapporteur submits the article in this report, provisionally numbered article 0. In dealing with particular articles, he also makes drafting suggestions concerning the use of this introductory article, with a view to simplifying the text of the other articles. The Special Rapporteur considers, however, that this is a task for the Drafting Committee, rather than the plenary Commission. In his opinion, however, the Commission should take a decision in plenary on the introductory article as a synthesis of juridical concepts.

6. The Special Rapporteur has devoted a separate section of this report to the question whether special rules of law should or should not be drafted for so-called "high-level" special missions, whose heads hold high office in their States. The Commission stated that it would appreciate the opinion of Governments on this matter and hoped that their suggestions would be as specific as possible.³

7. Similarly, in this report the Special Rapporteur has not overlooked the fact that 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".⁴ Several Governments have expressed their views on this question and the Special Rapporteur has devoted a special section to it.

8. Lastly, the Special Rapporteur reminds the Commission that the delegations and Governments of various States have also propounded some other questions of principle relating to the draft articles, to which he has devoted special attention in his report.

CHAPTER I

History of the idea of defining rules relating to special missions⁵

9. At its tenth session, in 1958, the International Law Commission adopted a set of draft articles on diplomatic intercourse and immunities. The Commission observed,

³ *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009, para. 48.

⁴ *Yearbook of the International Law Commission, 1963*, vol. II, p. 225, para. 64.

⁵ This section is taken mainly from the report of the International Law Commission on the work of its sixteenth session, *Yearbook of the International Law Commission, 1964*, vol. II, pp. 208 *et seq.* The relevant text is reproduced because it contains information necessary to readers of the third report on special missions.

however, that the draft "deals only with permanent diplomatic 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".⁶ The Commission decided at its eleventh session (1959) to include the question of *ad hoc* diplomacy as a special topic on the agenda of its twelfth session (1960).⁷

10. Mr. A. E. F. Sandström was appointed Special Rapporteur. He submitted his report⁸ to the twelfth session, and on the basis of this report the Commission took decisions and drew up recommendations for the rules concerning special missions. The Commission's draft was very brief. It was based on the idea that the rules on diplomatic intercourse and immunities in general prepared by the Commission should on the whole be applied to special missions by analogy. The Commission expressed the opinion that this brief draft should be referred to the Conference on Diplomatic Intercourse and Immunities convened at Vienna in the spring of 1961. But the Commission stressed 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.⁹

11. At its 943rd plenary meeting on 12 December 1960, the United Nations General Assembly decided,¹⁰ 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 with the draft articles on diplomatic intercourse and immunities. The Vienna Conference placed this question on its agenda and appointed a special Sub-Committee.¹¹

12. 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.¹² For this reason the Sub-Committee

⁶ *Yearbook of the International Law Commission, 1958*, vol. II, p. 89, para. 51.

⁷ *Yearbook of the International Law Commission, 1959*, vol. II, p. 122, para. 43.

⁸ *Yearbook of the International Law Commission, 1960*, vol. II, document A/CN.4/129, pp. 108-115.

⁹ *Ibid.*, p. 179, document A/4425, para. 37.

¹⁰ Resolution 1504 (XV).

¹¹ 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, p. 157, para. 44.

¹² United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, document A/CONF.20/C.1/L.315, p. 45.

recommended that the Conference should refer this questions 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 Conference on Diplomatic Relations which was then drawn up. At a plenary meeting of the Vienna Conference on 10 April 1961, the Sub-Committee's recommendation was adopted.¹³

13. 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 1687 (XVI) in which the International Law Commission was requested to study the subject further and to report thereon to the General Assembly.

14. 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.¹⁴ The Commission requested the United Nations Secretariat to prepare a working paper¹⁵ 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 for its fifteenth session (1963).

15. During its fifteenth session, at the 712th meeting, the Commission appointed Mr. Milan Bartoš as Special Rapporteur for the topic of special missions.¹⁶

16. 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."¹⁷

17. 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:

¹³ *Ibid.*, document A/CONF.20/10/Add.1, resolution I, pp. 89-90.

¹⁴ *Yearbook of the International Law Commission, 1962*, vol. II, p. 192, para. 76.

¹⁵ See document A/CN.4/155, in *Yearbook of the International Law Commission, 1963*, vol. II, pp. 151-158.

¹⁶ *Yearbook of the International Law Commission, 1963*, vol. II, page 225, para. 65.

¹⁷ *Ibid.*, para. 64.

"With regard to the scope of the topic, the members agreed that the topic of special missions should also cover itinerant envoys, in accordance with its decision at its 1960 session.¹⁸ At that session the Commission had also decided not to deal with the privileges and immunities of delegates to congresses and conferences as part of the study of special missions, because the topic of diplomatic conferences was connected with that of relations between States and inter-governmental organizations. At the present session, the question was raised again, with particular reference to conferences convened by States. Most of the members expressed the opinion, 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."¹⁹

18. The Special Rapporteur submitted his report,²⁰ which was placed on the agenda for the Commission's sixteenth session.

19. The Commission considered the report twice. First, at the 723rd, 724th and 725th meetings, it engaged in a general discussion and gave the Special Rapporteur general instructions on continuing his study and submitting the rest of his report at the following session. Secondly, at the 757th, 758th, 760th and 768th-770th meetings, it examined a number of draft articles and adopted sixteen articles,²¹ 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.

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

21. The topic of special missions was placed on the agenda for the Commission's seventeenth session, at which the Special Rapporteur submitted his second report on the subject.²² The Commission considered that report at its 804th-809th, 817th, 819th and 820th meetings.

22. The Commission considered all the articles proposed in the Special Rapporteur's second report. It adopted twenty-eight articles of the draft,²³ which follow on from the sixteen articles adopted at the sixteenth session. The Commission requested that the General Assembly should consider all the articles adopted at the sixteenth and seventeenth sessions as a single draft.

¹⁸ *Yearbook of the International Law Commission, 1960*, vol. I, 565th meeting, para. 26.

¹⁹ *Yearbook of the International Law Commission, 1963*, vol. II, p. 225, para. 63.

²⁰ *Yearbook of the International Law Commission, 1964*, vol. II, p. 67, document A/CN.4/166.

²¹ *Op cit.*, p. 210.

²² *Yearbook of the International Law Commission, 1965*, vol. II, document A/CN.4/179.

²³ *Op cit.*, document A/6009.

23. In preparing the draft articles, the Commission sought to codify the modern rules of international law concerning special missions, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law.

24. In conformity with articles 16 and 21 of its Statute, the Commission decided to communicate its draft articles on special missions to Governments through the Secretary-General, inviting their comments. Governments were asked to submit their comments by 1 May 1966. This short time-limit was regarded as essential if the Commission was to finish its preparation of the final draft on special missions with its present membership.

25. The Commission decided to submit to the General Assembly and to the Governments of Member States, in addition to the draft articles in chapter II, section B of its report, certain other decisions, suggestions and observations set out in section C, on which the Commission requested any comments likely to facilitate its subsequent work.

26. The General Assembly discussed the draft and referred it to the Governments of Member States, inviting them to communicate their comments and suggestions. However, only a small number of States had sent in their comments by the opening of the eighteenth session of the International Law Commission.

CHAPTER II

General

1. *Nature of the provisions relating to special missions*

27. In the International Law Commission, the question was raised whether the provisions relating to special missions should be considered as mandatory rules of law or as residuary rules. The Commission took the view that there were, in fact, few rules on the subject which had the character of *jus cogens*, and tried to bring out in the wording of the articles that they were residuary rules which would apply unless the parties agreed otherwise.

28. The Swedish Government particularly stressed that point in its comments. It expressed its opinion on the question in the following terms:

“The question to what extent the articles of the draft should be peremptory or *jus cogens* was also discussed by the Swedish delegate on the occasion referred to above. He said in that respect:

‘My next point on the draft on special missions derives not from the report of the Commission, but from the second report by Professor Bartoš, from which—on page 9—it appears that States would be free to derogate from such articles only as expressly allow it. The others would be peremptory, *jus cogens*. In the draft articles submitted to us, some are found, indeed, which expressly allow States to derogate, e.g. article 3. However, article 15, which provides that a special mission shall have the right to display its flag and emblem on its premises, on the residence of its head of mission, and on its means of transport,

contains no clause expressly allowing two States to derogate from it by agreement in the case of some particular mission. Yet, it would be hard to see why they should be precluded from so doing. The same argument could be adduced with respect to several other articles. Indeed, I wonder if it would not be wiser to accept as basic presumption that States are free to derogate from the rules, by express agreement between themselves, unless the contrary appears.’²⁴

“The Swedish Government considers that as the sending of a special mission in each case depends on an agreement between the sending and the receiving States, it would be natural to let the two States decide not only on the sending and task of the mission but also, in the last resort, on the status of the mission. The status needed by a mission may vary according to the task it shall carry out and already from that point of view flexibility should be allowed. Furthermore: supposing that for some reason the receiving State would be willing to accord to a special mission only a very limited amount of privileges and supposing that the sending State in that case would prefer to accept such very limited privileges for its mission rather than not sending the mission at all, why should the States not be permitted to derogate from the regime laid down in the instrument which in due time may result from the draft? In other words: the ambition to provide, through peremptory rules, an effective status for special missions may result in no mission being sent at all. It seems that the sending and the receiving States could be trusted to regulate freely, if they so wish, the status and conditions of work to be accorded to the mission. The purpose of the draft regulation should rather be to provide subsidiary rules which could be applied whenever the sending and receiving States have omitted to settle the matter by agreement.”

29. The Special Rapporteur considers that this is a fundamental question on which the Commission must take a decision, since the final form of the whole draft will depend on how it is answered. He himself does not advocate the solution proposed by the Swedish Government, which is to adopt a general provision stipulating that all the rules relating to special missions are residuary rules. On the contrary, he is convinced that even at the present time there are binding customary rules of international law on the subject, and that it is for the Commission to specify the cases in which the provisions of the articles should be considered as residuary rules, from which the States concerned may derogate unless they have agreed otherwise.

2. *Distinction between the different kinds of special missions*

30. During the debates in the Sixth Committee of the General Assembly, the representatives of various States referred to the question of the different kinds of special missions. For example:

²⁴ This statement was made at the 844th meeting of the Sixth Committee of the General Assembly, the records of which are published in summary form.

The representative of Brazil said that:

"The Commission had already rejected the idea that a distinction must be made between missions of a political nature and technical missions. Political missions could have important technical aspects, just as technical missions could have a significant political character."²⁵

The representative of Czechoslovakia expressed the following opinion on the subject:

"In view of the constantly increasing number of special missions entrusted with tasks ranging from the highly political to the purely technical, it might be advisable to draw a clearer line between the kind of missions that fell within the draft articles and those that did not."²⁶

31. As the Special Rapporteur was not in a position to draw any reliable conclusion from that statement, he hoped to find one in the written comments submitted by the Czechoslovak Government. These comments contain the following passage:

"The Government of the Czechoslovak Socialist Republic shares the views expressed by a number of members of the International Law Commission and likewise contained in the report of the Special Rapporteur, namely that the term special missions covers a great number of State organs for international relations which are entrusted with tasks of the most diverse character. It also shares the view that the tasks and legal status of special missions (except delegations to international conferences and congresses as well as delegations and representatives of international organizations) should be regulated within the general codification of diplomatic law by one convention. At the same time, however, it is of the opinion that in view of the fundamental difference in the character of the individual special missions it would be necessary to differentiate their legal status according to the functions assumed by them with the agreement of the participating States. (To characterize the individual categories of special missions would be undoubtedly very difficult and moreover they might be outdated by the relatively rapid development.) Proceeding from this fact the Government of the Czechoslovak Socialist Republic is inclined to believe that in the case of special missions of a predominantly technical and administrative character privileges and immunities of more limited character emanating from the theory of functional necessity would correspond better to the state of international law and to the needs of States. Therefore, it suggests that it might be purposeful that the Commission when definitively formulating the draft convention should proceed e.g. from a division of special missions into at least two categories. The first category might include special missions of political character and the second one special missions of predominantly technical and administrative character. The formulation of provisions concerning special missions of political character should proceed

from the Vienna Convention on Diplomatic Relations. However, special missions of a predominantly technical and administrative character should be granted only such privileges and immunities as are necessary for expeditious and efficient performance of their tasks."

32. From that explanation the Special Rapporteur deduced that the Government of Czechoslovakia took the view that the differences in the character of special missions, according to their task, would justify different measures in regard to the granting of privileges and immunities, according to the theory of functional necessity.

33. The delegation of Mali also took the position that the nature of the special mission itself should be taken into account. On this point its representative said:

"...given the large number of missions and their varied nature, it would be wise to limit the application of the relevant rules to a clearly defined category of missions."²⁷

34. The delegation of Finland also expressed an opinion on this question. It criticized the Commission, on the ground that:

"...the Commission had failed to recognize that most special missions were purely technical and that such drastic exemptions were therefore unnecessary. It should seek to limit the scope of application of those articles, or, failing that, it should at least establish a clear distinction between different groups of special missions, and condense the articles as much as possible."²⁸

35. The Special Rapporteur feels bound to point out, with regard to this comment by the Finnish delegation, that the Commission was not unaware of the fact that most special missions are of a technical character, but that it nevertheless recognized that they also have a functional and a representative aspect, and that the facilities, privileges and immunities provided for in the draft articles should be accorded to them for the performance of their functions, having regard to their nature and task (draft article 17).

36. In order to allay the anxieties of certain Governments, however, the Special Rapporteur proposes that the Commission should insert in article 17 a paragraph 2, reading as follows:

2. The facilities, privileges and immunities provided for in Part II of these articles shall be granted to the extent required by these articles, unless the receiving State and the sending State agree otherwise.

3. *Question of introducing into the draft articles a provision prohibiting discrimination*

37. In his second report on special missions,²⁹ submitted to the International Law Commission at its seventeenth session, the Special Rapporteur included an article 39, entitled "Non-discrimination". His intention in doing so was to include in the draft articles on special missions

²⁷ *Ibid.*, 845th meeting, para. 21.

²⁸ *Ibid.*, 850th meeting, para. 3.

²⁹ *Yearbook of the International Law Commission, 1965*, vol. II, document A/CN.4/179.

²⁵ *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 840th meeting, para. 15.

²⁶ *Ibid.*, 843rd meeting, para. 17.

a provision corresponding to article 47 of the 1961 Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations. In paragraph 49 of its report on the work of its seventeenth session (1965)³⁰ the Commission recorded its decision not to accept that suggestion "on the ground that the nature and tasks of special missions are so diverse that in practice such missions have inevitably to be differentiated *inter se*".

38. The Governments of various States reacted to this passage in the Commission's report in different ways:

(a) In its comments, the Government of Yugoslavia stated that it

"considers as justified the proposal for the inclusion of a provision forbidding discrimination, as in article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations."

(b) The Belgian Government stated that it

"agrees with the Commission that no provision on non-discrimination should be included in the draft, as special missions are so diverse."

(c) The Swedish Government also dealt with the question in its written comments, and stated that

"The Swedish Government agrees with the stand taken by the Commission that a provision on non-discrimination would be out of place with respect to special missions."

39. As can be seen from the foregoing summary, no Government of any Member State except Yugoslavia expressed itself in favour of inserting a provision of this nature.

4. *Reciprocity in the application of the draft*

40. Although the Belgian Government stated that no provision on discrimination as between States in the application of the draft articles should be included in the draft, it none the less expressed the view in its written comments that

"there should be a provision on reciprocity in the application of this draft."

41. The Special Rapporteur is of the opinion that all provisions of conventions should be applied on the assumption that there is reciprocity, and that no special provisions requiring reciprocity should be included in the draft articles.

5. *Relationship with other international agreements*

42. In the second report on special missions which he submitted to the Commission, the Special Rapporteur proposed an article 40, containing a provision on the relationship between the articles on special missions and other international agreements; this article corresponds to article 73 of the Vienna Convention on Consular Relations (1963). At its seventeenth session in 1965, the Commission decided not to accept this proposal by the Special Rapporteur for the time being, and noted its decision in paragraph 50 of its report.

43. In its written comments, the Belgian Government stated its views on this question in the following terms:

"As to the question whether the draft should contain a provision on the relationship between it and other international agreements, two points should be singled out:

(a) if the status of special missions to conferences and congresses convened both by States and by international organizations is eventually covered by this draft convention, the convention should stipulate that it does not prejudice agreements relating to international organizations in so far as they regulate the problems contemplated in the draft;

(b) more generally, the Belgian Government has no objection to the inclusion in the draft of an article similar to article 73 of the Vienna Convention on Consular Relations."

44. The Government of Israel, in its comments, emphasized the importance of the matter, saying that:

"The question of the relationship between the articles on special missions and other international agreements is undoubtedly of great importance, and it is hoped that it will be given further consideration by the Commission in due course."

45. In its written comments, the Swedish Government expressed the following opinion:

"The question whether the draft 'should contain a provision on the relationship between the articles on special missions and other international agreements' is closely connected with the problem whether the articles should have a subsidiary dispositive character or whether some of them should be *jus cogens*. Whatever course the Commission decides to follow in this respect, the character of the articles should be clearly defined in the draft."

46. Although only three Governments have stated their views on this question, it is incumbent on the Commission to revert to it and take a final decision.

6. *Form of the instrument relating to special missions*

47. During its fifteenth session, at the 712th meeting, the International Law Commission expressed the opinion 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 on Diplomatic Relations, or should be embodied in a separate convention or put in any other appropriate form. The Commission decided to await the Special Rapporteur's recommendations on that subject.

48. In the course of the discussion by the Sixth Committee of the General Assembly of the reports of the International Law Commission on its sixteenth and seventeenth sessions, several delegations stated their views on this question. The representative of Brazil took the view that:

"...there was ground for hope that a text on special missions might be added by an international conference to the 1961 Vienna Convention on Diplomatic Rela-

³⁰ *Ibid.*, document A/6009.

tions and the 1963 Vienna Convention on Consular Relations.”³¹

49. The Special Rapporteur considers that this statement supports the drafting of a separate convention on special missions which would be organically linked with the two Vienna Conventions.

50. The Czechoslovak representative said that “the draft articles should be embodied in an international treaty”.³²

51. The Swedish representative pointed out that “a convention on special missions had been deemed necessary to complement the 1961 Vienna Convention on Diplomatic Relations”.³³

52. The Greek representative said that the law on special missions should be codified in order to supplement the Vienna Conventions on Diplomatic and Consular Relations³⁴ (i.e. both Conventions, not merely that on Diplomatic Relations).

53. The Romanian representative expressed himself firmly on the question, as follows:

“His delegation accepted the view widely held that special missions were distinct from permanent diplomatic missions and considered that the rules regarding the former should be set out in a single separate convention to be drafted at a special conference of plenipotentiaries.”³⁵

54. The French representative expressed the opinion that:

“...the draft convention on special missions would certainly be useful, especially if it employed the same terminology as the 1961 Vienna Convention on Diplomatic Relations while remaining independent of that Convention.”³⁶

55. The representative of Iraq took the view that:

“It would be preferable for them [the draft articles] to constitute a separate convention instead of forming an additional protocol to the 1961 Vienna Convention”.³⁷

The same representative thought that “the draft articles would seem in their general lines already to constitute the foundations for a convention”.

56. Only the representative of the Netherlands advocated codification in the form of “one unified statute book”.³⁸

57. The Government of Israel, in its written comments, expressed itself as follows:

“The question of the final form in which the draft articles are to be couched will undoubtedly require

careful consideration. An international convention on the lines of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations would be an achievement well worth striving for, yet it is felt that it may eventually prove difficult to achieve the codification of this topic by means of a convention drawn up in a conference of plenipotentiaries. It would therefore appear desirable for the Commission to explore any other possibilities that may suggest themselves.

“It is hoped that it may be found possible to bring the draft articles, dealing as they do with a closely related subject, even more closely into line with the 1961 Vienna Convention (and, where appropriate, with the 1963 Vienna Convention) both with regard to the language used and to the arrangement of the articles.”

58. The Yugoslav Government also expressed its opinion on this question in its written comments. It considers:

“That the rules on special missions should be embodied in a separate international convention in the same manner as the Vienna Convention on Diplomatic Relations, 1961, and the Vienna Convention on Consular Relations, 1963.”

59. Taking into account all these statements by Member States, the Special Rapporteur reiterates the opinion he expressed in paragraph 28 of his first report on special missions, submitted to the Commission at its sixteenth session.³⁹ This opinion was summed up as follows: “The Special Rapporteur believes that it would be wrong to append the draft articles on special missions to the Vienna Convention on Diplomatic Relations as a mere additional protocol; for he cannot lose sight of the basic idea of the decision taken by the Commission, namely, that 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’.”

60. The Special Rapporteur is more than ever convinced that the draft articles on special missions should be a separate diplomatic instrument, but that their terms should take account of the Vienna Convention on Diplomatic Relations.

7. *Body which should adopt the instrument relating to special missions*

61. Although the Commission did not ask Member States what body should, in their opinion, adopt the text of the instrument relating to special missions, several States expressed their views on this question, either in the Sixth Committee of the General Assembly during the discussion of the reports of the International Law Commission on the work of its sixteenth and seventeenth sessions, or in their written comments.

62. The representative of Israel said he was not convinced at present that the draft articles on special missions should be put before a diplomatic conference.⁴⁰ The

³¹ *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 840th meeting, para. 14.

³² *Ibid.*, 843rd meeting, para. 17.

³³ *Ibid.*, 844th meeting, para. 9.

³⁴ *Ibid.*, 845th meeting, para. 45.

³⁵ *Ibid.*, 848th meeting, para. 12.

³⁶ *Ibid.*, 849th meeting, para. 20.

³⁷ *Ibid.*, para. 34.

³⁸ *Ibid.*, 847th meeting, para. 7.

³⁹ *Yearbook of the International Law Commission, 1964*, vol. II, p. 74.

⁴⁰ *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 840th meeting, para. 7.

Government of Israel reiterated this opinion in its written comments, inviting the Commission to consider whether there was not perhaps some other possible way of bringing this convention into being.

63. The Brazilian representative hoped that the text on special missions would be adopted by an international conference.⁴¹

64. The Romanian representative considered that there should be a "single separate convention to be drafted at a special conference of plenipotentiaries".⁴²

65. The Yugoslav Government gave its views on this question in its written comments. Its opinion is as follows:

"The convention should be adopted at a special meeting of State plenipotentiaries which might be held at the time of a session of the General Assembly of the United Nations. The convention could thus be adopted either before or after the session."

66. The Special Rapporteur considers it his duty to inform the Commission of the above opinions and to recommend that it should deal with this question in its final report, suggesting that the instrument be adopted by a special conference of plenipotentiaries of States.

8. Preamble

67. Although it is not current practice for the Commission to prepare preambles to the drafts which it submits to the General Assembly, the Yugoslav Government, in its written comments, stated that it

"...considers that the preamble to the convention should give a definition of a special mission and emphasize the differences between special missions and permanent diplomatic missions."

68. The Special Rapporteur considers it his duty to bring this statement to the attention of the Commission, but does not think the Commission should take any further action on this desideratum of the Yugoslav Government.

9. Arrangement of the articles

69. The Commission itself, as well as certain delegations, including those of Israel, Belgium and Finland, made suggestions to the effect that when the text was finally adopted, the general arrangement of the articles in the draft should be revised. The Belgian Government went very far in this direction, proposing that the articles should be rearranged as follows:

"The Belgian Government is of the opinion that it would be more practical to regroup these articles in accordance with the following arrangement:

First would come the articles on the sending of a mission: article 5 would become article 2; article 5 (*bis*) [Belgian proposal] would become article 3; article 16 would become article 4.

Then the task of a special mission: article 2 would become article 5.

Next would come the provisions dealing with the composition of the mission: article 6 would keep its number; article 3 (Appointment), would become article 7; article 8 (Notification) would retain its number; article 4 (Persons declared *non grata*) would become article 9, article 7 (Official communications) would become article 10.

In the case of two articles relating to precedence, article 9 would become article 11 and article 10 would become article 12. Article 11 (Commencement of the functions of a special mission) would become article 13, and article 12 (End of the functions) would become article 14; article 13 (Seat of the special mission) would become article 15; article 14 (Nationality of the members of the special mission) would become article 16.

Lastly, article 15 on the right to use the emblem of the sending State would become article 17."

70. The Special Rapporteur is of the opinion that the arrangement of the articles cannot be decided until they have been put into final form and that it would be premature to settle the question at the present stage.

CHAPTER III

Draft articles on special missions⁴³

PART. I. GENERAL RULES

Article 1.—The sending of special missions

71. The Swedish Government devoted special attention in its comments to the question of the use of special missions between States or Governments which did not recognize each other, and in relations with insurgents. The Swedish Government commented in the following terms:

"In its commentary to article 1 the Commission says:

'The question whether special missions can be used between States or Governments which do not recognize each other was also raised. The Commission considered that, even in those cases, special missions could be helpful in improving relations between States, but it did not consider it necessary to add a clause to that effect to article 1.'

"The Commission's view that special missions can be helpful in improving relations between States or Governments which do not recognize each other is certainly correct. Special missions are sometimes used to remove obstacles to recognition. It is, however, obvious that special missions can be used for these purposes only if it is clear that the mere sending of a special mission does not imply recognition. If it could be successfully argued that a State by sending to or receiving from a State or Government a special mission had recognized that State or Government, a special

⁴¹ *Ibid.*, para. 14.

⁴² *Ibid.*, 848th meeting, para. 12.

⁴³ For the text of the draft articles and commentaries, see *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009.

mission would no longer be a useful instrument for *preparing the way* to recognition. It might be useful further to investigate this problem and, if it is found warranted, include in article 1 a clause stating that sending or receiving a special mission does not in itself imply recognition.

"The Commission also states in its commentary to article 1:

"In the case of insurrection or civil war, however, any such movements which have been recognized as belligerents and have become subjects of international law have the capacity to send and receive special missions. The same concept will be found in the Vienna Convention on Diplomatic Relations (article 3, paragraph 1(a))."

"First, if also belligerents have the capacity to send and receive special missions, the term "States" in the text of article 1 is hardly adequate. Secondly, the meaning of the reference to article 3 of the Vienna Convention on Diplomatic Relations is not apparent. Thirdly, supposing that States A and B are both parties to the future instrument on special missions, supposing further that there is an insurrection in State A, that State B recognizes the insurgents as belligerents, and that State A protests against that recognition as an intervention in its internal affairs, supposing finally that State B sends a special mission to the insurgents, would State A be obliged to consider the mission as a special mission under the instrument? If so, is State A to be considered as a third State in relation to the special mission? How in that case would article 16 be applied? If the insurgents were defeated and the mission captured by State A on its territory, what is the mission's status? The questions could be multiplied; it therefore seems that, if insurgents recognized as belligerents are to be covered by article 1, the matter should be further explored and that more precise provisions thereon should be drafted. The short reference in the commentary is not sufficient to clarify and settle the question."

72. The Special Rapporteur considers these comments by the Swedish Government to be useful and well-founded, but in his opinion they are not such as to necessitate amendment of the actual text of the article. Nevertheless, they should be included in the commentary.

73. The Belgian Government takes the view that, in article 1, paragraph 1

"the words '*for the performance of specific tasks*' and '*temporary*' should be deleted, because they denote characteristics of a special mission which should be stated in the definitions".

74. The Special Rapporteur considers that this comment by the Belgian Government does not lack justification from a structural point of view, but that the characteristics involved are so essential to the concept of a special mission that there would be a risk of mutilating the whole draft if these words were omitted from the text of the provisions themselves. Lastly, it should not be overlooked that the purpose of this provision is to show

what the Governments of States must agree on if a special mission is to exist.

75. The Belgian Government then raises an objection to the use of the term "consent". In its opinion this word "does not seem to correspond with the facts of international life. It connotes tolerance rather than approval, whereas what often happens in practice is that a proposal is made which is followed by an invitation".

76. The Special Rapporteur considers that this comment goes beyond the Commission's intention. The Commission has taken the position that what is referred to is consent in the true sense of the term, which is the real expression of the will of the State and does not necessarily imply an invitation, strict formality not being required. The Special Rapporteur accordingly proposes to disregard this objection.

77. Another comment by the Belgian Government relates to the meaning of the provision in article 1, paragraph 2. It is worded as follows:

"Belgium endorses the Commission's opinion that special missions may be sent between States or Governments which do not recognize each other, but wishes to make it clear that this in no way prejudices subsequent recognition."

78. The Special Rapporteur considers that, in this case, paragraph (3) of the Commission's commentary on article 1 should be amplified by incorporating the sense of the Belgian comment "that this in no way prejudices subsequent recognition."

79. During the discussion in the Sixth Committee of the General Assembly, the representative of Ceylon expressed his delegation's opinion on this question. He proposed that the application of the rules concerning special missions should be confined to States which had diplomatic relations with each other.⁴⁴ The Special Rapporteur is unable to accept that proposal, and points out that, according to the International Law Commission,⁴⁵ special missions are very often used in practice—to the great advantage of international relations—precisely in cases where no diplomatic relations exist (see paragraph (2) of the commentary to article 1 in the Special Rapporteur's first report).⁴⁶

80. The delegation of Ceylon further considered that the articles on special missions should include provisions governing the legal status of delegations to international conferences. The Special Rapporteur is unable to accept that view, because the Commission has considered the question in principle and has recognized that, although there are many similarities between special missions in direct relations between States and special missions which represent States at international conferences, the rules governing the last-named missions should not be

⁴⁴ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 850th meeting, para. 8.*

⁴⁵ *Yearbook of the International Law Commission, 1964, vol. II, p. 211, para. (3) of commentary to article 1.*

⁴⁶ *Ibid.*, p. 89.

included in the present draft. The Special Rapporteur stresses that it will be necessary for the Commission to revert to this question, which will be studied jointly by two special rapporteurs (the Special Rapporteur on special missions and the Special Rapporteur on relations between States and inter-governmental organizations).

Article 2.—The task of a special mission

81. The Belgian Government submitted an observation on paragraph (5) of the commentary to article 2. The opinion it expressed was as follows:

“Belgium does not believe that the division of competence between a special mission and a permanent diplomatic mission is likely to give rise to difficulties, at any rate for the receiving State, for it is for the sending State to determine the methods of contact among its various missions and to intervene should there be any overlapping of authority. Moreover, it will frequently be the case that a member of the diplomatic mission will be attached to a special mission; he may even lead it as its *ad hoc* head.”

82. The Special Rapporteur draws attention to the fact that the Commission did not endeavour to settle this point in the text of article 2, but “decided to draw the attention of Governments to this point and to ask them to decide whether or not a rule on the matter should be included in the final text of the articles, and if so to what effect.”

83. The Government of the Republic of the Upper Volta also referred to this paragraph of the commentary in its observations. It expressed itself in the following terms:

“The problem here concerns the parallel existence of permanent and special missions and their respective areas of competence, and, in this context, the question of the validity of acts performed by special missions is raised.

“Special missions differ by nature from permanent missions, as is made clear, incidentally, in article 1 and its commentary.

“In the first place, States send special missions for specific tasks: their tasks are not of a general nature like those of a permanent mission; special missions are of a temporary nature. We mention these few facts concerning the nature of special missions in order to stress the difference, which we consider to be fundamental, between them and permanent missions; it is these individual features of special missions that determine the position of the Upper Volta Government with regard to the respective areas of competence of special missions and permanent missions. The Government of the Upper Volta therefore considers that since a special mission is established for a specific task and since it is temporary, it should be able to act independently of the permanent mission, and the tasks entrusted to it by the States concerned ought to be regarded as being outside the competence of the permanent diplomatic mission.”

84. The replies from the Belgian and Upper Volta Governments to the question raised are similar to that

submitted by the Yugoslav Government. In that Government’s opinion:

“it should be stated, in article 2 of the convention, as an addition to the text already adopted, that a special mission cannot accomplish the task entrusted to it, nor can it exceed its powers, except by prior agreement with the receiving State. This would avoid any overlapping of the competence of special missions with that of permanent diplomatic missions.

“The Government of the Socialist Federal Republic of Yugoslavia considers that some wording should be added to the commentary on that article, stating that the task of a special mission should not be specified in those cases where the special mission’s field of activity is known, and this should be considered as a definition of its task. An example of that would be the sending and receiving of experts in hydro-technology who are sent and received when two neighbouring countries are threatened by floods in areas liable to flooding”.

85. The comments of all these three Governments show that there is no need whatever to change the text of article 2, but that the Special Rapporteur will be compelled to change paragraph (5) of the commentary to that article when he puts it into final form.

Article 3.—Appointment of the head and members of the special mission or of members of its staff

86. The only comment on article 3 in the Sixth Committee of the General Assembly seems to have been that of the Hungarian representative, who stated “In draft articles 3, 4 and 6 on special missions, the latter comprised only the head of the mission and other principal delegates”.⁴⁷ The Hungarian representative regarded failure to mention the staff of the mission as a defect in those articles. The Special Rapporteur believes there must be some misunderstanding, for the text of article 3 as proposed by the Commission expressly states “as well as its staff”. He therefore considers that this comment should be disregarded.

87. In its written comments on article 3 the Swedish Government has the following to say:

“Should the principle be accepted that all the rules concerning the status of the special mission would be applicable unless the parties agree otherwise, the phrase ‘except as otherwise agreed’ in this and corresponding phrases in some other articles would have to be replaced by a more general provision. The second phrase of the article seems to be superfluous.”

88. With regard to this comment by the Swedish Government, the Special Rapporteur wishes to point out that the aim of the draft is to lay down certain general rules and at the same time to draw attention to those which are of a residual nature. The expression “except as otherwise agreed” indicates a residual rule. In his opinion, this expression cannot be omitted in all cases,

⁴⁷ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 843rd meeting, para. 37.*

because that would suggest that all the provisions without distinction were of a residual nature.

Article 4.—Persons declared non grata or not acceptable

89. The Belgian Government comments as follows on article 4, paragraph 2:

“To make the alternative stated at the end of the first sentence clearer, it would be advisable to add the words ‘as appropriate’, as in article 9, paragraph 1 of the Vienna Convention on Diplomatic Relations.”

90. The Government of Israel expresses the same view and also proposes the insertion of the expression “as appropriate”. The Special Rapporteur finds these proposals acceptable.

91. In its comments on article 4, the Yugoslav Government expressed the view that

“Consideration should be given to the possibility of adding to article 4 a provision stating that the receiving State may not declare a person *persona non grata* if that State, by prior agreement with the sending State, had already signified its acceptance of that person as head of the mission, assuming that States agree, at the level of Ministers for Foreign Affairs, to send and receive missions and that, between the agreement and the appointment of the special mission, no change of Ministers took place”.

92. The Special Rapporteur is unable to support this proposal, for he too has abandoned his previous opinion that the receiving State would have to renounce its right to have recourse to the *persona non grata* procedure if that State had agreed in advance to accept a particular person; every State has the right to make use of this procedure at any time and it can consequently do so for reasons or arguments advanced after its acceptance of the person concerned.

93. The Hungarian delegation also commented on this article in connexion with the membership of the mission and in particular of its staff.⁴⁸ The Special Rapporteur considers that this comment has already been replied to in principle in connexion with the discussion on article 3.

94. The Turkish representative pointed out that draft articles 4, 21 and 42, on the membership of the mission, were based on the 1961 Vienna Convention on Diplomatic Relations and his delegation found it difficult to accept them in the case of special missions.⁴⁹ The Special Rapporteur does not see how this difficulty arises in connexion with article 4, since experience shows that, even in the case of special missions, individual States may find themselves unable to work with the head of the special mission or a member of its staff and that it is therefore in the interest of good relations and of the successful accomplishment of the task of the special mission that the right to declare a person *persona non grata* or not acceptable should also be available in the case of special missions. Accordingly, the Special Rap-

porteur believes there is no need to introduce any changes in the idea conveyed in draft article 4.

Article 5.—Sending the same special mission to more than one State

95. The Belgian Government accepts the text of the article but has the following comment to make:

“This article is unilateral; the converse situation is also conceivable, i.e. the sending of the same mission by two or more States. Belgium therefore proposes the addition of a new article, which might be drafted as follows:

‘Article 5(bis). A special mission may be sent by two or more States. In that case, the sending States shall give the receiving State prior notice of the sending of that mission. Any State may refuse to receive such a mission’.”

96. From the point of view of doctrine, the Special Rapporteur sees no objection to this proposal of the Belgian Government in support of which the same arguments can be adduced as those which led the 1961 Vienna Conference to adopt article 6 of the Vienna Convention on Diplomatic Relations. There is, however, an all-important difference between the text of the Vienna Convention and the Belgian Government’s proposal. The Vienna Convention deals with the case where the same person is accredited by several States (a subjective consideration) whereas the Belgian proposal refers to the sending of the same mission (an objective consideration). Moreover, there is an increasing tendency to emphasize the undesirability of joint missions, because of the predominance of the strongest State in such a partnership, leading to inequality of rights, unequal protection of interests, conflict of interests between the sending States, and so forth. The Special Rapporteur is, however, prepared to admit that special missions of this kind are sent by States belonging to a community or union. After studying the problem, the Special Rapporteur, though grateful to the Belgian Government for having drawn attention to it, does not advise the Commission to adopt the Belgian proposal.

97. The Swedish Government comments that article 5 seems to it to be superfluous. It says:

“The article seems to be superfluous as article 1, paragraph 1, sufficiently covers the case. If State A wants to send a special mission to State B whose relations with State C are difficult, State A would certainly in some way or other consult authorities in State B before sending the mission on to State C. A special rule to that effect is unnecessary and could in any case be easily evaded, e.g., if State A so wished, it could postpone telling State B about its intention to send the mission to State C until the mission had accomplished its task in State B.”

98. The Special Rapporteur does not consider that there are good grounds for these comments by the Swedish Government, since the sending of the same special mission to two or more States would give rise to disputes of a special kind.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, 847th meeting, para. 24.

Article 6.—Composition of the special mission

99. The Belgian Government made certain comments on the terminology used in paragraph 1 of article 6. The text of its comments is as follows:

“In order to prevent any confusion with diplomatic terminology, the word ‘delegate’ should be substituted for the word ‘representative’. What should be made quite explicit in the definition of a special mission is its official character, i.e. the fact that it is composed of persons designated by a State to negotiate on its behalf. Consequently, it seems excessive to confer on them automatically a representative character, as that term is construed in diplomacy and politics.

“The expression ‘other members’ causes many ambiguities in the articles of the present draft. In the Vienna Convention on Diplomatic Relations, the term ‘members of the mission’ is entirely general and means the head of the mission and the members of the staff, the latter being subdivided into members of the diplomatic staff, members of the administrative and technical staff, and members of the service staff.

“The introduction into the present draft of a new specific concept without giving it a specific name considerably impairs the intelligibility of the text.”

100. The Commission is not unfamiliar with the problem of terminology raised by the Belgian Government. In his first draft, the Special Rapporteur also used the term “delegate”, but some members of the Commission rightly observed that in practice all the members of a special mission who have full powers are regarded as delegates. For this reason, the Commission took the position that where a special mission included only one representative with full powers he should be called “a single representative”, in contrast to the situation where there is “a delegation composed of a head and other members”.

101. The Special Rapporteur does not share the view expressed by the Belgian Government that the term “representative” is essentially incorrect because it implies a representative character, which the Belgian Government considers excessive. His understanding is that the Commission has recognized that special missions also have a representative character, even when their task is not purely diplomatic or political. This argument of the Belgian Government would therefore call for a departure from the attitude hitherto adopted by the Commission.

102. As to the expression “other members”, it might, as the Belgian Government has rightly observed, give rise to confusion between a member of the mission in the strict sense of the word and a member in the wider sense, meaning a member of the mission’s staff. The Commission has therefore distinguished between these two meanings and made this distinction in the introductory article containing the definitions. Hence it is not considered necessary to revert to this question.

103. The Belgian Government also commented on paragraph 2 of this article. It considers that

“A similar confusion is caused by the use of the term ‘diplomatic staff’. If these words applied to

advisers and experts, as stated in paragraph (5) of the commentary on the article, there is no reason for not saying so explicitly. Besides, it is to be presumed that the ‘other members’ also enjoy diplomatic status”.

104. The Special Rapporteur does not think he should recommend that the text of the convention should specify the functions which the diplomatic staff of the special mission are entitled to perform. Even in the commentary referred to by the Belgian Government it is not stated that the diplomatic staff is composed of advisers and experts; they are merely mentioned by way of example. In practice, the diplomatic staff of special missions is designated by a wide variety of titles, such as assistant delegate, secretary of mission, military adviser, etc. For this reason, the Special Rapporteur is of the opinion that, even in the case of special missions, the Commission should keep to the general term “diplomatic staff”, as was done in the 1961 Vienna Convention on Diplomatic Relations.

105. The comments of the Government of Israel also deal with article 6. They concern paragraph 3 of the article and are as follows:

“Article 6 distinguishes between ‘a delegation’ and ‘the staff’ (see, for example, paragraph (5) of the commentary to that article). Paragraph 3 of the article provides for the limiting of the size of the staff, but keeps silent about the size of the delegation. Article 11 of the 1961 Vienna Convention provides for the possibility of limiting the size of ‘the mission’, which in the present article would mean ‘the delegation’, and it would appear that a similar provision would be desirable in the present article. Article 6, paragraph 3, would then read:

“‘In the absence of an express agreement as to the size of a special mission and its staff, the receiving State may require that the size of the special mission and its staff be kept within limits...’.”

106. The Special Rapporteur considers that this proposal by the Government of Israel is justified and recommends the Commission to adopt it.

107. In the Sixth Committee, the Hungarian delegation made the same comment on article 6, concerning the composition of special missions, as it had made on article 3.⁵⁰ The Special Rapporteur believes that the view hitherto expressed by the Commission is correct, namely, that the provisions on the composition of special missions should be similar to those of the 1961 Vienna Convention on Diplomatic Relations. He does not really see in what respect the present text of article 6 of the draft should be changed; he thinks that something must have been omitted from the official records of the Sixth Committee.

Article 7.—Authority to act on behalf of the special mission

108. In its comments the Yugoslav Government says it considers that

⁵⁰ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 843rd meeting, para. 37.*

"In view of the fact that there is some inconsistency between the provisions of article 7 and the commentary on that article, the words 'and a member of his diplomatic staff' should be inserted after the word 'mission' at the beginning of article 7, paragraph 2".

109. The Special Rapporteur is of the opinion that, in accordance with the intention of the Commission, only the head of a special mission is normally authorized, by virtue of his function, to act on behalf of the special mission, whereas paragraph 2 of the text provides for the possibility of authorizing some other person as well. After considering the Yugoslav comments, the Special Rapporteur does not see why one of the members of the staff could not be authorized to perform certain acts on behalf of the mission; but he does not think that members of the staff can be authorized to replace the head of the mission. Consequently, the Special Rapporteur recommends that the Commission should adopt only part of the Yugoslav Government's proposal and should insert in the text of article 7 a new, additional paragraph 3, reading as follows:

A member of the staff of the special mission may be authorized to perform particular acts on behalf of the mission.

110. In its comments, the Belgian Government expresses the opinion that in order to make the article correspond better with the idea expressed in paragraph (2) of the commentary, it would be better to say "unless otherwise agreed" and to delete the word "normally". The Special Rapporteur cannot agree to this proposal; the word "normally" was used deliberately, because there may be cases which are not provided for in the agreement concluded between the parties, but which justify a derogation from the normal rule. For example, the head of a special mission might fall ill and he could then be replaced by his deputy or even by the chargé d'affaires *ad interim* of the special mission as stated in paragraphs (7), (8), (9) and (10) of the commentary to article 7. The Special Rapporteur therefore recommends that the proposal made in the Belgian Government's comments should be disregarded.

111. The Swedish Government also made some comments on article 7, which read as follows:

"The phrase 'normally' is a descriptive term and hardly appropriate here. The text should be rephrased. How, would depend upon whether the principle of the subsidiary character of the rules is accepted or not."

112. The Special Rapporteur thinks that the reply given above to the Belgian Government's comments also applies to this observation by the Government of Sweden. He reiterates that the word "normally" is an essential term and not a descriptive one, as stated above.

113. The Government of Israel suggested in its comments that the text of article 41 of the draft articles on special missions should be incorporated in the text of article 7. The Special Rapporteur does not share this view, because article 7 deals with authority to act on behalf of the special mission, whereas article 41 concerns the establishment of rules for designating the organ of the receiving State with which official business is conducted.

Article 8.—Notification

114. In its comments on article 8 the Government of Israel says:

"With regard to the expression 'any person' used in article 8, paragraph 1(c), it may perhaps be desirable to include an explanation in the commentary to that article, such as that given by the Special Rapporteur in paragraph 14 of the summary record of the 762nd meeting of the International Law Commission."⁵¹

115. In the opinion of the Special Rapporteur, this comment should be taken into consideration; he will bear it in mind when drafting the commentaries.

116. The Government of Yugoslavia comments on this article as follows:

"...the commentary on article 8 should be made consistent with the provisions of that article. Whereas article 8, paragraph 1(d), provides for the receiving State to be notified of the members of the mission, the private servants of the head or of a member of the mission or of a member of the mission's staff who are recruited from among the nationals of that State or from among aliens domiciled in its territory, it is stated in paragraph (7) of the commentary that such recruitment is in practice limited to auxiliary staff without diplomatic rank. Since some States allow the recruitment of staff with diplomatic rank, the Government considers that the following words should be inserted in paragraph (7) of the commentary: 'In some countries such recruitment is in practice limited to auxiliary staff without diplomatic rank'."

117. Having considered this comment by the Yugoslav Government, the Special Rapporteur takes the view that the text of article 8, paragraph 1(d) is correctly formulated, because it covers all recruitment of persons "residing in the receiving State as members of the mission or as private servants...", but that the observation on paragraph (7) of the commentary is justified. He is therefore of the opinion that the Yugoslav Government's proposal should be adopted in so far as it supplements the commentary.

118. The Belgian Government's comments also contain a passage concerning article 8. First of all, it is said that:

"As to the substance, it should be specified that there must be prior notification, which would avoid having to resort where necessary to the *non grata* procedure, which is always unpleasant for all parties concerned. The text of this paragraph should therefore read as follows:

'The sending State shall notify the receiving State in advance...'

119. The Special Rapporteur is not able to recommend the Commission to adopt this suggestion by the Belgian Government. He is convinced that it is impossible in practice to give prior notification always, and in all circumstances, of all the facts listed in sub-paragraphs (a) to (d). This could not be done even in the case of regular

⁵¹ *Yearbook of the International Law Commission, 1964, vol. I, p. 253.*

diplomatic missions, and that is why the matter was regulated as follows in article 10, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations: "Where possible, prior notification of arrival and final departure shall also be given". If this cannot constitute a general rule, even for these two isolated events, in the case of permanent diplomatic missions, there is clearly no need to amend the text of the article. However, it might perhaps be useful to include the essence of the Belgian Government's observation in the commentary.

120. The Belgian Government's comments contain another passage referring to article 8, paragraph 2, of the draft and reading as follows:

"In this context, the notifications to be made when the special mission has already commenced its functions would concern only persons subsequently called upon to participate in the special mission's work, which would be more in line with the usual practice."

121. The Special Rapporteur, knowing the practice of special missions, considers that the Commission was right in laying down the rule for all cases arising after the commencement of the special mission's functions and in including persons who have been the subject of notification by other organs of the sending State, and that this rule should not be limited to the notification of facts concerning persons forming part of the mission or arriving after it has commenced its functions. Until the time when the special mission commences its functions, the notification is made by other organs, because the special mission does not yet exist *de facto*; and once it has really begun to function there is no need to resort to notification by other organs.

Article 9.—General rules concerning precedence

122. The Belgian Government makes the following comment on article 9, paragraph 1:

"Belgium is of the opinion that the choice of the language determining the alphabetical order should be made in accordance with the rules of protocol of the receiving State. The end of the paragraph should therefore read

'...in conformity with the protocol in force in the receiving State.'

123. The Special Rapporteur considers this to be an apposite comment which is in conformity with the idea expressed by the Commission in paragraph (20) of the commentary on article 9. He is willing to make the change proposed.

124. The Belgian Government proposes in its comments that the text of article 9 should be expanded by the addition of a new paragraph. This proposal is worded as follows:

"It is considered that it would be useful to lead up to the exception which is stated in the following article; there should accordingly be a new paragraph 3 stipulating that 'the present article shall not affect the provisions of article 10 relating to special ceremonial and formal missions'."

125. The Special Rapporteur is not convinced of the need for this new paragraph, because article 10 immediately follows article 9.

126. The comments of the Government of Israel include a proposal that articles 9 and 10 should be combined into a single article. The text of the proposal is as follows:

"There would seem to be no necessity for applying different criteria in article 9, paragraph 1 and article 10, and it is therefore suggested that they be combined as follows: 'Except as otherwise agreed, where two or more special missions meet in order to carry out a common task, or on a ceremonial or formal occasion, precedence among their respective members and staff shall be determined by the alphabetical order of the names of the States concerned'."

127. The Special Rapporteur is of the opinion that modern special missions having a substantive task should not be associated with the traditional institution of special ceremonial and formal missions.

128. In its comments on article 9 the Yugoslav Government says that:

"As regards precedence and the alphabetical order to be applied under draft article 9, it is considered that the alphabetical order to be adopted should be the one in use in the receiving State, or, in the absence thereof, the method used by the United Nations."

129. With regard to this comment, the Special Rapporteur takes the same position as he does on the Belgian Government's proposal referred to above. He considers it his duty to point out that the Yugoslav proposal is more complete, because it provides for an alternative solution by suggesting two alphabetical orders—that of the receiving State, and that used by the United Nations. It might, perhaps, even be better to adopt this proposal as an addition to paragraph 1 of article 9.

130. The Government of Israel suggests, in its comments, that the commentary on article 9 should be shortened, as it is too long. The Special Rapporteur will take this suggestion into consideration and will be very grateful to Mr. Rosenne, the member of the Commission who is probably familiar with the intentions underlying this comment, if he will indicate the passages which he thinks should be shortened.

Article 10.—Precedence among special ceremonial and formal missions

131. The Belgian Government formulated comments and proposals concerning article 10, in the following terms:

"This article is ambiguous. It refers to special missions which meet on a ceremonial occasion; but, taken literally, it seems to refer to special missions of all kinds. It would be both clearer and simpler to state that 'precedence among special ceremonial and formal missions shall be governed by the protocol in force in the receiving State.' In that case, Belgium would not wish this article to be regulated by a detailed text such as that proposed in paragraph (4) of the commentary."

132. In the Special Rapporteur's view, the text proposed by the Belgian Government is identical in substance with the text of article 10 of the Commission's draft, but is perhaps more suitable because briefer.

133. We recall that the Belgian Government has proposed an additional paragraph to article 9 containing a reference to article 10. The Special Rapporteur has given his opinion on this matter in the section relating to article 9.

134. The Government of Israel proposes that article 9, paragraph 1, and article 10 should be combined as a single provision, which would entail the deletion of article 10. The Special Rapporteur has already expressed his view on this proposal in connexion with article 9.

135. In the remarks by the Government of Israel on the commentary to article 10 there is also a suggestion that that commentary should be shortened. The Special Rapporteur's opinion on this proposal has been given in the section relating to article 9.

Article 11.—Commencement of the functions of a special mission

136. The Government of the Upper Volta proposes in its comments that the actual text of article 11 should include the idea of non-discrimination in the reception of special missions and the way in which they are permitted to begin to function, especially among special missions of the same character—the idea set forth in paragraph (12) of the commentary to article 11 of the draft. This proposal is worded as follows:

“The problem raised in paragraph (12) of the commentary on article 11—that of the discrimination to which some special missions may be subjected in practice in comparison with others—is of great importance at the present time. Such discrimination is contrary to the sovereign equality of States and to the principles which should guide States in their daily relations with each other; the differences in treatment in the reception of special missions and the way in which they are permitted to begin to function may prejudice the chances of success of the mission itself, which should be able to develop in an atmosphere of calm and confidence.

“The Government of the Upper Volta considers that a provision on non-discrimination should be included in this article.”

137. The Special Rapporteur views this proposal with especial sympathy; he regards it as justified in law and founded on the principle of the equality of States. This idea also underlay the formulation of article 13, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations.

138. The Belgian Government uses as a starting point for its comments a concept of the commencement of the special mission's functions differing from that adopted by the vast body of international practice and by the Commission. The purpose of article 11 of the draft is to link the commencement of the special mission's functions to the time of effective contact between the

special mission and the appropriate organs of the receiving State. The Belgian Government, however, has submitted a proposal which might lead to a different interpretation in the over-all solution of the problem. First, the commencement of the special mission's privileges and immunities should not be confused with the commencement of its functioning. In the Special Rapporteur's opinion, these are two different juridical institutions, although they occasionally coincide. For this reason, the Commission should take up a definite position on the Belgian proposal, which is worded as follows:

“The usefulness of the first sentence of the article is open to question, as the commencement of privileges and immunities is governed by article 37. Furthermore, the present wording may lead to confusion in connexion with protocol, which is precisely where letters of credence may be required.

“Lastly, a diplomatic mission should not be qualified as regular, but as permanent. The article might therefore be drafted as follows: ‘Where no other provision is made by the protocol in force in the receiving State for special ceremonial and formal missions, the exercise of the function of a special mission shall not depend upon presentation of the special mission by the permanent diplomatic mission or upon the submission of letters of credence or full powers.’”

Article 12.—End of the functions of a special mission

139. The Belgian Government proposes, in its comments, that sub-paragraphs (a) and (b), both dealing with causes of the cessation of the special mission's functions, should be combined in a single paragraph. Sub-paragraph (a) relates to “The expiry of the duration assigned for the special mission”, while sub-paragraph (b) relates to “The completion of the task of the special mission”. The Commission took the view that these two causes of the cessation of the special mission's functions should be separated, so as to emphasize that they were independent of each other. The Special Rapporteur is of the opinion that the wording adopted by the Commission should be left as it stands.

140. The Belgian Government further proposes that in the French text the word “*rappel*” should be used rather than the word “*révocation*” (of the special mission), which it finds too strong. The Special Rapporteur points out that both of these terms are used in practice, and that as this is a question of drafting it should be settled by the Drafting Committee.

141. The Belgian Government considers that the provision in article 44, paragraph 2, of the Commission's draft should also be included in article 12. This provision reads as follows: “The severance of diplomatic relations between the sending State and the receiving State shall not automatically have the effect of terminating special missions existing at the time of the severance of relations, but each of the two States may terminate the special mission”. In this case the Commission was not referring to the mandatory termination of the special mission, so that adoption of the Belgian Government's proposal would upset the system which the Commission had in mind.

142. The Government of the Upper Volta comments on article 12 as follows:

“The Government of the Upper Volta would like to support the proposal, mentioned in the commentary to this article, which was submitted in 1960 by the Commission’s Special Rapporteur, Mr. Sandström.

“It is desirable to consider that when negotiations between the special mission and the local authorities are interrupted, the mission loses its purpose, and that consequently the interruption of negotiations marks the end of the functions of a special mission.”

143. The Special Rapporteur is not sure of the purpose of this comment by the Government of the Upper Volta; that is to say, whether it is a proposal to transfer one of the ideas in the commentary to the actual text of the draft or whether it is an expression of support by the Government of a Member State for this idea, which is still an integral part of the commentary. If the Government of the Upper Volta considers that this idea should be transferred to the text of the article, the Special Rapporteur’s view is that the position taken by the Commission on this question should be adhered to, and that no change should be made in the text of the draft. If what is intended is an expression of agreement with the opinion of the previous Special Rapporteur, Mr. Sandström, which should remain in the commentary, the Special Rapporteur sees no need for a further discussion of this question in the Commission.

144. The Government of Israel suggests, in its comments, that article 12 should be transferred to the end of the draft and placed after articles 43 and 44. The Special Rapporteur considers that article 12 is appropriately placed and should stay where it is.

Article 13.—Seat of the special mission

145. Commenting on article 13, paragraph 1, the Belgian Government says:

“The need for the proviso ‘in the absence of prior agreement’ is not readily apparent; for in any case the procedure contemplated consists of a proposal followed by its approval. It should also be noted that in practice the seat of a special mission is always determined by mutual consent.”

146. The Special Rapporteur shares, in principle, the Belgian Government’s view that mutual consent is always involved; but that consent may either be reached in advance—which is the situation referred to in the phrase “in the absence of prior agreement”—or be reached later. The Special Rapporteur therefore considers that the text formulated by the Commission is correct, for it makes provision for both solutions.

147. The comments by the Government of Israel also include one relating to the expression “in the absence of prior agreement”; it reads as follows:

“The phrase ‘in the absence of prior agreement’ is used in article 13, preceding the residual rule, whereas the expression ‘except as otherwise agreed’ is used in article 9, and the expression ‘unless otherwise agreed’ in articles 21 and 26. It is suggested that the same

terminology be employed to express the residual rule throughout the draft.”

148. The Special Rapporteur proposes that this point, being a matter of drafting, should be considered by the Drafting Committee, although in his view the expression “in the absence of prior agreement” is here correctly used.

149. In paragraph (4) of the commentary on article 13, the Commission suggested a compromise in cases where the seat of the special mission was not established in advance by agreement, namely, that the receiving State should have the right to propose the locality, but that, in order to become effective, that choice should be accepted by the sending State. However, the Commission left this question open. Only the Government of the Upper Volta gave attention to this solution, expressing the following opinion in its written comments:

“The Upper Volta considers that the compromise suggested by the Commission, namely that the sending State should have a part in choosing the seat of the special mission, might impair the sovereign authority of the receiving State over its own territory. The Government of the Upper Volta is of the opinion that the receiving State is competent to choose the seat of the mission, without the participation of the sending State, provided that the locality chosen by the receiving State is suitable in the light of all the circumstances which might affect the special mission’s efficient functioning.”

150. The Special Rapporteur considers that the Commission should take note of the opinion expressed by the Government of the Upper Volta, but that it is not such as to affect the actual text of the proposed article.

Article 14.—Nationality of the head and the members of the special mission and of members of its staff

151. The comments by the Swedish Government include two proposals for the amendment of article 14. The first of these proposals is as follows:

“The term ‘should in principle’ is too vague. Paragraph 1 of the article could well be omitted.”

152. In the Special Rapporteur’s opinion, the Commission was right to include in article 14, paragraph 1 of the draft on special missions, a provision corresponding to article 8, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations. It was right, as regards substance, too, since both these provisions express a general rule, subject to the exceptions referred to in the subsequent paragraphs, that members of a mission should in principle be of the nationality of the sending State. Consequently, the Special Rapporteur does not consider this comment justified.

153. The Swedish Government’s second proposal is that:

“If the articles of the draft are given only a subsidiary character, paragraph 3 could also be omitted.”

154. The Special Rapporteur considers that the Commission was right to introduce this paragraph from article 8, paragraph 3, of the 1961 Vienna Convention on

Diplomatic Relations. The question often arises, even as regards its substance. At the Vienna Conference, however, the Scandinavian States opposed this provision, although it proved generally acceptable.

Article 15.—Right of special missions to use the flag and emblem of the sending State

155. In its comments the Belgian Government expressed the opinion "that the solution adopted in article 20 of the Vienna Convention on Diplomatic Relations should prevail and that the emblem should be used only on the means of transport of the head of the mission".

156. The Special Rapporteur's view is that there are practical reasons, such as travel in the territory concerned, which make it necessary, in the interests of both States and for the information of the general public, for special missions to make wider use of the emblem of the sending State. This does not apply to permanent diplomatic missions, for which the privilege can be confined to heads of mission.

157. During the discussion in the Sixth Committee of the General Assembly, the Hungarian representative expressed the view that there was no need to retain draft article 15, which should be regarded as an instance of the rule that special missions are required to comply with the laws and regulations of the receiving State.⁵²

158. The Special Rapporteur considers that the right of special missions to use the flag and emblem of the sending State is a specific right which should be guaranteed to special missions and that, accordingly, regulation of the exercise of that right cannot be left entirely to the receiving State. In paragraph (2) of its commentary on article 15, the Commission stressed that it "reserves the right to decide at a later stage whether article 15 should be placed in the section of the draft dealing with general matters or in the special section concerning facilities, privileges and immunities". The Special Rapporteur's view is that it would be preferable to leave article 15 in part I of the convention, but he could agree to its being transferred to part II, where it would precede the present article 18.

Article 16.—Activities of special missions in the territory of a third State

159. The Government of Israel comments as follows:

"Although the right of the 'third State' concerned to withdraw its consent appears to be implied in the wording of article 16, paragraph 1, it may be preferable to accord such an important eventuality a separate paragraph (on the lines of paragraph (8) of the commentary to that article), which could at the same time provide for an express agreement to the contrary:

'3. Unless otherwise agreed between the third State and the sending States concerned, the third State may at any time, and without being obliged to give any reason, withdraw its hospitality for special

missions in its territory and prohibit them from engaging in any activity. In such a case, the sending States shall recall their respective special missions immediately, and the missions themselves shall cease their activities as soon as they are informed by the third State that hospitality has been withdrawn'."

160. The Special Rapporteur reminds the Commission that he put forward the same idea in his second report⁵³ and proposed that it be incorporated in the text of the article. He accordingly supports the proposal.

161. The Government of Israel also proposes that certain changes should be made in article 16, paragraph 2. Its proposal is as follows:

"With regard to article 16, paragraph 2, it is suggested to use the expression 'the sending States', as obviously there must be more than one 'sending State'."

162. The Special Rapporteur accepts this proposal, as it would bring the English text into line with the French, which is his original text.

163. The Belgian Government made a separate comment on this article and proposes a new draft. Its comment reads:

"From the point of view of substance, a fundamental question arises, namely, whether the convention will apply in this case or whether on the contrary this article forms a separate entity. In other words, is the situation with which it deals regulated solely by the terms of the conditions imposed by the host State or is the host State bound by the fact of its consent to apply the articles of the convention, and in particular those which concern privileges and immunities? In the latter case, to what extent can the conditions imposed by the third State derogate from the provisions of the convention?

"From the point of view of drafting, it would be desirable to specify that the consent must be prior and may be withdrawn at any time. The text might therefore be amended to read as follows:

'1. Special missions may not perform their functions on the territory of a third State without its prior consent.

'2. The third State may impose conditions which must be observed by the sending States.

'3. The third State may at any time and without having to explain its decision, withdraw its consent'."

164. The Special Rapporteur's view is that the draft proposed by the Belgian Government is an over-simplification. He prefers the wording proposed by the Government of Israel and reproduced above.

165. In his statement to the Sixth Committee of the General Assembly, the Hungarian representative made suggestions similar to those of the Governments of Israel and Belgium, namely that the substance of paragraph (3) of the commentary on article 16 should be incorporated

⁵² Official Records of the General Assembly, Twentieth Session, Sixth Committee, 843rd meeting, para. 39.

⁵³ See Yearbook of the International Law Commission, 1965, vol. II, document A/CN.4/179, para. 145.

in the text of the article itself.⁵⁴ As he has already explained when discussing these proposals, the Special Rapporteur is in favour of this idea.

PART II. FACILITIES, PRIVILEGES AND IMMUNITIES

Article 17.—General facilities

166. During the discussion in the Sixth Committee of the General Assembly, the Indian representative took his stand on the principle that the privileges and immunities of officials of special missions should be based not on formal criteria, but on "functional necessity". He expressed the fear that undue expansion of the categories of functionaries of special missions on whom diplomatic immunity and privileges were conferred might put them on an equal footing with permanent diplomatic missions and thus lead to many irritating situations and problems. In his opinion, that could be avoided without adversely affecting the functioning of special missions.⁵⁵

167. The representative of Nigeria also pointed out that privileges and immunities should be granted to members of special missions on the basis of their functions and not of their personal status.⁵⁶

168. The Special Rapporteur takes these two comments as evidence of a trend against granting officials of special missions the same legal status as members of permanent diplomatic missions, and points out that in the introduction to his first report he himself, unlike the majority of the Commission, was inclined to give precedence to the functional character of special missions rather than the representative character. As other States have not opposed the view of the majority, the Special Rapporteur does not consider it possible to abandon the system adopted by the Commission. Nevertheless, he feels bound to stress that these comments are such as to require the Commission to take a position on the matter: if the Commission changes its former opinion, it will be necessary to revise a whole series of provisions.

169. The Swedish Government devoted special attention to this question in its comments. Its main point is that the number of persons who will enjoy privileges and immunities in their capacity as members of special missions should be taken into account. The Swedish delegation advanced this opinion during the discussion in the Sixth Committee of the General Assembly, and maintained it as a general remark in its written comments. This remark reads as follows:

"During the discussion of the Commission's report in the Sixth Committee, at the twentieth session of the General Assembly, the Swedish delegate, in a speech on 8 October 1965, drew attention to the problem of granting immunities and privileges to a great number of people. He pointed out that this problem arises in connexion with special missions, and he continued:

'While the great quantity of these missions makes a codification desirable, it also makes it difficult, for

immunities and privileges granted to a few may not meet insurmountable obstacles, but the same immunities and privileges given to many may cause a real problem.

'Now, as Professor Bartoš demonstrated in his first report on the subject, a great many kinds of special missions would come under the new régime: political, military, police, transport, water supply, economic, veterinary, humanitarian, labour-recruiting and others. Consequently, a great many persons would be immune from jurisdiction, would enjoy exemption from Customs control and duties, etc. This group of persons would be further widened at a later stage, when rules in the same vein were introduced for delegates to conferences convened by governments or international organizations. Yet, we know that in many countries the public and parliament already complain of the present extent of immunity and privileges. A wide extension would surely meet some resistance. Of course, to the extent that such widening is functionally indispensable, we must try to achieve its acceptance and persuade the opponents it will meet. However, it would seem highly desirable that the Commission should seek some means of reducing the circle of missions which would fall under the special régime or else of limiting the privileges and immunities granted. It is appreciated that there are great difficulties in distinguishing between missions. Diplomatic or non-diplomatic status cannot alone be decisive; a mission consisting of a minister of defence and generals sent to negotiate military co-operation may have as great a functional need to be under the special régime as a diplomatic delegation sent to negotiate a new trade agreement. Yet it may possibly be said that special missions, which by definition are *temporary*, generally have a somewhat more limited need, at least for privileges, than do permanent missions. In a great many cases the express agreement to send and receive a special mission may also be a guarantee that the receiving State will in all ways spontaneously facilitate the task of the mission, a guarantee that does not necessarily exist for permanent missions'."⁵⁷

170. The Swedish Government is of the opinion that great care should be taken to limit privileges and immunities as much as possible, both with respect to their extent and with respect to the categories of persons who would enjoy them. This is regarded as particularly important if it is the intention that a considerable part of the provisions regarding privileges and immunities shall be peremptory.

Extent of the privileges and immunities of special missions as compared with permanent diplomatic missions

171. The Commission started from the principle that special missions should enjoy such privileges and immunities as are necessary for the performance of their tasks. On the other hand, the Commission drafted the provisions of the articles on special missions in conformity with the rules of the 1961 Vienna Convention on Diplo-

⁵⁴ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 843rd meeting, para. 40.*

⁵⁵ *Ibid.*, 846th meeting, para. 5.

⁵⁶ *Ibid.*, 847th meeting, para. 17.

⁵⁷ This statement was made at the 844th meeting of the Sixth Committee of the General Assembly, the records of which are published in summary form.

matic Relations, as it considered that special missions cannot enjoy wider privileges and immunities than are granted to permanent diplomatic missions. However, the absence from this body of rules of any express provision on the subject prompted the Belgian Government to make the following point in its written comments:

"... it is hard to conceive that a special mission should receive better treatment than the permanent diplomatic mission of the same nationality established in the receiving State. Privileges and immunities should be granted to a special mission only to the extent to which they are applied in favour of the permanent diplomatic mission of the same nationality, unless otherwise mutually agreed between the States concerned."

172. The Special Rapporteur thinks it necessary to include a special provision which, as an operative rule, will settle this question, and to insert an explanation of the Commission's view in the commentary on article 17. (For the text of the new paragraph 2 of article 17, see above, paragraph 36.)

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

173. No reference was made to this article either during the discussions in the Sixth Committee of the General Assembly or in the written comments by Governments.

Article 19.—Inviolability of the premises

174. In its comments, the Government of Israel proposes an addition to article 19, paragraph 1. The proposal reads as follows:

"With regard to article 19, paragraph 1, it would appear desirable, from a practical point of view, to add to it a provision similar to the last sentence of article 31, paragraph 2 of the 1963 Vienna Convention: 'The consent...may, however, be assumed in case of fire or other disaster requiring prompt protective action'."

175. The Special Rapporteur points out that in his second report he considered the possibility of introducing, in the text itself, a provision similar to that of article 31, paragraph 2, of the Vienna Convention on Consular Relations, concerning the right of the receiving State to assume the consent of the head of a consular post in case of fire or other disaster requiring prompt protective action. The Commission studied this question very carefully and decided that it should not adopt the relevant provision of the Convention on Consular Relations, but should take the same position in the draft articles on special missions as had been taken in the Vienna Convention on Diplomatic Relations.⁵⁸

176. The Government of Israel also makes the following suggestion concerning article 19:

"Consideration may, perhaps, be given to drawing a distinction between the case of a special mission

residing in a town where the sending State has a permanent mission and that of a special mission in a town where there is no such permanent mission, and allowing the aforesaid proposition only in the former case."

177. The Special Rapporteur is not convinced that this is a useful proposal, because the respective powers of the head of the special mission and the head of the permanent diplomatic mission remain the same in both cases.

178. The Belgian Government, in its comments, proposes an amendment to article 19, paragraph 3. Its proposal is as follows:

"The words 'by the organs of the receiving State' might be deleted; they do not appear either in article 22 of the Vienna Convention on Diplomatic Relations or in article 31 of the Vienna Convention on Consular Relations. Furthermore, the term used should be 'measure of execution'."

179. The Special Rapporteur points out that although, when the articles on special missions were being drafted, there was a tendency to model the text as closely as possible on the Vienna Conventions on Diplomatic Relations and on Consular Relations, certain special conditions and circumstances in which the tasks of special missions are performed were nevertheless taken into account. That was why the Special Rapporteur and the Commission thought it necessary to make the text clearer by introducing the words whose deletion is suggested by the Belgian Government solely on the ground that they do not appear in the texts of the two Vienna Conventions.

Article 20.—Inviolability of archives and documents

180. No observations were made on this article, either in the Sixth Committee of the General Assembly or in the comments by Governments.

Article 21.—Freedom of movement

181. In the Sixth Committee of the General Assembly, the Turkish representative expressed the opinion that the International Law Commission had gone too far by granting all members of special missions, in principle, freedom of movement throughout the territory of the receiving State. He doubted whether it was necessary to retain that provision and thus place the special mission, in that respect, on an absolutely equal footing with the staff of permanent diplomatic missions.⁵⁹ The Special Rapporteur points out that in his first and second reports he informed the Commission that in practice it was possible to lay down rules placing some restriction on the freedom of movement of the members and staff of a special mission in the territory of the receiving State. The Commission considered that it should start from the principle of full freedom of movement to the extent provided for in the Vienna Convention on Diplomatic Relations (1961). It decided, however, not to make the

⁵⁸ See *Yearbook of the International Law Commission, 1965*, vol. I, 804th meeting, paras. 77-105, 805th meeting, paras. 1-28, 817th meeting, paras. 7-10, and 820th meeting, paras. 29-31.

⁵⁹ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 847th meeting, para. 24.*

rule stated in article 21 of the draft an absolute rule. It regarded this provision as a residuary rule from which States might derogate in their mutual relations, making restrictions by agreement. The words "unless otherwise agreed" were accordingly added at the end of article 21. The Special Rapporteur proposes that the Commission should reconsider the principle as he himself attaches some weight to the comment made by the Turkish delegation.

182. The Swedish Government also commented on this article, as follows:

"Should the principle of the subsidiary character of the articles be accepted, the phrase 'unless otherwise agreed' can be omitted. If, on the other hand, the articles are in principle to constitute *jus cogens* the text should at least be reworded along these lines:

'In the absence of an agreement on the matter between the sending and the receiving State, the receiving State shall, subject to its laws, etc. ensure, etc.'

"As now phrased the text seems to assume that the parties might agree not to accord such freedom of movement to the mission as is necessary for the performance of its functions."

183. The Special Rapporteur does not consider the phrase "unless otherwise agreed" superfluous. It is, in fact, necessary, in order to show what is held to be the general rule on the subject; but this general rule, being of a residuary character, will not be applied if the States concerned agree otherwise. The Special Rapporteur does not see the advantage of the new wording proposed by the Swedish Government.

Article 22.—Freedom of communication

184. The Yugoslav Government suggests that paragraph 6 of article 22 should be amended. It comments as follows:

"...consideration should be given to the possibility of guaranteeing, in article 22, the immunity of couriers *ad hoc* during their return journey also, if it immediately follows the delivery of the bag to the special mission."

185. The Special Rapporteur fully appreciates the reasons which led the Yugoslav Government to make this suggestion; he considers it very logical, but, in his opinion, it would be difficult to provide, for the couriers *ad hoc* of special missions, greater guarantees and more extensive rights than those enjoyed by the same category of couriers of regular and permanent diplomatic missions and consular posts. For this reason, he does not recommend the adoption of this suggestion by the Yugoslav Government. In the two Vienna Conventions, immunity was not conferred on this category of couriers as a personal safeguard, but as protection of the bag they carry.

186. In its comments, the Belgian Government deals with several aspects of the text of article 22. In the first place, it emphasizes in the following terms the inadequacy of the protection provided for the telegraphic communications of special missions, if they are not transmitted as communications of diplomatic or consular missions:

"With regard to wireless communications, the article provides that the special mission shall be entitled to send messages in code or cipher. But article 18 of the Telegraph Regulations annexed to the 1959 Geneva International Telecommunication Convention states:

'The sender of a telegram in secret language must produce the code from which the text or part of the text or the signature of the telegram is compiled if the office of origin or the Administration to which this office belongs asks him for it. This provision shall not apply to Government telegrams'.⁶⁰

"The only way to reconcile the provisions of this paragraph relating to secret messages with the provisions of the international Conventions relating to the telegraph service would be for special missions to transmit such messages as Government telegrams.

"However, annex 3 of the Geneva International Telecommunication Convention gives a complete list of the persons authorized to send Government telegrams and it refers only to diplomatic or consular agents.⁶¹

"In short, in the present state of international conventional law, special missions would have to be authorized by their diplomatic or consular posts to hand in Government telegrams bearing the seal or stamp of the authority sending them.

"If there is no such post the problem remains unsolved. This question might well be raised when the time comes to revise the International Telecommunication Convention."

187. The Special Rapporteur considers it his duty to thank the Belgian Government for having drawn attention to the provisions of the Geneva International Telecommunication Convention, but he adds that the International Law Commission had this provision in mind when drafting article 22, paragraph 1 and decided to recognize the right of special missions to use messages in code or cipher and to use them directly, without using the permanent diplomatic or consular mission of the sending State as an intermediary. The Belgian Government is of the opinion that the convention under study cannot amend the Geneva International Telecommunication Convention, whereas in the International Law Commission the prevailing opinion was that the future convention on special missions, as a subsequent instrument, would be directly applicable. Nevertheless, it is the Special Rapporteur's duty to draw the Commission's attention to this comment by the Belgian Government.

188. In its comments, the Belgian Government also refers to the last sentence of paragraph 1 of article 22, as follows:

"With regard to wireless transmitters, it would be desirable to amend the last sentence of the present paragraph to read as follows:

⁶⁰ *Telegraph regulations (Geneva revision, 1958) annexed to the International Telecommunication Convention (Geneva, International Telecommunication Union, 1959)*, p. 22.

⁶¹ *International Telecommunication Convention, 1959 (Geneva, International Telecommunication Union)*, p. 73.

'However, the special mission may install and use a wireless transmitter or any means of communication to be connected to the public network only with the consent of the receiving State.'

"There are separate wireless telephone devices which can be linked to the public telephone network: if these devices are not in conformity with those approved by the competent technical services, they may cause disturbance in the network."

189. The Special Rapporteur points out that the sentence in the text of the draft article referred to by the Belgian Government in the above comment, is copied from the last sentence of article 27, paragraph 1, of the Vienna Convention on Diplomatic Relations and the last sentence of article 35, paragraph 1 of the Vienna Convention on Consular Relations. The Belgian Government's proposal is more complete from the technical point of view and the Special Rapporteur has no objection to its adoption. If adopted, the Belgian text would replace the last sentence of paragraph 1 of article 22 of the Commission's draft.

190. The Belgian Government also makes some comments on the provisions of article 22 relating to diplomatic bags. On this subject it says:

"With regard to the postal service, it should be borne in mind that the Universal Postal Convention does not make provision for any special treatment of diplomatic bags from the point of view of rates. Some postal unions covering a limited area consent to carry such bags post-free, but this is solely because special reciprocal arrangements have been made; all proposals so far submitted for including a provision for their carriage post-free in the Universal Convention have been rejected.

"As Belgium does not participate in an arrangement for the post-free carriage of diplomatic bags, this mail is subject to the ordinary postal rates."

191. After studying this comment by the Belgian Government, the Special Rapporteur feels bound to point out that what was intended by the Commission in paragraphs 3 and 4 of article 22 was solely the protection under substantive law of the inviolability of the contents and secrecy of the bag, and not any special treatment of diplomatic bags in respect of postal rates. The Special Rapporteur is of the opinion that the Commission should not discuss the question of privileged rates, which is not referred to in the Vienna Conventions of 1961 and 1963; the diplomatic bag should be uniformly protected regardless of the means used for its transport and there is no need to draw special attention to the situation of diplomatic bags sent by post.

Articles 23 to 32.—Questions of terminology

192. In connexion with these articles, the Government of Israel raises the question of terminology. Its comment is as follows:

"The following observation is made in respect of articles 23 to 32 inclusive: these articles, which deal mainly with questions of exemptions and immunities,

mention alternately the 'staff' of the special missions in some places, and the 'diplomatic staff' in others, without this distinction being always really justified, especially in view of the provisions of article 32. It is therefore suggested to use the term 'staff' throughout the aforesaid articles and to adjust article 32 accordingly."

193. The Special Rapporteur thanks the Government of Israel for having raised this question, but he considers that in principle the comment is not pertinent. In his first draft, the Special Rapporteur proceeded on the assumption that all staff members of special missions should be accorded the same privileges and immunities. The Commission, however, did not adopt this view, but distinguished, in each article, between the different categories of staff of special missions, and tried not to grant them greater privileges and immunities than those granted to the corresponding categories of staff under the 1961 Vienna Convention on Diplomatic Relations. This is why articles 23 to 32 refer in some places to the "staff" of special missions and in others to the "diplomatic staff". The Special Rapporteur will try to take this comment by the Government of Israel into consideration with respect to each of these articles and to verify once again that the distinction between "staff" and "diplomatic staff" is justified.

Article 23.—Exemption of the mission from taxation

194. With regard to article 23 of the draft, the Belgian Government comments as follows:

"The Belgian view is that which it upheld in connexion with article 23 of the Vienna Convention on Diplomatic Relations, namely that the head of the mission is exempt from dues and taxes in respect of the premises of the mission only if he has acquired them in his capacity as head of the special mission and with a view to the performance of the functions of the mission. Accordingly, the words 'in his capacity as such' should be inserted after 'head of the special mission'."

195. The Special Rapporteur considers this suggestion useful, as it removes all doubt about the meaning of the text.

196. Although the proposal of the Government of Israel concerning questions of terminology includes article 23, we do not think it applies to this article, the text of which contains none of the terms whose standardization is aimed at in the above-mentioned proposal.

Article 24.—Personal inviolability

197. The Belgian Government comments as follows:

"The Belgian Government is of the opinion that members of missions should be granted only a personal inviolability limited to the performance of their functions."

198. The Special Rapporteur points out that the Commission limited this guarantee to "the person of the head and members of the special mission and of the members of its diplomatic staff". The Commission recognized that

these persons should be placed on an equal footing with the diplomatic agents referred to in article 29 of the 1961 Vienna Convention on Diplomatic Relations. This question is directly dependent on the answer to the general question whether the extent of the privileges and immunities to be granted to special missions should depend on the functions they have to perform. The point is dealt with in article 17, and the decision concerning the Belgian Government's comments will depend on the attitude taken with regard to this article. The Special Rapporteur nevertheless considers that personal inviolability is a fundamental guarantee which should, in any case, be granted to the persons mentioned above.

199. In connexion with this article, the question also arises whether, in keeping with the spirit of the general comment by the Government of Israel, the Commission should aim at simplifying the term *staff* and apply it, without restriction, to the category of *diplomatic staff*. The Special Rapporteur reminds the Commission that it rejected his original idea that personal inviolability should be guaranteed to all categories of staff of the special mission. It kept to the analogy with article 29 of the Vienna Convention on Diplomatic Relations and considered it inadvisable to extend that privilege to other categories of staff.

Article 25.—Inviolability of the private accommodation

200. In its comments, the Belgian Government makes the following proposal regarding article 25, paragraph 2:

"It would be as well to introduce, as in article 30 of the Vienna Convention on Diplomatic Relations, a proviso regarding measures of execution on property in cases where immunity from civil and administrative jurisdiction does not apply, and accordingly to begin the paragraph with the words: 'Except as provided in article 26, paragraph 4...'"

201. The Special Rapporteur considers that this proposal by the Belgian Government is in conformity with the Commission's concern not to grant the staff of special missions more rights than are granted to diplomatic agents under the 1961 Vienna Convention on Diplomatic Relations; consequently, he is of the opinion that this proposal can be adopted.

202. In examining this article, account should also be taken of the comment by the Government of Israel concerning terminology. The Special Rapporteur points out that the Commission also wished to restrict this right exclusively to the diplomatic staff of special missions, in order not to grant other members of the staff more privileges and immunities than are enjoyed by the other categories of staff of diplomatic missions. He therefore believes that the expression "members of its diplomatic staff" was not used without good reason.

Article 26.—Immunity from jurisdiction

203. Applicable to this article is the comment by the Government of Israel that the terminology should be revised and consideration given to the question whether the text should refer solely to members of the diplomatic staff of the special mission or to all categories of staff.

The Special Rapporteur considers it his duty to mention that the Commission, following article 31 of the 1961 Vienna Convention on Diplomatic Relations, deliberately restricted the text to diplomatic staff only.

Article 27.—Waiver of immunity

204. Taking into account the comment by the Government of Israel concerning terminology, the Special Rapporteur thinks that the expression "members of its staff" is correctly used in this article also, for the Commission took the view that this provision should apply to waiver of immunity for all persons, not only members of the diplomatic staff.

Article 28.—Exemption from social security legislation

205. Here, too, the Special Rapporteur has examined the applicability of the general comment on terminology made by the Government of Israel with regard to articles 23 to 32; he finds that the expression "member of its staff" is correctly used, and that it is unnecessary to specify the different categories of staff in greater detail in this article.

Article 29.—Exemption from dues and taxes

206. In considering this article, the Special Rapporteur kept in mind the general comment on terminology made by the Government of Israel with regard to articles 23 to 32 and he considers it necessary to confine the article to the members of the diplomatic staff of the special mission, without mentioning the other categories of staff of the special mission; these other categories come under the provisions of article 32.

Article 30.—Exemption from personal services and contributions

207. This article is restricted to members of the diplomatic staff, the privileges of the other categories of staff of the special mission being regulated by article 32. The Special Rapporteur points out that it was impossible to apply to article 30 the simplified formula proposed by the Government of Israel in its general comment on the terminology of articles 23 to 32.

Article 31.—Exemption from Customs duties and inspection

208. The Belgian Government has a comment to make on article 31, paragraph 1 and proposes that the range of articles to which Customs privileges extend should be restricted. The proposal is worded as follows:

"With regard to sub-paragraph (b), the word 'articles' is too vague and is inadequate. The Belgian Government is prepared to grant exemption from Customs duties solely in the case of personal effects and baggage."

209. The Special Rapporteur believes it to be necessary to grant to the members of special missions mentioned in article 31, paragraph 1, a fairly wide degree of Customs exemption, not confined to personal effects and baggage in the strict sense, yet narrower than that granted under

the Vienna Convention on Diplomatic Relations to diplomatic agents, who are granted this privilege in connexion with the entry of articles intended for their establishment. He considers that the provision laid down by the Commission is a just one and that it should not be restricted.

210. The Belgian Government further considers that the privileges granted to the members of the families of the head and of members of a special mission and of its diplomatic staff should not be expressly mentioned, because this matter is explicitly regulated by article 35, paragraph 1. The Special Rapporteur considers that the Belgian Government's comment is well-founded and that that part of the provision relating to members of families could be omitted.

211. In connexion with article 31, the Government of Israel, in its general comment on terminology, raises the question whether the restrictive expression "diplomatic staff" (of the special mission) or the general term "staff" should be used. In the Special Rapporteur's view, the specific term "members of its diplomatic staff" should be used here, because the position in the case of other types of staff is governed by a special provision in article 32.

212. The Swedish Government also has a comment to make on article 31 in its written remarks. It says:

"In view of the fact that there is a special article (article 35) dealing with the families, should not, in paragraph 1(b), the words 'or of the members of their family who accompany them' be omitted?" (Cf. commentary (2)(a) to article 32). There also seems to be a discrepancy between the expression 'who accompany them' in article 31, paragraph 1, and the expression 'who are authorized by the receiving State to accompany them' in article 35, paragraph 1."

213. The Special Rapporteur regards this comment by the Swedish Government as essentially the same as that by the Belgian Government referred to above, which he considered well-founded.

Article 32.—Administrative and technical staff

214. In its written comments, the Belgian Government expresses the view that the reference to nationality or permanent residence in article 32 should be omitted, on the ground that the matter is regulated by article 36. The Special Rapporteur's view is that, although this comment by the Belgian Government may strictly speaking be correct, the omission of these references from article 32 would make it necessary to insert a reference to article 36. The question is whether it is better to have a direct reservation, or an indirect reservation which would be less clear because it would merely take the form of a reference to another article.

215. The Israel Government's general comment on terminology also refers to this article. The Special Rapporteur does not think that the abbreviated expression "the staff" can be used, because the Commission's idea, based on the 1961 Vienna Convention on Diplomatic Relations, is that the privileges and immunities of the

administrative and technical staff should not be the same as those of the diplomatic staff.

216. The Swedish Government's comment on article 31 (see above, paragraph 212) also refers to this article. The Special Rapporteur has already accepted this comment in connexion with article 31.

Article 33.—Members of the service staff

217. In its written comments, the Belgian Government proposes an addition to article 33. This proposal is worded as follows:

"No reference is made to article 28 concerning social security. The following should therefore be added: 'as well as the provisions of article 28 on social security'."

218. The Special Rapporteur thanks the Belgian Government for this reminder, for article 28 (Exemption from social security legislation) refers to the staff of the special mission in general and consequently also to members of the service staff. The reference to article 28 proposed by the Belgian Government will therefore have to be inserted in article 33.

219. The Belgian Government proposes in its comments that the reference to nationality or permanent residence of members of the service staff should be omitted from article 33, as the matter is regulated by article 36, paragraph 2. The Special Rapporteur considers this observation to be well-founded.

Article 34.—Private staff

220. The Belgian Government takes the view that reference to nationality and permanent residence should be omitted from this article, on the ground that the position of private staff where nationality or permanent residence in the territory of the receiving State is concerned is regulated by article 36. The Belgian Government's observation is correct.

Article 35.—Members of the family

221. The Belgian Government has the following comment to make on article 35, paragraph 1:

"The paragraph refers to articles 24 to 31, including article 29; but it is hard to see how a member of the family can enjoy tax exemption on income attaching to functions with the special mission."

222. Although in principle it is difficult to see how members of the families of members of the special mission and of its staff can have "income attaching to their functions with the special mission", the fact remains that in practice special missions entrust certain minor matters to members of the families of members of the special mission rather than to persons not connected with the mission. For this reason, the Special Rapporteur considers that the reference to article 29 should not be deleted from the text of article 35, paragraph 1.

223. The Belgian Government also has some comments to make on article 35, paragraph 2. It says:

"This paragraph refers to article 32, which itself refers back to the same articles; the comment on paragraph 1 therefore applies equally to this paragraph.

"The drafting of this paragraph does not seem adequate; it would be clearer to word it: 'Members of the families of the administrative and technical staff of the special mission who are authorized to accompany it shall enjoy the privileges and immunities referred to in article 32 except when they are nationals of or permanently resident in the receiving State.'

"An anomaly, which in fact exists in article 37, paragraph 1 of the Vienna Convention on Diplomatic Relations, but was corrected in article 71, paragraph 2 of the Vienna Convention on Consular Relations, should be pointed out. If a member of the mission is a national or permanent resident of the receiving State, he loses his immunities; taking the text literally, the members of his family who are not either nationals or permanent residents would enjoy the immunities."

224. The Special Rapporteur, while thanking the Belgian Government for its comment, does not accept this literal interpretation of the text. In his view, members of the family cannot possess privileges and immunities greater than those enjoyed by the member of the mission or the member of the staff from whom their privileged position is derived. Consequently, the Special Rapporteur sees no reason for changing the Commission's text.

225. The Swedish Government's comment on article 31 (see above, paragraph 212) also refers to this article. The Special Rapporteur has already answered this comment by the Swedish Government in the section dealing with article 31.

Article 36.—Nationals of the receiving State and persons permanently resident in the territory of the receiving State

226. In its written comments, the Belgian Government states that the text of this article contains a drafting error. This comment is worded as follows:

"The word '*que*' in the seventh line of the French text should be placed before the words '*de l'immunité*'. This drafting error, which appeared in article 38, paragraph 1, of the Vienna Convention on Diplomatic Relations, was in fact corrected in article 71, paragraph 1 of the Vienna Convention on Consular Relations."

227. The Special Rapporteur considers this comment to be of a drafting nature, but he is not sure whether it is a question of a "drafting error" or of two expressions that were used deliberately. The Drafting Committee will no doubt take the comment into consideration.

228. The Swedish Government has the following to say about the commentary to article 36:

"The commentary should be revised. As it now stands, it is confusing, in particular because the phrase 'This idea is set forth in article 14'; etc., is not exact. As appears from paragraph (3), only part of the idea was incorporated in article 14."

229. Since this comment by the Swedish Government relates only to the commentary, and since it is in large measure justified, the Special Rapporteur will endeavour to redraft the commentary on this article.

Article 37.—Duration of privileges and immunities

230. In its written comments, the Belgian Government raises the following objection of a terminological character to the drafting of article 37, paragraph 1:

"The word 'organ' in the seventh line should be replaced by some more neutral word such as 'authority'."

231. The Special Rapporteur's view is that the issue is not merely one of terminology but also of modern concepts of comparative constitutional law. To the contemporary way of thinking, every official is not at the same time an *authority*, but he is certainly an *organ*.

232. The Belgian Government also makes the following drafting comment on the French text of article 37, paragraph 2:

"In the fifth line of the French text '*qu'il*' should read '*qui lui*'."

233. The Special Rapporteur leaves the decision on this point to the Drafting Committee.

Article 38.—Case of death

234. This article was not referred to either in the discussions in the Sixth Committee of the General Assembly or in the written comments of Governments.

Article 39.—Transit through the territory of a third State

235. In its written comments, the Government of Israel proposes a change in the adjective applied to the third State. Its proposal is as follows:

"With regard to article 39, paragraph 1, attention is drawn to the use therein of the expression 'in a foreign State', and it is suggested that it may perhaps be preferable in the context to say 'in another State', in view of the fact that except for a person's 'own country' (which expression is also used in that paragraph) every other country is a 'foreign State', including the 'third State' (likewise mentioned in that paragraph)."

236. The Special Rapporteur considers that this comment is justified and that the Drafting Committee should take it into account.

237. The Government of Israel also has the following suggestion to make with regard to article 39, paragraph 4:

"In respect of article 39, paragraph 4, it is suggested to delete the phrase 'either in the visa application or by notification' and to substitute the word 'notified' for the word 'informed', in the third line of that paragraph."

238. The Special Rapporteur wishes to draw the Commission's attention to the fact that the phrase which the Government of Israel suggests should be deleted conveys a definite opinion on the part of the Commission, which held that the sending State was not always bound

to notify the proposed transit by a formal note and that the visa application relating to the transit would suffice. The Special Rapporteur considers that failure to mention in the text the form which the notification should take might lead to misunderstandings in practice and, in consequence, he is not disposed to recommend the Commission to adopt this suggestion by the Government of Israel.

239. The Belgian Government also proposes a change in article 39, paragraph 4, as follows:

“It would be better to say ‘*soit dans la demande de visa*’, as that wording would bring out better the obligation to inform at the time that the visa application is made.”

240. The Special Rapporteur emphasizes that the intention of the Belgian proposal is to replace the word “*par*” by the word “*dans*”, but the proposal is also useful from the point of view of substance, as it clearly brings out the idea that it is not sufficient merely to apply for a visa; the visa application concerned must be an application arising out of the need for transit by the special mission itself. Accordingly, the Special Rapporteur is in favour of adopting the Belgian proposal.

Article 40.—Obligation to respect the laws and regulations of the receiving State

241. This article was the subject of an observation made in the Sixth Committee of the General Assembly by the Hungarian delegation. That delegation expressed the opinion that article 15 of the draft concerning the use of the flag and emblem of the sending State was superfluous, since that question was covered by article 40 of the draft.⁶² The Special Rapporteur has dealt with this question in his observations on article 15.

Article 41.—Organ of the receiving State with which official business is conducted

242. In its observations, the Belgian Government expresses the opinion that the words “or such other organ, delegation or representative...” which appear at the end of article 41 of the draft should be changed. It says:

“At the end, it would be advisable to use a broader and less controversial listing, for example ‘such body or person as may be agreed’.”

243. The Special Rapporteur does not feel able to approve the expressions proposed by the Belgian Government, for in his opinion they are not in conformity with modern ideas as to who may negotiate on behalf of a Government with the mission of another sovereign State.

244. In its observations, the Belgian Government also makes an alternative proposal in case the Commission does not adopt its above-mentioned proposal. The Belgian proposal reads as follows:

“If the titles of the articles are retained, the word ‘authority’ should be substituted for ‘organ’.”

245. The Special Rapporteur recalls that he has already stated his views on a similar proposal by the Belgian Government with respect to article 37 of the draft. It is not merely a question of terminology but also of conceptions of comparative constitutional law which does not regard the notions of organ and authority as equivalent.

Article 42.—Professional activity

246. The Belgian Government has stated its views on the question whether members of special missions and their diplomatic staff should be forbidden to practise a professional or commercial activity by a provision on the lines of article 42 of the 1961 Vienna Convention on Diplomatic Relations, or by one on the lines of article 57 of the 1963 Vienna Convention on Consular Relations. In this connexion, it states:

“The prohibition against practising any professional or commercial activity would be better rendered by the expression ‘shall not carry on’, as in article 57 of the Vienna Convention on Consular Relations of 24 April 1963.”

247. The Special Rapporteur reminds the Commission of the discussion held by it on the question whether the professional activity of the members of special missions should be regulated by a provision on the lines of one or other of those two Conventions.⁶³ At the close of the discussion, the prevailing view was that the provisions of the Convention on Diplomatic Relations should be followed.

248. In line with the attitude set forth above, the Belgian Government also made the following proposal:

“In addition, the article should be supplemented by provisions similar to those in paragraph 2 of the aforesaid article 57.”

249. The Special Rapporteur considers that the explanation given by him with respect to the preceding proposal is also an adequate reply to this second proposal by the Belgian Government.

250. The Government of Israel thinks that it might perhaps be better for the Commission to reconsider the essence of article 42. Its proposal reads as follows:

“It is submitted that the wording of the second paragraph of the commentary to article 42 is not very clear. As to the substance of that article, it is suggested that the Commission may wish to reconsider the proposal to include a provision enabling members of a special mission, in particular instances, to engage in some professional or other activity whilst in the receiving State, e.g., by substituting a comma for the full-stop at the end of that article and adding thereto: ‘without the express prior permission of that State’.”

251. In connexion with this proposal by the Government of Israel, which is contrary to the line taken by the Belgian Government, the Special Rapporteur expresses the opinion that this question is a very delicate one and

⁶² Official Records of the General Assembly, Twentieth Session, Sixth Committee, 843rd meeting, para. 38.

⁶³ See Yearbook of the International Law Commission, 1965, vol. I, 809th meeting, paras. 10-51.

that a number of different attitudes can be taken towards it. He personally considers that the text adopted should be adhered to, but at the same time he recalls that this text was not adopted unanimously at the first part of the Commission's seventeenth session, in 1965, and that consequently any doubts regarding it should be taken into consideration. He hopes that certain members of the Commission will give a more detailed explanation of the attitude taken by the Government of Israel.

252. During the discussion in the Sixth Committee of the General Assembly, the Turkish representative stated that he hesitated to express an opinion concerning the advisability of adopting *mutatis mutandis*, in article 42 on special missions, the rules of article 42 of the Vienna Convention on Diplomatic Relations.⁶⁴ From the official record in question the Special Rapporteur has been unable to form a clear idea of the meaning of the observation of the Turkish representative, whom he has asked for a more detailed explanation of his ideas. At the time of writing he has received no reply to his letter.

Article 43.—Right to leave the territory of the receiving State

253. The Government of Israel considers that the terminology used in article 43 ought to be re-examined. It has drawn up two proposals on this subject.

254. According to the first proposal of the Government of Israel:

“Article 43 speaks of ‘persons enjoying privileges and immunities’ and ‘members of the families of such persons’, instead of referring to ‘members of the special mission, its staff, families, etc.’, which would seem to be more in keeping with the language employed elsewhere in the draft articles.”

255. The Special Rapporteur observes that the terminology criticized by the Government of Israel was borrowed from article 44 of the 1961 Vienna Convention on Diplomatic Relations and that the Commission was not inclined to depart from that terminology unless obliged to do so. In this case, he does not see any need to depart from the wording of the Vienna Convention.

256. The second proposal of the Government of Israel reads as follows:

“Article 43 requires the receiving State to place at the disposal of the persons mentioned therein means of transport ‘for themselves and their property’. Article 44, however, which deals with a very similar situation, likewise necessitating the withdrawal of the special mission and all that goes with it, speaks of ‘its property and archives’, but makes no effective provision for the removal of such ‘property and archives’ from the territory of the receiving State.”

257. The Special Rapporteur thinks that the purpose of article 43, which refers to the right of persons to leave the territory of the receiving State, and that of article 44, which concerns the situation in case of the cessation of

the special mission's functions, cannot be considered as identical. In his opinion, the correct solution is that which provides for the possibility of removing the archives only in the second case, for the archives in question are not those of persons who enjoy privileges and immunities but archives of special missions. The question raised, however, is an interesting one and deserves the Commission's attention.

Article 44.—Cessation of the functions of the special mission

258. In its observations the Belgian Government also touched on the substance of article 44 and particularly on its paragraph 2. This observation reads as follows:

“This article deals only with the action to be taken when a special mission ceases to function. Accordingly, paragraph 2 would be better placed in article 12. In addition, the word ‘automatically’ in that paragraph should be replaced by ‘*ipso facto*’. Lastly, the words ‘but each of two States may terminate the special mission’ would become superfluous.”

259. The Special Rapporteur considers it his duty to point out that the Belgian Government, in formulating this amendment, looked at the matter from a purely juridico-technical point of view, whereas the Commission envisaged other aspects, namely that the severance of diplomatic relations is not the same thing as the termination of the special mission, although each of the States concerned has the right to terminate it if it wishes. For this reason, the Special Rapporteur is of the opinion that the Belgian proposal should not be adopted.

260. The Special Rapporteur considers, however, that the Drafting Committee should take a decision concerning the Belgian Government's proposal that the word “automatically”, which appears in the present text of article 44, paragraph 2, should be replaced by the expression “*ipso facto*”, although he prefers the term “automatically”, since it is a question of the effective consequence of a fact rather than of a juridical effect.

261. The Government of Israel also makes some observations concerning the text of article 44. These observations are as follows:

“Article 44, paragraph 1, provides for the permanent diplomatic mission or a consular post of the sending State to ‘take possession’ of the ‘property and archives’, but there may not exist any such diplomatic mission or consular post of the sending State in the territory of the receiving State”.

“Article 44, paragraph 3(b), would also not meet the case, as there may not be any mission of a third State in the territory of the receiving State prepared to accept the custody of the ‘property and archives’ of the stranded mission of the sending State.”

“It would, therefore, appear to be necessary to make express provision for the removal of the aforesaid archives from the territory of the receiving State in the cases envisaged in articles 43 and 44.”

262. The Special Rapporteur thanks the Government of Israel for having drawn attention to the special

⁶⁴ Official Records of the General Assembly, Twentieth Session, Sixth Committee, 847th meeting, para. 24.

situations connected with the severance of diplomatic or consular relations, since the draft has not taken such situations sufficiently into account, but he is not sure whether it is necessary to go into details on the subject. Perhaps the proper place for dealing with these situations would be the commentary on article 44.

CHAPTER IV

Introductory article

263. In paragraph 46 of its report on the work of the first part of its seventeenth session (1965), the Commission "instructed the Special Rapporteur to prepare and submit to the Commission an introductory article on the use of terms in the draft, in order that the text may be simplified and condensed."⁶⁵

264. This idea met with general approval, both in the discussions in the Sixth Committee of the General Assembly and in the written comments by Governments.

265. During the discussions in the Sixth Committee, the representatives of Hungary,⁶⁶ Turkey⁶⁷ and Ceylon⁶⁸ spoke in favour of an introductory article comprising definitions. The representatives of Israel⁶⁹ and Finland⁷⁰ considered that such an article would make it possible to condense the text of the draft. They also referred to the need to keep the terminology of the articles on special missions as close as possible to that of the Vienna Conventions of 1961 and 1963. The representatives of Hungary,⁷¹ Sweden⁷² and France⁷³ also expressed this view, whereas the representative of Jordan⁷⁴ said that only the 1961 Vienna Convention on Diplomatic Relations should be taken into consideration.

266. It is interesting to note that the delegation of Afghanistan had a different opinion on terminology: it proposed that the term "special mission" should be rejected in favour of "temporary mission" and that "a standard terminology of international law" should be adopted in formulating the rules.⁷⁵

267. The Government of Israel devoted particular attention to this point in its comments, where it says:

"With this object in mind, it would be most helpful if an article containing definitions of terms frequently used could be drawn up and embodied in the draft, giving those terms the same meanings as in the 1961 Vienna Convention, and, whenever possible, making

use of cross-references to the said Convention. The definitions would probably include such terms as: special missions, head of special mission, members of special mission, staff (diplomatic, administrative and technical, service, personal), premises, etc.

"It is believed that the draft articles would gain by being shortened, and that this could be achieved by such cross-references and by combining some articles."

268. The Yugoslav Government also dealt with this matter in its comments. It states that it

"agrees with the International Law Commission's proposal that an article defining the terms used in the convention should be inserted as article 1 of the future convention".

269. In accordance with the Commission's decision and with the opinions expressed by delegations and Governments, the Special Rapporteur proposes the introductory article, set out below, which contains definitions of the expressions used in several articles of the draft. If the Commission adopts this article, the texts of a number of articles can be shortened, since the repetition of descriptive definitions can be avoided.

270. The text of the introductory article proposed by the Special Rapporteur is as follows:

Article 0 (provisional number).—Expressions used

For the purposes of the present articles

(a) A "special mission" is a temporary special mission which a State proposes to send to another State, with the consent of that State, for the performance of a specific task;

(b) A "permanent diplomatic mission" is a diplomatic mission sent in accordance with the 1961 Vienna Convention on Diplomatic Relations;

(c) A "consular post" is a consular post established under the 1963 Vienna Convention on Consular Relations;

(d) The "head of a special mission" is the person charged by the sending State with the duty of acting in that capacity;

(e) A "representative" is a person charged by the sending State with the duty of acting alone as a special mission;

(f) A "delegation" is a special mission consisting of a head, and other members;

(g) The "members of a special mission" are the head of the special mission and the members authorized by the sending State to represent it as plenipotentiaries;

(h) The "members and staff of the special mission" are the head and members of the special mission and the members of the staff of the special mission;

(i) The "members of the staff of the special mission" are the members of the diplomatic staff, the administrative and technical staff and the service staff of the special mission;

(j) The "members of the diplomatic staff" are the members of the staff of the special mission to whom the sending State has given diplomatic rank;

(k) The "members of the administrative and technical staff" are the members of the staff of the special mission employed in the administrative and technical service of the special mission;

(l) The "members of the service staff" are the members of the staff of the special mission employed in unskilled and domestic service within the special mission;

(m) The "private staff" are persons employed in the private service of the members and staff of the special mission;

⁶⁵ *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009, para. 46.

⁶⁶ *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 843rd meeting, para. 36.

⁶⁷ *Ibid.*, 847th meeting, para. 24.

⁶⁸ *Ibid.*, 850th meeting, para. 8.

⁶⁹ *Ibid.*, 840th meeting, paras. 6 and 7.

⁷⁰ *Ibid.*, 850th meeting, para. 3.

⁷¹ *Ibid.*, 843rd meeting, para. 37.

⁷² *Ibid.*, 844th meeting, para. 12.

⁷³ *Ibid.*, 849th meeting, para. 20.

⁷⁴ *Ibid.*, 842nd meeting, para. 42.

⁷⁵ *Ibid.*, 850th meeting, paras. 23 and 26.

(n) The "sending State" is the State which has sent the special mission;

(o) The "receiving State" is the State which has received on its territory a special mission from the sending State for the purpose of transacting official business with it;

(p) A "third State" is a State on the territory of which special missions perform their tasks or through whose territory they pass in transit;

(q) The "task of a special mission" is the task specified by mutual consent of the sending State and of the receiving State;

(r) The "premises of the special mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the special mission, including the residence or accommodation of the members and staff of the special mission.

CHAPTER V

Draft provisions concerning so-called high-level special missions

271. 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.

272. 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.

273. In his second report (A/CN.4/179), submitted to the Commission at its seventeenth session, the Special Rapporteur accordingly included draft provisions concerning so-called high-level missions.

274. The Commission did not discuss this draft at its seventeenth session, but it considered whether special rules of law should or should not be drafted for so-called "high-level" special missions, whose heads held high office in their States. It stated that it would appreciate the opinion of Governments on this matter and hoped that their suggestions would be as specific as possible.⁷⁶ The Special Rapporteur prepared a draft on high-level missions.

275. The Commission reproduced this draft as an annex to the report on the work of its seventeenth session, submitted to the General Assembly at its twentieth session. The draft reads as follows:

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

⁷⁶ *Yearbook of the International Law Commission, 1965, vol. II, document A/6009, para. 48.*

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.

276. Only a few Member States expressed an opinion on the question raised by the Commission.

277. The Belgian Government commented as follows:

"In the case of so-called high-level missions, the question arises whether an attempt to define their limits in an instrument may not lead to serious omissions.

"In practice, moreover, the rules to be applied to such missions are always established by agreement and

in respect of the particular case. That being so, it may be asked whether the rules of protocol in force in each State do not amply suffice.”

278. In its comments on this question, the Government of Israel said:

“Whilst expressing full appreciation of the work done by the Special Rapporteur in preparing the draft provisions ‘concerning so-called high-level special missions’, it is felt that there is no particular necessity to include this subject in the articles on special missions.”

279. The Government of the Upper Volta expressed the following opinion:

“On the question whether special rules of law should or should not be drafted for so-called ‘high-level’ special missions, whose heads hold high office in their States:

“It is true that in practice no distinction is made, with respect to legal status, between special missions led by a high official of the sending State and other special missions. The draft provisions concerning these so-called high level special missions, which have been submitted to Governments for their comments, are therefore likely to draw the attention of Governments to this state of affairs in relations between States.

“(A) Special mission which is led by a Head of State:

“In rule 2, paragraph (f), concerning the end of the functions of a special mission which is led by a Head of State, the interruption of the negotiations which are the purpose of the special mission should also be considered as bringing the mission’s functions to an end. The views expressed above concerning paragraph (4) of the commentary on article 12 of the Commission’s draft articles on special missions also apply in this case.

“Rule 2, paragraph (i), relating to the freedom of movement of a Head of State: for reasons of security, it is indeed necessary that there should be an agreement between the sending State and the receiving State limiting the freedom of movement of the Head of State.

“In practice, however, the situation is often different. Many Heads of State, for personal reasons, like to have great freedom of movement in order to be in touch with the mass of the people. Others even like to refuse all protection in certain situations. These are cases which bring up the problem of the security of special missions led by a Head of State. The Government of the Upper Volta would like to see specific provisions on this subject included in the draft.”

280. The Yugoslav Government made the following comment:

“The Government of the Socialist Federal Republic of Yugoslavia also considers that there should be special provisions applicable to special missions led by Heads of State or Heads of Government but not to those led by Ministers for Foreign Affairs and

Cabinet Ministers. The Yugoslav Government takes the view, however, that such provisions should be included in the body of the convention and not in an annex and should therefore be drafted more concisely.”

281. The Government of Czechoslovakia, in its comments, expressed the following opinion:

“The Government of the Czechoslovak Socialist Republic agrees that the status of special missions at the so-called high level should be regulated in harmony with the prevailing customs and usages. In view of the fact that the proposed regulation is almost identical for all the four categories of special missions of this kind, it seems useful to embody the identical provisions contained in draft rules 2-5 in a general rule covering all the four categories and to stipulate exceptions for the individual categories in a special rule, whereby the draft would be substantially shorter. The Government of the Czechoslovak Socialist Republic holds that the draft rules should be further elaborated.”

282. The Swedish Government made the following comment:

“The Commission would like to know the opinion of Governments on the question whether ‘special rules of law should or should not be drafted for so-called high-level special missions whose heads hold high office in their States’. In the opinion of the Swedish Government such special rules should not be included in the draft on special missions. If the head of a ‘high-level’ mission is entitled to a special status, that would not be because he is the head of a special mission but because of his position as Head of State, Head of Government, Member of Government, etc. The rules envisaged, therefore, do not really pertain to the matter of special missions but to the question of the international status of Heads of State, etc.”

283. In the Sixth Committee of the General Assembly, the Brazilian representative also referred to this question, pointing out that the sending of high-level special missions was common practice. The Brazilian representative concluded by saying that: “There might be a special chapter to give high-level missions separate treatment.”⁷⁷

284. The Turkish delegation adopted a more definite attitude in the Sixth Committee of the General Assembly, where the Turkish representative said that:

“The preparation of draft provisions concerning so-called high-level special missions would seem to serve a useful purpose. A point to be considered, however, was the existence of a category of persons—for example, vice-presidents, deputy prime ministers and ministers of State—who were generally higher in rank than ministers for foreign affairs and were being more and more frequently entrusted with special missions.”⁷⁸

⁷⁷ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 840th meeting, para. 15.*

⁷⁸ *Ibid.*, 847th meeting, para. 24.

285. During the discussion in the Sixth Committee of the General Assembly, the delegation of Israel opposed the inclusion of rules concerning high-level special missions in the draft articles on special missions;⁷⁹ this attitude is similar to the opinion expressed in the written

⁷⁹ *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 840th meeting, para. 7.

comments by the Government of Israel quoted in paragraph 278 above.

286. In the light of the facts and opinions reported above, the Special Rapporteur considers that States have given the Commission no encouragement to introduce rules concerning so-called high-level special missions into its draft articles.

**Written comments by Governments received subsequently, with the Special Rapporteur's observations thereon
(A/CN.4/189/Add.2)**

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PRELIMINARY NOTE

1. This addendum deals with the written comments by Governments which did not reach the Secretariat within the prescribed time-limit. Its structure is the same as that of the earlier part of the report, and the headings of the chapters and sections correspond.

2. This addendum includes comments by the Governments of Austria, Malta, the Union of Soviet Socialist Republics and the United Kingdom, together with the Special Rapporteur's opinions on those comments.

Ad CHAPTER II—GENERAL

...

2. *Distinction between the different kinds of special missions*

3. In its written comments, the United Kingdom Government expresses concern at the liberality of the draft articles with regard to the granting of privileges and immunities which, in that Government's opinion, go beyond the requirements of functional necessity. These comments are as follows:

"While expressing their general agreement with the principles and rules embodied in the draft articles, and with the desirability of codifying international law and practice on this aspect of diplomacy, the United Kingdom Government feel bound to record their opposition to the undue extension of privileges and immunities which certain articles appear to confer. In their view the grant of such privileges and immunities should be strictly controlled by considerations of functional necessity and should be limited to the minimum required to ensure the efficient discharge of the duties entrusted to special missions. The draft articles follow closely the corresponding provisions of the Vienna Convention on Diplomatic Relations and it is the view of the United Kingdom Government that such extensive privileges in the case of special missions cannot be justified on functional grounds."

4. The Special Rapporteur regards these comments by the United Kingdom Government as a confirmation of his conclusion, recorded in chapter II, section 2 of this report (see above, paragraph 36), in which he proposed an addition to article 17 of the draft. That addition would meet the wishes of the United Kingdom Government.

5. The Austrian Government, in its written comments, also supports the contention that the privileges and immunities of special missions, and more particularly of the non-diplomatic officials of such missions, should be restricted in accordance with the functional theory. The Austrian comment is given below:

"However, in the opinion of the Austrian Government, the privileges and immunities of such non-diplomatic officials should be codified in such a way that the rights of these officials do not go beyond what is unavoidably necessary for the functioning of special missions, since, even in the case of diplomats and consuls, the principle holds that they enjoy privileges not in their personal interest, but only to facilitate their work."

6. The Special Rapporteur is of the opinion that the reply to the United Kingdom Government's comment given above applies equally to the Austrian Government's comments.

3. *Question of introducing into the draft articles a provision prohibiting discrimination*

7. In addition to the opinions of three Governments on this question, reproduced earlier in this report (see above, paragraph 38), it should be noted that the United Kingdom Government also expressed its views in its written comments. That Government's opinion is as follows:

"*Paragraph 49.* It is agreed that there would be no point in including non-discrimination provisions in draft articles of this character."

8. The Special Rapporteur does not consider that the insertion of this opinion in any way changes the situation described in the report.

...

5. *Relationship with other international agreements*

9. In its written comments, the United Kingdom Government touches on the question of the relationship of the draft articles on special missions with other international agreements, with special reference to paragraph 50 of the report of the International Law Commission on the work of its seventeenth session (1965). The United Kingdom Government's opinion is as follows:

"Paragraph 50. The United Kingdom Government believe that there would be advantage in adding to the draft articles a provision dealing with their relationship to other international agreements."

10. This being the fourth Government that has expressed an opinion on this subject, the Special Rapporteur recommends that the Commission should decide what provision should be included in the final text of the draft articles.

...

Ad CHAPTER III—DRAFT ARTICLES ON SPECIAL MISSIONS

Part I. General rules

Article 1.—The sending of special missions

11. In its written comments, the United Kingdom Government puts forward a proposal concerning article 1, paragraph 1 of the draft. The proposal is as follows:

"Article 1. In paragraph 1 the word 'express' should be inserted before 'consent' in order to eliminate reliance upon alleged tacit or informal consent as a basis for invoking the special treatment provided for in the draft articles."

12. The Special Rapporteur is not in favour of taking up the United Kingdom proposal, since the Commission, in requiring the consent of the receiving State, deliberately avoided qualifying that consent in any way, so as to make the provision as flexible and informal as possible. Contrary to the opinion of the Belgian Government, that the word "consent" connotes tolerance, the United Kingdom Government proposes that express consent should be required. Although the Commission is of the opinion that consent should be consent in the proper sense of the term, a genuine expression of the will of the receiving State, it takes into consideration the fact that consent is often given informally or even tacitly. The Special Rapporteur accordingly considers that if the United Kingdom proposal was adopted, it would call in question the whole system on which the draft articles are based.

13. In the United Kingdom Government's written comments concerning the relationship between the concept of special missions and the concept of permanent specialized missions, it is suggested that the latter should also be brought within the scope of the draft articles on special missions, although the application of the articles might be made subject in each specific case to the conditions to be determined by the express consent of the receiving

State. The United Kingdom Government's proposal reads as follows:

"In paragraph 2(d) of the commentary the question of permanent specialized missions is discussed. It is made clear that the special missions to be covered by the draft articles are temporary in character. Although permanent specialized missions may in some cases be staffed by members of the staff of the diplomatic mission of the country concerned and occupy 'premises of the mission' in a manner bringing them within the scope of the Vienna Convention on Diplomatic Relations, there will be other cases to which that Convention will not be applicable since the purposes of the permanent specialized mission will not be 'purposes of the mission'. In some cases a permanent mission is accredited to an international organization and its status is regulated by an international agreement governing the privileges and immunities of the organization. The United Kingdom Government believe that permanent missions which do not fall into either of these categories should be brought within the scope of the present draft articles. It appears desirable to regulate their status by international agreement and there seems no reason to do this by a separate code of rules. It is further suggested that the application of the rules laid down in these draft articles to permanent specialized missions might be made subject in each case to the express consent of the receiving State."

14. Although that proposal was made in connexion with the text of the Commission's commentary on article 1, it actually bears no relation to the commentary: it is rather a suggestion for an amendment to the text of the article itself, and should be considered as such. The question accordingly arises as to whether the scope of the draft articles should be extended to cover categories other than special missions. The Special Rapporteur does not consider that it should; otherwise the draft articles would have to deal with all kinds of related institutions. He does not think that the Commission would be prepared to follow up this idea, and does not therefore recommend the adoption of the United Kingdom proposal.

15. The United Kingdom comments include a suggestion referring to the matter dealt with in paragraph (7) of the commentary on article 1. In discussing the commentary, the United Kingdom Government again suggests a change in the text of the draft article itself. This is what it says on the subject:

"With regard to paragraph (7) of the commentary, the United Kingdom Government suggest that a provision should be added to the article to make clear that where members of the regular permanent diplomatic mission act also in connexion with a special mission, their position as members of the permanent mission should determine their status."

16. The Special Rapporteur does not agree with the United Kingdom Government. Admittedly, members of a regular permanent diplomatic mission should retain their diplomatic status even when they are members of a special mission, if the permanent mission is accredited to the same receiving State as the special mission. But

the Special Rapporteur thinks that in such a case a career diplomat is entitled to make use of the privileges he enjoys in his capacity as head or member of a special mission, and that it is his duty, in performing the tasks of the special mission, to discharge the obligations arising from the rules on special missions. Hence, he has a dual status. For these reasons the Special Rapporteur considers that the attitude adopted by the Commission hitherto, i.e., that the question should be mentioned only in the commentary on article 1, and that there should be no reference to the substance in the article itself, is correct.

17. In its written comments, the Government of the USSR concentrates on the question whether the existence of diplomatic or consular relations, or recognition between the sending and receiving States, are necessary for the sending or reception of special missions. The USSR Government considers that the text of the draft articles should be made quite clear on this point, and proposes that article 1, paragraph 2 of the draft should be worded as follows:

“Neither diplomatic and consular relations nor recognition are necessary for the sending and reception of special missions.”

18. As several Governments and several delegations to the General Assembly touched on this question, the Special Rapporteur is of the opinion that the USSR proposal should be adopted, since it has the advantage of also covering the question of recognition between States sending or receiving special missions.

Article 2.—The task of a special mission

19. The United Kingdom Government is not satisfied with the Commission's proposal concerning the determination of the task of a special mission. In its opinion, it would be desirable, when determining the mission's task, not to apply the rules on special missions on every occasion and for all kinds of missions coming from another State on official or quasi-official business. It is afraid that the existing text of the draft may create an obligation for the receiving State to accord privileges and immunities to every “mission” of this kind. The United Kingdom Government expresses this concern in its written comments, as follows:

“Article 2. It appears desirable to limit in some way the purposes for which a special mission qualifying for the treatment contemplated in the draft articles may be constituted—otherwise there is a danger that the provisions of an eventual convention could be invoked in any case of a visit to one State by a person or group of persons from another on official or quasi-official business, whatever its nature. There may be cases in which the receiving State wishes to permit a mission to come without necessarily according it the full privileges and immunities laid down in the draft articles but as the articles are at present drafted this might be very difficult.”

20. The Special Rapporteur understands the United Kingdom Government's concern, but he thinks that the meaning of the draft articles on special missions submitted

by the Commission had not been fully grasped. In the first place, no State is obliged to receive a special mission from another State without its consent. Secondly, in the Commission's draft, the task of a special mission is determined by mutual consent of the sending State and of the receiving State; on receiving a visiting foreign mission, the receiving State is entitled to make it clear that it is not considered as a special mission; and finally, the existence and extent of privileges and immunities can also be determined by mutual consent of the States concerned. It is very difficult to make reservations in the text of the article with regard to certain categories of special mission. For that reason, the Commission left it to States themselves to determine what they would regard as a special mission.

21. In connexion with paragraph (5) of the commentary on article 2, the United Kingdom Government also referred to the extremely difficult question of the relationship between special missions and permanent diplomatic missions as regards their respective competence. In reply to the last proposition set forth in the commentary, the United Kingdom Government expressed its opinion on this question; it was thus one of the few Governments that were kind enough to reply to the question put by the Commission in that proposition. In its reply, the United Kingdom Government states that it sees no need to include a rule on this subject in article 2, but the reply in itself is typical of the underlying legal concept. It reads as follows:

“With reference to paragraph (5) of the commentary, the United Kingdom Government see no need for a rule of the exclusion of the tasks or functions of a special mission from the competence of the permanent diplomatic mission. The matter seems to be entirely one between the sending State and its two missions and the receiving State should be entitled to presume that either the permanent or the special mission (within the scope of its task) has authority to perform any acts which it purports to perform. If difficulties are likely to arise, they can be dealt with by an *ad hoc* arrangement on the subject.”

22. The Special Rapporteur is of the opinion that this reply from the United Kingdom Government is worthy of mention in the commentary, and will try to reproduce it fully when drafting the final text. He himself considers that from the point of view of law, the solution proposed is likely to increase the stability of legal relations between States.

23. The Government of Malta dealt with this question in its written comments. Its opinion on the matter is as follows:

“Article 2. The question of overlapping authority resulting from the parallel existence of permanent diplomatic missions and special missions, is of considerable importance and it is felt that a rule on the matter should be included in the final text of the articles. The absence of any such rule could leave open to question the validity of acts performed by the special mission and this is most undesirable. The competence or authority of a mission is a fundamental issue which

unless regulated could undermine the essential quality of a mission, namely its authority to function.

"As to the nature of the rule that ought to be included in the final text, it is agreed that certain powers are retained by the permanent mission notwithstanding that a special mission is functioning. These functions, however, relate to matters touching the special mission itself: its powers, including their limits and their revocation, certain changes in the composition of the mission, particularly those affecting the head of mission, and the recalling of the special mission. On the other hand, once the sending State has deemed it necessary or expedient to send a special mission, it is to be presumed, in the absence of an express statement to the contrary, that the task of that mission is temporarily excluded from the competence of the permanent diplomatic mission."

24. The Special Rapporteur is grateful to the Government of Malta for having responded to the Commission's appeal and given its opinion on this difficult question. Having regard to the opinions expressed in the comments of Malta and the United Kingdom, the Special Rapporteur believes it would be useful for the comments of the Government of Malta also to be reproduced in full in the final text of the Commission's commentary.

25. In its written comments, the Government of Austria deals with the question of overlapping and possible conflicts of competence between the special mission and the regular permanent diplomatic missions of the sending State. It expresses the following view on the subject:

"Moreover, in the further elaboration of the draft articles, care should be taken that their provisions impair the position of traditional diplomacy as little as possible.

"Accordingly, it is essential that the relationship between permanent representative authorities (diplomatic missions and consulates) and special missions should be expressly regulated, so as to avoid overlapping and conflicts in the matter of privileges. This would appear to be especially necessary in dealing with the immunities granted under articles 26 *et seq.*"

26. The Special Rapporteur takes this opportunity to thank the Austrian Government for its comments, but his opinion on the subject remains as stated in paragraph 24 above.

27. In this connexion, the Special Rapporteur wishes to draw attention to the remark made by the Austrian Government in its comments on article 19, paragraph 1, which refers to the question of allowing agents of the receiving State access to the premises of a special mission. The text of the Austrian comment is reproduced in this addendum in the section devoted to article 19.

28. The Special Rapporteur does not regard this as a case of overlapping between the functions of a special mission and those of a regular diplomatic mission, as the only actual conflict of competence the Commission had in mind concerns the representation of the State in respect of the specific task assigned to a special mission, and not

the legal protection of the mission's status, the subject dealt with in article 19 of the draft.

...
Article 5.—Sending the same special mission to more than one State

29. With regard to article 5 of the draft, the Government of the USSR makes the same comment as the Government of Sweden. Its written comments contain the following passage:

"In view of the tasks which are usually given to special missions, it is unnecessary to include in the draft provisions relating to the possibility of sending the same special mission to more than one State (article 5) and to the size of the staff of a special mission (article 6, paragraph 3). These provisions should therefore be deleted from the draft."

30. The Special Rapporteur expressed his views on the substance of this idea in his comments on the Swedish Government's observation¹ and the same arguments apply to the comments of the USSR.

...
Article 6.—Composition of the special mission

31. In its written comments, the Government of the USSR suggests that paragraph 3 of article 6 (possible limitation of the size of the staff of a special mission) might be deleted (for this proposal, see article 5, paragraph 29 above).

32. In submitting this proposal by the Government of the USSR, the Special Rapporteur draws attention to the fact that the problem of limiting the size of the special mission has already been dealt with in paragraphs (6) and (7) of the commentary on article 6, in which it is pointed out that article 6, paragraph 3 of the draft is based on article 11 of the Vienna Convention on Diplomatic Relations. The Special Rapporteur recalls that the Commission discussed the question fully at its seventeenth session, and he does not think that any new problems have arisen in this connexion.

...
Article 9.—General rules concerning precedence

33. In its written comments, the Austrian Government refers to the question of the more precise determination of the alphabetical order of the names of States as a basis for settling the problem of the precedence of special missions. Its observations on this subject are as follows:

"Article 9, paragraph 1:

"It would seem desirable to render the provision more precise by showing in what language the alphabetical order is to be determined, especially as no unambiguous conclusions on this point can be drawn from the commentary."

34. In principle, the Special Rapporteur endorses the Austrian proposal, and suggests to the Commission that it should be co-ordinated with the proposals of the Belgian and Yugoslav Governments, set forth in the relevant paragraphs of the section dealing with article 9.²

¹ See above, document A/CN. 4/189 and Add. 1, paras. 97 and 98.

² See above, document A/CN. 4/189 and Add. 1, paras. 122, 123, 128 and 129.

...
Article 11.—Commencement of the functions of a special mission

35. In its written comments, the United Kingdom Government refers to paragraph (12) of the commentary on article 11, in which the Commission raises the question of the need to include in the article a rule on non-discrimination among the various sending States with regard to the commencement of the functions of their special missions. The Commission has made it clear that, in its view, discrimination is not permissible in practice. The United Kingdom Government's comment, which is contrary to that made by the Government of Upper Volta,³ is as follows:

"Article 11. The United Kingdom Government consider, with reference to paragraph (12) of the commentary on this article, that it would not be necessary or appropriate to add to this article a reference to the principle of non-discrimination. They support fully the views of the Commission on this question."

36. The Government of Malta also deals with this question in its written comments, in which it expresses the following view:

"Article 11. The question as to whether an appropriate rule should be included to deal with non-discrimination between special missions by the receiving State appears to be limited in this article to discrimination 'in the reception of special missions and the way they are permitted to begin to function even among special missions of the same character', while the broader question of non-discrimination is referred to in paragraph 49 of the report.

"It is felt that a special provision in article 11 to deal with non-discrimination is not appropriate, since the scope of any such provision would be either too limited or, if extended to cover non-discrimination in general, out of place. On the other hand, it is felt that a new article corresponding to article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations should be included in the final text. The fact that the nature and tasks of special missions are so diverse should not justify discrimination as between States in the application of the rules contained in the articles."

37. The Special Rapporteur notes that the Governments of both the United Kingdom and Malta consider it unnecessary to include in article 11 a rule on non-discrimination in respect of the commencement of the functions of a special mission. The Special Rapporteur thinks that a summary of these two opinions and of the opinion expressed by the Government of Upper Volta should be included in the final text of the commentary.

Part II. Facilities, privileges and immunities

Article 17.—General facilities

38. On the subject of article 17, the United Kingdom Government raises a question which was not discussed in the Commission and is not even referred to in the

literature on special missions. This is the question of the possibility of the sending State believing that all expenses of the special mission should be defrayed by the receiving State. The written comments by the United Kingdom Government contain the following reference to this problem:

"Article 17. This article suggests that, for instance, the sending State may have all expenses of its special mission defrayed by the receiving State, which is not the case, unless by virtue of a special agreement. Some clarification appears to be desirable."

39. This is a point which the Special Rapporteur has not hitherto considered, but he would have no objection to the Commission stating in the commentary its belief that, unless otherwise agreed, all expenses of the special mission should be defrayed by the sending State. It was, in fact, on this understanding that the Special Rapporteur in his first report raised the question of possible over-charging for accommodation occupied by the special mission.⁴

...

Article 19.—Inviolability of the premises

40. In its written comments, the United Kingdom Government also refers to the text of article 19 of the Commission's draft. It states:

"Article 19. The United Kingdom Government observes that this article accords the property of special missions a wider protection than is given to diplomatic missions by the Vienna Convention in that property not on the premises of the mission other than means of transport is covered by the article. The United Kingdom Government doubts whether this distinction is justifiable on functional grounds."

41. The Special Rapporteur wishes to point out that the question raised in this comment was discussed in the Commission; it was noted that, in view of the nature of the special mission, the property of special missions was not always located on the premises of the special mission proper and that, precisely on functional grounds, it was necessary to provide constant protection for such property, contrary to the opinion expressed by the United Kingdom Government. The Special Rapporteur accordingly proposes that this comment should be disregarded.

42. In its written comments, the Austrian Government expresses the view that article 19, paragraph 1, of the draft implies some conflict of competence between the head of the special mission and the head of the regular permanent diplomatic mission. It is not opposed to such a solution for the purpose of allowing agents of the receiving State access to the premises of the special mission, but believes that the case in question calls for some modification of the commentary on article 2 of the draft. This opinion of the Austrian Government is expressed as follows:

"Article 19, paragraph 1:

"This paragraph states that the agents of the receiving State may be allowed access to the premises (including

³ See above, document A/CN. 4/189 and Add 1, para. 136.

⁴ *Yearbook of the International Law Commission, 1964*, vol. II, p. 107, para. (4) of the commentary on article 17.

grounds) of the special mission both by the head of the special mission and by the head of the permanent diplomatic mission. This suggests the conclusion that, by analogy, the question raised in paragraph (5) of the commentary to article 2 as to the relationship between the permanent diplomatic mission and the special mission should be settled by recognizing the continuing competence of the former.”

43. The Special Rapporteur thanks the Austrian Government for this comment, but does not believe that there is any question here of a dual competence which might give rise to an actual conflict of competence between the special mission and the regular permanent diplomatic mission, on which the Commission has expressed its views in paragraph (5) of the commentary on article 2. The subject discussed in that paragraph is the competence of the two types of missions with respect to the task of the special mission during the latter's existence. The Special Rapporteur does not therefore believe that the amendment proposed is necessary.

...

Article 22.—Freedom of communication

44. In its written comments, the United Kingdom Government states that it is opposed in principle to the special mission being entitled to have a diplomatic bag of its own, where the sending State has a permanent diplomatic mission in the receiving State. Its views on this subject are as follows:

“Article 22. It should be made clear that the word ‘free’ as used in paragraph 1 has the sense of ‘unrestricted’.

“The United Kingdom Government considers that the bag facilities of special missions should be restricted to the minimum and that where the sending State has a permanent diplomatic mission in the receiving State official documents etc. for the use of the special mission should be imported in the bag of the permanent mission. In this way the onus of ensuring that improper use is not made of the bag would rest with the head of the permanent mission who, unlike the head of the special mission, has a continuing duty to the receiving State in this respect. There appears to be nothing contrary to this in paragraph 4 of article 27 of the Vienna Convention.”

45. The Special Rapporteur believes that, judged by the concepts of traditional diplomacy, this comment by the United Kingdom Government is contrary to the interests of special missions and to their freedom of action. But apart from these theoretical considerations, there are practical reasons for disagreement with the United Kingdom comment. Special missions are not always conveniently placed geographically for their communications to pass through the permanent diplomatic mission. They are very often situated at points in the territory of the receiving State from which it is much more convenient for them to communicate with their governments directly and without the intervention of the permanent diplomatic mission. For this reason, the Special Rapporteur does not share the view expressed in this comment.

Article 23.—Exemption of the mission from taxation

46. In its written comments, the United Kingdom Government expresses the view that some addition should be made to the text of article 23 of the Commission's draft, and it makes the following proposal in this connexion:

“Article 23. The expression ‘taxes in respect of the premises of the special mission’ in paragraph 1 does not clearly cover capital gains tax on the disposal of the premises. The United Kingdom authorities would not seek to tax a gain accruing to the sending State under these circumstances and they accordingly suggest the addition of the words ‘including taxes on capital gains arising on disposal’ after the words ‘premises of the special mission’.”

47. The Special Rapporteur wishes to point out that, in drawing up article 23 of the draft, the Commission took the text of article 23 of the 1961 Vienna Convention on Diplomatic Relations as a basis; it did not go into details, its aim being rather to produce a general text. Obviously, therefore, there are a considerable number of cases which would have to be inserted in the text of this article in order to make it comprehensive. The Special Rapporteur does not object in principle to the United Kingdom Government's proposal, but fears that the introduction of this detailed point might guarantee special missions an exemption from taxation to an extent which is not explicitly guaranteed to permanent diplomatic missions.

Articles 24, 25 and 26.—General remarks on these three articles

48. In its written comments, the United Kingdom Government expresses its concern that, if the rules of the 1961 Vienna Convention on Diplomatic Relations are applied to special missions, as provided for in the above-mentioned articles of the Commission's draft, immunities and privileges may be extended to a very large number of individuals.

49. The Special Rapporteur believes that this remark by the United Kingdom Government is similar in substance to the comments made earlier, in chapter II, section 2, “Distinction between the different kinds of special missions”,⁵ and in chapter III, part II, section on article 17.⁶

50. The United Kingdom Government's comments on these three articles are as follows:

“Articles 24-25-26. The scale of immunity and inviolability prescribed in these articles, based on the corresponding provisions of the Vienna Convention on Diplomatic Relations, appears excessive, and inappropriate to the character and functions of special missions. While noting the Commission's basic hypothesis that special missions should be equated, so far as practicable, with permanent missions, the United Kingdom Government would prefer a restriction of

⁵ Document A/CN.4/189 and Add. 1, paras. 30-36.

⁶ *Ibid.*, paras. 166-170.

immunity and inviolability to official documents and official acts.”

51. The Special Rapporteur believes that this question has been answered in chapter II, but he will take these remarks into consideration in dealing with each of the three articles individually.

Article 24.—Personal inviolability

52. In its written comments, the United Kingdom Government—as stated above in the section headed “General remarks on these three articles” (articles 24, 25 and 26)—says that it would prefer a restriction of immunity and inviolability to official documents and official acts.

53. The Special Rapporteur recalls that the Commission has already discussed this possibility, and has come to the conclusion that members of the special mission could not perform their functions with complete freedom if they could be arrested, detained or brought before a court at any time by the authorities of the receiving State on the pretext of their responsibility for acts other than those performed in their official capacity. The Commission took the view that a guarantee of this kind would not be adequate for special missions, and had accordingly decided to adopt the provisions of the 1961 Vienna Convention on Diplomatic Relations and not those of the 1963 Vienna Convention on Consular Relations.

54. Bound as he is by the Commission’s decision, the Special Rapporteur cannot recommend the adoption of the United Kingdom Government’s proposal.

Article 25.—Inviolability of the private accommodation

55. This article is also referred to in the United Kingdom Government’s written comments, as already indicated in the section headed “General remarks on these three articles”.

56. The Special Rapporteur cannot see how the inviolability of the private accommodation of members of special missions could be restricted to official documents and official acts, particularly as members of the special mission move around the territory of the receiving State, their stay is only temporary, and their accommodation is such that it would be difficult to differentiate between objects relating to official acts and other objects in that accommodation. He is, therefore, unable to recommend that the Commission should adopt this proposal.

Article 26.—Immunity from jurisdiction

57. This article also is referred to in the general remarks on articles 24, 25 and 26 in the written comments of the United Kingdom Government. The United Kingdom Government bases its arguments on the assumption that special missions should be accorded only what is known as minor or functional immunity. The Commission, on the other hand, strongly believes that members of the special mission should enjoy complete immunity from criminal jurisdiction, as a protection against the receiving State. This point has already been mentioned in the

section on article 24, and the Special Rapporteur does not think that there is any reason for reverting to it here.

58. The above-mentioned general remarks also relate to immunity from the civil and administrative jurisdiction of the receiving State. The United Kingdom Government believes that these forms of immunity should be restricted exclusively to official documents and official acts. The Commission’s attitude, on the other hand, is based on the assumption that members of the special mission must enjoy complete immunity in this respect also, subject to two limitations. The first results from the proviso “unless otherwise agreed” in the text of article 26, and the second from the exceptions provided for in the Vienna Convention on Diplomatic Relations.

59. The Special Rapporteur believes that the Commission should reconsider the question of the immunity of members of special missions in regard to the civil and administrative jurisdiction of the receiving State; and he would point out that in his first and second reports he himself supported the idea of functional immunity.⁷

60. In its written comments, the United Kingdom Government questions whether the text of article 26, paragraph 2, sub-paragraph (c), is wide enough to protect the receiving State against all abuses of immunity. Its remarks on this subject are as follows:

“Article 26. There seems to be room for doubt whether the expression ‘professional or commercial activity’ in paragraph 2(c) is wide enough to cover, for instance, disputes about the ownership of, or liability for calls etc. on, shares in a company registered in the receiving State. The expression has in the case of the Vienna Convention on Diplomatic Relations given rise to difficulty and its scope should be made more clear.”

61. The Special Rapporteur draws the Commission’s attention to the fact that the question of the ownership of shares was discussed at the Vienna Conferences and referred to by the Special Rapporteur himself in his second report. The Commission, however, took the view that it was only one of many points of detail all of which could not be included in the text of the Convention. The Special Rapporteur leaves it to the Commission to decide whether this matter should be included in the text or perhaps mentioned in the commentary, so as to make the Commission’s intentions clearer.

62. In its written comments, the United Kingdom Government also suggests that some attention should be given to paragraph (3) of the commentary on article 26. Its remarks are worded as follows:

“The commentary on this article implies that the phrase ‘unless otherwise agreed’ in paragraph 2 does not contemplate the possibility of excluding all immunity from civil and administrative jurisdiction but only of limiting immunity to official acts. This should be made clear in the text.”

⁷ See *Yearbook of the International Law Commission, 1964*, vol. II, p. 111, para. (3) of the commentary on article 26; and *Yearbook of the International Law Commission, 1965*, vol. II, document A/CN.4/179, para. (3) of the commentary on article 27.

63. The Special Rapporteur believes that this observation by the United Kingdom Government is in line with the attitude of that Government, as described in paragraph 58 above. The amendment of the text of the commentary will, therefore, depend on whether the Commission adheres to its existing position or adopts the idea of "minor" or so-called functional immunity.

...

Article 28.—Exemption from social security legislation

64. In its written comments, the United Kingdom Government expresses the view that it is unnecessary to refer in article 28 of the draft to the exemption of persons who are nationals or permanent residents of the receiving State, as the status of these persons is defined in article 36 of the draft.

65. The Special Rapporteur believes that, despite the existence of a general provision concerning this category of persons in article 36 of the draft, it would nevertheless be more satisfactory for their position in regard to the social security legislation of the receiving State to be clearly and explicitly dealt with in article 28 of the draft. It would otherwise be uncertain whether the privileges referred to in article 36 apply to these persons, since social security is connected with the performance of official functions in the special mission.

Article 29.—Exemption from dues and taxes

66. The United Kingdom Government has made a detailed comment on this article, in which it tries to show that the abridged text of article 29 of the draft, based on the provisions of article 34 of the 1961 Vienna Convention on Diplomatic Relations, is not altogether felicitous, as the curtailment of the text has left certain situations unsolved. The United Kingdom Government's remarks are as follows:

"Article 29. The article as it stands does not fully carry out the intention of the Commission expressed in paragraph (2) of the commentary to accord a narrower scale of exemption than is accorded to permanent missions by article 34 of the Vienna Convention on Diplomatic Relations. Omission of the exceptions has had in some respects the contrary effect—for example, relief appears due from taxes normally included in the price of goods or services.

"Moreover, unlike article 34 of the Vienna Convention on which it is said to be based, the article might be construed as exempting from stamp duty cheques, receipts, etc., given by the head, members and diplomatic staff of a special mission in the course of their duties. It will not be construed in the United Kingdom as having any effect in relation to duties chargeable under the Stamp Act 1891, as amended, on cheques and other instruments issued by the head, members or diplomatic staff of a special mission.

"In the matter of income tax, because of the exclusion under article 36 of United Kingdom citizens and permanent residents in the United Kingdom from any exemption from United Kingdom tax under this article, it is only in exceptional cases that United Kingdom law would impose any liability to income tax. In such exceptional cases, the expression 'income

attaching to their functions with the special mission' is too wide. There is no objection to the exemption of emoluments or fees paid by the sending State or, so long as the mission is for the governmental purposes of the sending State, of emoluments or fees paid by other sources in the sending State. Article 42, however, does not appear to exclude the possibility of members of a special mission deriving income from the sale of goods in the receiving State, or the provision of services, or any other activity of a profit-making nature, if the activity attaches to their functions with the mission. A mission sent to promote the export trade of the sending State or to organize a fair or exhibition on behalf of the sending State might claim that the sale of large quantities of goods was within its functions. Income derived from such activities should not be exempt from tax in the receiving State."

67. The Special Rapporteur recognizes that all the arguments put forward in the United Kingdom comment are technically sound; but he wonders whether the Commission, in a draft on special missions, considers it advisable to go into the details of fiscal legislation. He fears that this might cause it to become too deeply involved in the subject, particularly in view of the fact that no other State has made any comments on this article.

68. In its written comments on article 32 of the draft, the United Kingdom Government expresses the view that it is not necessary to include in article 32 the clause referring to nationals of, and permanent residents in, the receiving State, since article 36 of the draft contains a general provision relating to these categories of persons on the staff of the special mission.

69. The Special Rapporteur agrees in substance with this remark by the United Kingdom Government, but ventures to point out that, in drafting article 29, the Commission decided not to insert a clause relating to nationals and permanent residents, precisely because there is a general provision relating to this subject in article 36 of the draft.

70. On the subject of article 38 the United Kingdom Government, in its written comments (see the text of the comments in the section on article 38), expresses the fear that the Commission's commentary on article 29 might be taken to mean that the possibility of profit-making special missions has not been excluded.

71. Although this is a comment on the commentary, the Special Rapporteur does not think that it requires any attention from the Commission since, when drafting article 29 of the draft, the Commission intended that exemption from dues and taxes should apply only to income which can be considered as attaching to functions with the special mission and he believes that the matter should be left there.

Article 30.—Exemption from personal services and contributions

72. In its comments on article 32 of the draft, the United Kingdom Government states that it seems unnecessary to include in article 30 a clause relating to nationals of,

and permanent residents in, the receiving State, as there is a general provision relating to these categories of persons in article 36 of the draft.

73. The Special Rapporteur points out that the Commission was of the same opinion, and did not insert in article 30 of the draft a clause relating to nationals of, and permanent residents in, the receiving State.

Article 31.—Exemption from Customs duties and inspection

74. In its written comments the United Kingdom Government expresses the view that exemption from Customs duties and inspection should not be accorded to members of special missions. It believes that this would be going too far, and that the granting of such facilities should be optional. The United Kingdom Government's view is as follows:

"Article 31. The United Kingdom Government would be reluctant to extend full diplomatic Customs privilege to members of special missions: it appears that they would not be alone in disallowing relief from Customs duty on articles for the personal use of members of a special mission and they consider that the personal relief provision in the article should be made optional. This would conform more closely with international usage."

75. The Special Rapporteur draws the Commission's attention to the fact that the exemptions granted to members of special missions in article 31 of the draft are narrower than those provided for in the Vienna Convention on Diplomatic Relations. He does not think, however, that it would be advisable to grant more exemptions than those listed in article 31 of the draft. The rather severe character of the United Kingdom proposal stems from the basic attitude of the United Kingdom Government towards the restriction of the immunities and privileges of members of special missions. The proposal is based, in short, on a concept which the Commission has not adopted.

76. In the written comments of the United Kingdom Government we also find the following remark on paragraph (2) of the commentary on article 31:

"Paragraph (2) of the commentary is difficult to understand: it appears to be at variance with the terms of the article."

77. The Special Rapporteur is grateful to the United Kingdom Government for drawing his attention to this fact but, even after a very careful examination, he has been unable to discover any inconsistency between the operative text and the commentary.

78. The United Kingdom Government, in its written comments on article 35 of the draft, states that its comment on article 31 applies equally to families.

79. The Special Rapporteur thanks the United Kingdom Government for this remark, and points out that the whole question will have to be reconsidered in the light of the remarks made by the Swedish and Belgian Governments, on which he has expressed his views in the section

on article 31,⁸ since the United Kingdom comment is closely linked with those of the other two Governments.

Articles 31 and 32.—Exemption of administrative and technical staff from Customs duties and inspection

80. The Austrian Government points out in its written comments that there is a certain inconsistency between the wording of articles 31 and 32 of the draft regarding exemption of administrative and technical staff from Customs duties. The Austrian Government states in this connexion:

"Article 37, paragraph 2 of the Vienna Convention on Diplomatic Relations contains a limitation in time of the Customs exemptions granted to members of the administrative and technical staff. The omission of this limitation in the present draft articles would place the administrative and technical staff of a special mission in a substantially more favourable position than the corresponding staff members of a permanent mission.

"In article 32, moreover, instead of referring to article 31 as a whole, reference should be made to article 31, paragraph 1(b), since it can hardly be intended to grant to administrative and technical staff the same rights as are granted to diplomats in article 31, paragraph 2, which would be going beyond the corresponding provision in the Vienna Convention on Diplomatic Relations. Accordingly, in article 32 of the draft either the same time-limitation to 'articles imported at the time of first installation' should be inserted and, in addition, the reference limited to article 31, paragraph 1(b), or the reference to article 31 should be omitted altogether."

81. As this remark by the Austrian Government is almost identical in substance with the written comment of the United Kingdom Government, on which the Special Rapporteur states his views in paragraph 84 of this addendum in the section on article 32, he does not think that there is any need to express a further opinion on the subject.

82. The above-mentioned remark by the Austrian Government relates also to the Austrian comment cited in the section in this addendum on article 35.

Article 32.—Administrative and technical staff

83. In its written comments the United Kingdom Government expresses the fear that the wording of article 32 may be too wide, in that it confers "first installation" Customs privilege on administrative and technical staff. Its remarks are as follows:

"Article 32. According to paragraph 2(b) of the commentary, the Commission did not intend the grant of 'first installation' Customs privilege to administrative and technical staffs, but the article as it stands confers on these staffs full diplomatic Customs privilege, contrary to intention."

84. The Special Rapporteur thanks the United Kingdom Government for this warning, but believes that the

⁸ See above, document A/CN. 4/189 and Add 1, paras. 210, 212 and 213.

reference in the commentary is not to article 31 of the draft but to article 37 of the 1961 Vienna Convention on Diplomatic Relations, and that accordingly this staff does not enjoy "first installation" Customs privilege, which is not mentioned in article 31 of the draft, though there is a reference to it in article 37 of the above-mentioned Vienna Convention.

85. In its written comments the United Kingdom Government, like the Belgian Government, expresses the view that it is unnecessary to insert here a clause relating to nationals of, and permanent residents in, the receiving State, since the relevant *sedes materiae* provision is to be found in article 36 of the draft.

86. In the section on article 32,⁹ the Special Rapporteur recognizes the soundness of this observation; and he himself considers that the clause in question should be retained in article 36 only, as suggested in the United Kingdom remark, which reads as follows:

"Since nationals of, and permanent residents in, the receiving State are excluded from privileges and immunities by article 36, the repetition of the exclusion in this article seems unnecessary and, as it is not repeated in articles 28, 29 and 30, confusing."

87. On the subject of article 35, the United Kingdom Government, in its written comments, expresses the fear that the commentary on article 32 may give the impression that the draft accords full diplomatic Customs privilege to families of administrative and technical staff.

88. The Special Rapporteur wishes to confine himself for the moment to article 32 of the draft, and to point out that this article does not relate directly to members of families.

Article 33.—Members of the service staff

89. In its remarks on article 33 of the draft, the United Kingdom Government refers to paragraphs (3) and (4) of the Commission's commentary on the article and, in its written comments, it states:

"Article 33. The formulation of the Commission is preferred to the suggestion of the Rapporteur that service staffs of special missions should be accorded a level of immunity higher than that given in the case of permanent diplomatic missions."

90. As the United Kingdom Government's remarks amount merely to acceptance of the Commission's view, as opposed to the separate opinion expressed by the Special Rapporteur, the latter believes that they do not require any comment.

Article 34.—Private staff

91. In its written comments, the United Kingdom Government suggests that some restrictions should be introduced, and some amendments made, in the text of draft article 34 as drawn up by the Commission. While the Commission takes the view that "Private staff... shall... be exempt from dues and taxes on the emoluments they receive by reason of their employment", the United

Kingdom Government takes the opposite view. Its objection is worded as follows:

"Article 34. The United Kingdom Government opposes the exemption of private servants from income tax on their emoluments.

"A private servant who is not himself permanently resident in the United Kingdom would be liable to United Kingdom tax on his emoluments for his services in the United Kingdom if he were in the United Kingdom for six months or more in any one income tax year. In such circumstances it is unlikely that the private servant would be liable to taxation on his emoluments in the sending State: if the receiving State were required to exempt him, he would be free of all taxation. By contrast, the staff of the special mission will normally be taxed by the sending State. If, exceptionally, the sending State should tax the private servant's emoluments, he would qualify for double taxation relief in the United Kingdom."

92. The Special Rapporteur feels obliged to point out that the exemption of private staff from taxes is also in accordance with the provision contained in article 37, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, that it is frequently applied in practice and that it is not merely a privilege accorded to private staff but also a concession granted to the members of the special mission themselves, so that they do not have to waste time, during their brief sojourn in the receiving State, in studying its taxation system and procedure.

Article 35.—Members of the family

93. On the subject of this article, the United Kingdom Government expresses the view that the Commission's commentary on articles 31 and 32 should be more specific. In that Government's opinion the consequence of these two articles, taken in conjunction with the text of article 35, would be that members of the family of administrative and technical staff would enjoy excessive Customs privileges, which the United Kingdom Government is not prepared to accept. The text of the comment by the United Kingdom Government is as follows:

"Article 35. The comment on article 31 above applies equally to families. The provision which appears to accord full diplomatic Customs privilege to families of administrative and technical staff is presumably an error consequent upon that apparently existing in article 32, to which attention has already been drawn."

94. The Special Rapporteur believes that there are no grounds for the concern expressed by the United Kingdom Government, and that the latter's comments apply to the commentary rather than to the operative text. He will, nevertheless, take these comments into account in preparing the final text of the commentary.

95. The Austrian Government considers that the wording of paragraph 2 of article 35 is incomplete and inconsistent with the text of article 31, and suggests that the two texts should be brought into line with each other. Its remarks are worded as follows:

"This paragraph should, in the manner already explained in connexion with article 32, and in the light

⁹ See above, document A/CN. 4/189 and Add 1, para. 214.

of the wording ultimately adopted for that article, be limited to the privilege set forth in article 31, paragraph 1(b) and to articles imported at the time of first installation, unless this paragraph is omitted altogether."

96. The Special Rapporteur thanks the Austrian Government for drawing his attention to this question and points out that he has already expressed his views on it in paragraph 94 above, in reply to a similar remark by the United Kingdom Government.

Article 36.—Nationals of the receiving State and persons permanently resident in the territory of the receiving State

97. In its written comments on article 32, the United Kingdom Government draws attention to the nature of the principle underlying article 36, and expresses the view that the article is sufficient in itself and that the clause relating to nationals of, and permanent residents in, the receiving State need not be repeated in the other articles of the draft.

98. The Special Rapporteur agrees with this comment by the United Kingdom Government.

....

Article 38.—Case of death

99. In the section on this article (paragraph 234), we stated that article 38 of the Commission's draft had not been referred to either in the discussions in the Sixth Committee of the General Assembly or in the written comments of Governments. But the United Kingdom Government has now referred to the text of this article in its written comments, and has made the following proposal:

"Article 38. If the possibility of profit-making special missions is to remain (see comment on article 29) the United Kingdom Government would prefer not to give exemption from estate duty to the personnel of such a mission."

100. The Special Rapporteur is of the opinion that the text of article 38 relates only to the movable property of members of special missions, and that the Commission was thinking only of movable property which such persons had brought in as luggage or acquired by legal means during their stay in the territory of the receiving State. He realizes that the extent of this movable property may not coincide with what the Commission had in mind; but, as the article deals with the case of death in the territory of the receiving State, he believes that the Commission might in some future revision of the draft consider the possibility that estate duty should be levied only on movable property which cannot be regarded as the luggage or personal effects of the deceased.

Article 39.—Transit through the territory of a third State

101. The United Kingdom Government in its written comments calls in question the whole principle of the obligation of States which accede to the convention on special missions to comply with the stipulation that third

States shall accord immunities where they permit transit. The observations of the United Kingdom Government are as follows:

"Article 39. As drafted this article obliges the third State to grant immunities where it permits transit. The United Kingdom Government would prefer that third States should instead be entitled to permit transit without also granting immunities to a special mission."

102. The Special Rapporteur is convinced that adoption of the United Kingdom proposal would undermine the whole institution of special missions. He does believe, however, that this is a question of exceptional importance and that the Commission should consider it in greater detail.

...

Article 44.—Cessation of the functions of the special mission

103. In its written comments the United Kingdom Government suggests that an addition should be made to the text of article 44 of the draft. Its proposal is as follows:

"Article 44. It is desirable to provide a time-limit to the continuing inviolability of the premises of the special mission. The addition of a reference to 'a reasonable period' would seem to be sufficient."

104. The Special Rapporteur considers that this United Kingdom proposal deserves special attention, since it introduces into public international law a new legal institution—namely, a time-limit to the inviolability of the premises of the special mission after the cessation of its functions. During the Second World War, Hitler's doctrine was that the Reich could dispose of the premises of the permanent regular diplomatic missions of States with which it had broken off relations. Reference to this doctrine was made at both the Vienna Conferences, but proposals to mention it in article 45 of the 1961 Vienna Convention on Diplomatic Relations were definitely rejected. The United Kingdom proposal is less categorical, but it does limit the obligation to respect the inviolability to a "reasonable period". The Commission should, accordingly, deal with this proposal since, in the opinion of the Special Rapporteur, it might be an abuse for the sending State to keep the premises closed after the cessation of the functions of the special mission; and it would therefore be better to take a middle course.

Ad CHAPTER IV—INTRODUCTORY ARTICLE

105. In its written comments, the United Kingdom Government supports the Commission's view that a special introductory article containing definitions should be drawn up. It says:

"The United Kingdom Government consider that it would be highly desirable to include a 'definitions' article on the lines of article 1 of the Vienna Convention on Diplomatic Relations, in which certain of the terms used in the draft articles should be precisely defined. In their view it is of particular importance to define the term 'special mission' with precision so that the scope of the draft articles may be made clear. The terms 'head and members of the special mission',

'members of its staff', 'permanently resident in the receiving State' and 'premises of the special mission', in particular, are among those used in the draft articles which should be precisely defined. It seems, for example, unclear whether 'members [of the special mission]' as used in article 6 (1) does or does not include some or all of the staffs referred to in article 6 (2). A definition of the term 'premises of the special mission' should exclude living accommodation of all staff."

106. The Special Rapporteur believes that, in substance, he has already complied with the wishes of the United Kingdom Government in submitting the draft introductory article contained in this report.¹⁰ There are, however, two points on which he is unable to reach a conclusion without guidance from the Commission. These are:

(a) the exclusion of living accommodation of members of the special mission from the concept of "premises of the mission", since, as a general rule, the special mission has no premises in the proper sense of the term and its business premises are considered as identical with the premises used for accommodation; and

(b) the definition of the concept of "resident", as this concept varies from one State to another.

107. In its written comments the Austrian Government also expresses itself in favour of an introductory article containing definitions. Its statement reads as follows:

"A noticeable feature in the Commission's draft is that, unlike the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, it contains no definitions of the various categories of members of special missions; in addition, it would seem necessary to define the possible tasks and functions of special missions more specifically than has so far been done in the introduction to the draft articles."

¹⁰ See above, document A/CN.4/189 and Add. 1, para. 270.

108. The Special Rapporteur considers that he has complied with this proposal in submitting the draft introductory article contained in this report.

Ad CHAPTER V—DRAFT PROVISIONS CONCERNING
SO-CALLED HIGH-LEVEL SPECIAL MISSIONS

109. Contrary to what was stated earlier by the Special Rapporteur in Chapter V, paragraph 286, the Commission has now received a comment from the Government of Malta encouraging the elaboration of rules on so-called high-level special missions. In this comment, the Government of Malta makes some detailed suggestions for amending the draft provisions which the Special Rapporteur submitted to the Commission at its seventeenth session (1965).¹¹ The text of the comment is as follows:

"It is not understood why paragraph (c) of rule 2, which is extended to a special mission led by a Minister for Foreign Affairs (paragraph (c) of rule 4) or by a Cabinet Minister (paragraph (a) of rule 5) is not also extended to the case of a special mission led by a Head of Government.

"If it is accepted that a special mission led by any of the distinguished persons mentioned in the draft provisions in question is a high-level special mission (and the inclusion of special rules to govern these missions implies such an acceptance), then paragraph (d) of rule 2 should, *mutatis mutandis*, be applied to the other high-level special missions. This is further justified by the rule, which has been proposed in respect of all such missions, that the level of the mission changes as soon as the head of mission leaves the territory of the receiving State."

110. The Special Rapporteur is of the opinion that the encouragement given by the Governments of Malta and Yugoslavia does not, in the light of the opposite views expressed, justify the elaboration of rules of this kind.

¹¹ Also printed in this report, at para. 275 of document A/CN.4/189 and Add. 1.