

Document:-
A/CN.4/194 and Add.1-5

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

Topic:
Special missions

Extract from the Yearbook of the International Law Commission:-
1967 , vol. II

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

SPECIAL MISSIONS

[Agenda item 1]

DOCUMENTS A/CN.4/194 AND ADD.1-5

Fourth Report on special missions, by Mr. Milan Bartoš, Special Rapporteur

[Original text: French]

[5 April, 18 April, 21 April, 9 May, 10 May and 17 May 1967]

CONTENTS*

| | <i>Page</i> |
|--|-------------|
| PRELIMINARY NOTE | 3 |
| CHAPTER I : HISTORY OF THE IDEA OF DEFINING RULES RELATING TO SPECIAL MISSIONS. | 4 |
| CHAPTER II : INTRODUCTION | |
| 1. The object of this report and the practical importance of the question | 6 |
| 2. Preliminary question: should the rules governing special missions cover the regulation of the legal status of delegations and delegates to international conferences and congresses? | 9 |
| 3. Preliminary question: with respect to special missions, should there or should there not be an additional protocol to the Vienna Convention on Diplomatic Relations or a special draft linked to that Convention by a reference clause? | 10 |
| 4. Relationship with other international agreements | 13 |
| 5. Body competent to adopt the instruments relating to special missions | 14 |
| 6. Is it possible in this connexion to seek historical continuity with the rules relating to special missions which formerly existed (explanation of the method to be used in seeking sources)? | 14 |
| 7. Are there or are there not any rules of positive public international law concerning special missions? | 15 |
| 8. Legal status of the articles relating to special missions | 20 |
| 9. Controversies concerning the concept of special missions | 22 |
| 10. Some special aspects of special missions | 27 |
| A. Special missions with ceremonial functions | 27 |
| B. <i>Ad hoc</i> diplomacy with special functions | 28 |
| C. The <i>ad hoc</i> diplomat as messenger | 28 |
| D. Secret emissaries | 29 |
| E. Observers as <i>ad hoc</i> diplomats | 30 |
| F. Ambassadors at large | 31 |
| G. The suite of a Head of State considered as an <i>ad hoc</i> mission | 31 |
| H. Political agents not possessing diplomatic status | 32 |
| I. Private agents | 32 |

* The table of contents for documents A/CN.4/194/Add.3 and A/CN.4/194/Add.4 will be found on page 110 and for document A/CN.4/194/Add.5 on page 127.

| | <i>Page</i> |
|---|-------------|
| 11. Competence of special missions | 33 |
| 12. Categories of special mission staff | 34 |
| 13. Draft provisions concerning so-called high-level special missions | 36 |
| 14. Introduction of a provision prohibiting discrimination and requiring reciprocity in the application of the articles | 36 |
| 15. Introductory article | 37 |
| 16. Question of the preamble of the future instrument relating to special missions | 39 |
| 17. Legal status of special missions in relation to third States | 39 |
| CHAPTER III : DRAFT ARTICLES ON SPECIAL MISSIONS | |
| <i>Part I — General rules</i> | 40 |
| Article 1: The sending of special missions | 40 |
| Article 2: The task of a special mission | 44 |
| Article 3: Appointment of the head and members of the special mission or of members of its staff | 46 |
| Article 4: Persons declared <i>non grata</i> or not acceptable | 48 |
| Article 5: Sending the same special mission to more than one State | 49 |
| Article 5 <i>bis</i> : Sending of the same special mission by two or more States | 51 |
| Article 6: Composition of the special mission | 51 |
| Article 7: Authority to act on behalf of the special mission. | 53 |
| Article 8: Notification | 55 |
| Article 9: General rules concerning precedence. | 57 |
| Article 10: Precedence among special ceremonial and formal missions. | 61 |
| Article 11: Commencement of the functions of a special mission. | 62 |
| Article 12: End of the functions of a special mission | 65 |
| Article 13: Seat of the special mission. | 66 |
| Article 14: Nationality of the head and the members of the special mission and of members of its staff | 68 |
| Article 15: Right of special missions to use the flag and emblem of the sending State. | 69 |
| Article 16: Activities of special missions in the territory of a third State | 70 |
| <i>Part II — Facilities, privileges and immunities</i> | |
| General considerations | 72 |
| Article 17: General facilities | 75 |
| Article 17 <i>bis</i> : Derogation by mutual agreement from the provisions of Part II | 76 |
| Article 17 <i>ter</i> : Difference between categories of special missions. | 77 |
| Article 17 <i>quater</i> : Status of the Head of State | 77 |
| Article 18: Accommodation of the special mission and its members. | 78 |
| Article 19: Inviolability of the premises | 79 |
| Article 20: Inviolability of archives and documents. | 81 |
| Article 21: Freedom of movement. | 81 |
| Article 22: Freedom of communication | 82 |
| Article 23: Exemption of the mission from taxation | 84 |
| Article 24: Personal inviolability | 85 |
| Article 25: Inviolability of the private accommodation | 87 |
| Article 26: Immunity from jurisdiction | 87 |
| Article 27: Waiver of immunity. | 89 |
| Article 28: Exemption from social security legislation | 90 |
| Article 29: Exemption from dues and taxes | 90 |
| Article 30: Exemption from personal services and contributions | 91 |
| Article 31: Exemption from customs duties and inspection | 92 |

| | <i>Page</i> |
|--|-------------|
| Article 32: Administrative and technical staff | 93 |
| Article 33: Members of the service staff | 94 |
| Article 34: Private staff | 95 |
| Article 35: Members of the family. | 96 |
| Article 36: Nationals of the receiving State and persons permanently resident in the territory of the receiving State | 98 |
| Article 43: Right to leave the territory of the receiving State. | 99 |
| Article 37: Duration of privileges and immunities | 100 |
| Article 38: Case of death. | 100 |
| Article 39: Transit through the territory of a third State | 101 |
| Article 40 <i>bis</i> : Non-discrimination | 103 |
| <i>Part III — Miscellaneous clauses</i> | |
| Article 40: Obligation to respect the laws and regulations of the receiving State | 103 |
| Article 42: Professional activity. | 104 |
| Article 41: Organ of the receiving State with which official business is conducted | 105 |
| Article 44: Cessation of the functions of the special mission | 106 |
| Article O: Expressions used | 107 |
| Article "X": Legal status of the provisions | 108 |
| Article "Y": Relationship between the present articles and other international agreements | 108 |
| Preamble | 109 |
| Arrangement of the articles | 110 |

Preliminary note

1. Since the membership of the International Law Commission changed as a result of the 1966 elections and since the material on special missions is scattered in different places, the Special Rapporteur has thought it necessary in this fourth report to summarize all the previous reports and submit them as a whole. The purpose of this presentation is to provide the members of the Commission with adequate information and with a guide for their work at the nineteenth session, in order to facilitate a final decision on the draft articles on special missions. This report therefore combines in a single document the substance of the first, second and third reports (A/CN.4/166, A/CN.4/179 and A/CN.4/189 and Add.1 and 2).

2. The Special Rapporteur feels obliged to point out that at its eighteenth session the Commission did not have time to study thoroughly the material put forward in his third report on special missions but confined itself to studying the general questions dealt with in that report, particularly in chapter II (A/CN.4/189). For that reason, the Special Rapporteur considers that the Commission should give particular attention to the detailed suggestions on each article, since it will be the first time that they will have received such consideration.

3. As a result of the decision taken by the International Law Commission at its eighteenth session and in accordance with resolution 2167 (XXI), adopted by the General Assembly on 5 December 1966, Member States were allowed extra time to submit comments on the

draft articles. When that period expired, on 1 March 1967, the Special Rapporteur had received comments from the Governments of the Netherlands and Pakistan and a reply from the Government of Kuwait stating that it had no comments to make. The Special Rapporteur also studied the comments made in the Sixth Committee at the twenty-first session of the General Assembly and the Commission will have to give special attention to those comments at its nineteenth session in view of the instructions given by the General Assembly in paragraph 6 of its resolution 2167 (XXI).

4. At the twenty-first session of the General Assembly, the representative of the Byelorussian Soviet Socialist Republic in the Sixth Committee said he thought that articles 1, 7, 13 and 18 could benefit from some revision. The Special Rapporteur considers that it is unnecessary to ask Governments of Member States for their views on these articles again as this request is implicit in the general invitation addressed by the Commission and the General Assembly to the Governments of all Member States, asking them to transmit before 1 March 1967 their opinions, suggestions and proposals on all the questions and thus on that question as well. Furthermore, in paragraph 4 (a) of resolution 2167 (XXI), the General Assembly recommended the International Law Commission to complete its work on the draft articles on special missions at the nineteenth session. The Commission, therefore, will not be able to invite Governments to transmit their comments on specific points after the nineteenth session, but they will still be able to submit their views to the body in which represen-

tatives of States take their final decision on the draft articles.

CHAPTER I

History of the idea of defining rules relating to special missions

5. At its tenth session, in 1958, the International Law Commission adopted a set of draft articles on diplomatic intercourse and immunities. The Commission observed, however, that the draft dealt only with permanent diplomatic missions. Diplomatic relations between States also assumed other forms that might be placed under the heading of "*ad hoc* diplomacy", covering itinerant envoys, diplomatic conferences and special missions sent to a State for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and requested the Special Rapporteur to make a study of the question and to submit his report at a future session.¹ The Commission decided at its eleventh session (1959) to place the question of *ad hoc* diplomacy as a special topic on the agenda for its twelfth session (1960).

6. Mr. A. E. F. Sandström was appointed Special Rapporteur. He submitted his report² 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.³ The Commission's draft was very brief. It was based on the idea that the rules on diplomatic intercourse and immunities in general prepared by the Commission should on the whole be applied to special missions by analogy. The Commission expressed the opinion that this brief draft should be referred to the *Conference on Diplomatic Intercourse and Immunities* convened at Vienna in the spring of 1961. But the Commission stressed that it had not been able to give this draft 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.⁴

7. At its 943rd plenary meeting on 12 December 1960, the General Assembly decided, on the recommendation of the Sixth Committee, that these draft articles should be referred to the Vienna Conference with the recommendation that the Conference should consider them together with the draft articles on diplomatic intercourse and immunities.⁵ The Vienna Conference placed this question on its agenda and appointed a special Sub-Committee to study it.⁶

¹ *Yearbook of the International Law Commission, 1958*, vol. II, p. 89, para. 51.

² *Yearbook of the International Law Commission, 1960*, vol. II, p. 108, document A/CN.4/129.

³ *Ibid.*, pp. 179 and 180.

⁴ *Ibid.*, p. 179, para. 37.

⁵ Resolution 1504 (XV).

⁶ The Sub-Committee was composed of the representatives of Ecuador, Iraq, Italy, Japan, Senegal, USSR, United Kingdom, United States of America and Yugoslavia.

8. The Sub-Committee noted that the draft articles did little more than indicate which of the rules on permanent missions applied to special missions and which did not. The Sub-Committee took the view that the draft articles were unsuitable for inclusion in the final convention without long and detailed study which could take place only after a set of rules on permanent missions had been finally adopted. For this reason, the Sub-Committee recommended that the Conference should refer this question back to the General Assembly so that the Assembly could recommend to the International Law Commission further study of the topic, i.e., that it continue to study the topic in the light of the Vienna Convention on Diplomatic Relations which was then drawn up. At its fourth plenary meeting, on 10 April 1961, the Conference adopted the Sub-Committee's recommendation.⁷

9. The matter was again submitted to the General Assembly. On 18 December 1961, the General Assembly, on the recommendation of the Sixth Committee, adopted resolution 1687 (XVI), in which it requested the International Law Commission to study the subject further and to report thereon to the General Assembly.

10. In pursuance of that resolution, the question was referred back to the International Law Commission, which decided, at its 669th meeting, on 27 June 1962, to place it on the agenda for its fifteenth session. The Commission also requested the Secretariat to prepare a working paper on the subject.

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

12. On that occasion, the Commission took the following decision:

With regard to the approach to the codification of the topic, the Commission decided that the Special Rapporteur should prepare a draft of articles. These articles should be based on the provisions of the Vienna Convention on Diplomatic Relations, 1961, but the Special Rapporteur should keep in mind that special missions are, both by virtue of their functions and by their nature, an institution distinct from permanent missions. In addition, the Commission thought that the time was not yet ripe for deciding whether the draft articles on special missions should be in the form of an additional protocol to the Vienna Convention, 1961, or should be embodied in a separate convention or put in any other appropriate form, and that the Commission should await the Special Rapporteur's recommendations on that subject.⁸

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

With regard to the scope of the topic, the members agreed that the topic of special missions should also cover itinerant envoys, in accordance with its decision at its 1960 session.⁹ At that session

⁷ *Yearbook of the International Law Commission, 1963*, vol. II, p. 157, document A/CN.4/155, paras. 44-45.

⁸ *Ibid.*, p. 225, para. 64.

⁹ *Yearbook of the International Law Commission, 1960*, vol. I, p. 260, para. 26.

the Commission had also decided¹⁰ 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.¹¹

14. The Special Rapporteur submitted his report,¹² which was placed on the agenda for the Commission's sixteenth session.

15. 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 for continuing his study and submitting the continuation of his report at the following session. Secondly, at the 757th, 758th, 760th-763rd and 768th-770th meetings, it examined a number of draft articles and adopted sixteen articles subject to their being supplemented, if necessary, during its seventeenth session. These articles were submitted to the General Assembly and to the Governments of Member States for information.

16. 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 expressed the hope that the reports on this topic submitted at the 1964 and 1965 sessions would be consolidated in a single report.

17. 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.¹³ The Commission considered that report at its 804th-809th, 817th, 819th and 820th meetings.

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

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

20. 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 be able to complete its final draft on special missions with its present membership.

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

22. At its twentieth session the General Assembly discussed the draft articles, which were transmitted to the Governments of Member States for comment. By the opening of the Commission's eighteenth session, however, only a limited number of States had submitted their comments.

23. At its eighteenth session, the International Law Commission only considered the general questions relating to special missions which had been raised by the Governments of Member States in their comments and suggestions or which had been brought up by the delegations of Member States in the Sixth Committee at the twentieth session of the General Assembly. It took decisions of principle on those questions. They were: the nature of the provisions relating to special missions; the distinction between the different kinds of special missions; the question of introducing into the draft articles a provision prohibiting discrimination; reciprocity in the application of the rules on special missions; relationship with other international agreements; the form of the instrument relating to special missions; the adoption of the instrument relating to special missions; the preamble. The Commission did not have time to deal with the comments on the actual draft articles because it concentrated all its efforts at that session on preparing the draft articles on the law of treaties.

24. In its report to the General Assembly on the work of its eighteenth session, the International Law Commission informed the Assembly of the decisions it had taken on those questions of principle, of the instructions it had given to the Special Rapporteur and of the fact that only a few States had transmitted their observations and comments on the draft articles. It asked the Secretary-General to invite the Governments of Member States again to forward their comments, before 1 March 1967, since the Commission had not yet been able to consider individual comments.

25. At the twenty-first session of the General Assembly, the Sixth Committee considered that report and some representatives stated their position on it. In its resolution 2167 (XXI) of 5 December 1966, the General Assembly invited the International Law Commission to continue its work of codification and progressive development of the international law relating to special missions and to present a final draft on the topic in its report on the work of its nineteenth session, taking into account the views expressed by the representatives of Member States at the twenty-first session of the General Assembly and

¹⁰ *Ibid.*, para. 25.

¹¹ *Yearbook of the International Law Commission, 1963*, vol. II, p. 225, para. 63.

¹² *Yearbook of the International Law Commission, 1964*, vol. II, p. 67, document A/CN.4/166.

¹³ *Yearbook of the International Law Commission, 1965*, vol. II, p. 109, document A/CN.4/179.

any comments which might be submitted by Governments.

26. At its eighteenth session, the International Law Commission requested the Special Rapporteur, Mr. Milan Bartoš, despite the fact that his term of office as a member of the Commission was to expire on 31 December 1966, to continue his work on the rules relating to special missions if he were re-elected a member of the Commission. Since he was re-elected by the General Assembly on 10 November 1966, the Special Rapporteur has continued his work.

CHAPTER II

Introduction

1. *The object of this report and the practical importance of the question*

27. The problem of *ad hoc* diplomacy is becoming increasingly important in international law and in international relations, where it appears in a new form while at the same time, in theory, it has remained, as it were, non-existent — or rather, writers on international law do not make it a special object of their research and mention it only in passing, as an adjunct to the general notion of diplomacy.

28. Many writers are still in bondage to the “classic” conception of this notion. They speak of *ad hoc* diplomacy in the past tense, as though it were something fallen into disuse and displaced by resident, permanent diplomacy. There are writers, even today, who regard *ad hoc* diplomacy as simply a matter of ceremonial or etiquette missions, which they believe to have been for some time past the only occasions for the dispatch of special ambassadors, all other diplomatic affairs having been transferred to permanent missions. Other writers, more realistic in outlook, concede that the assignment of special envoys and missions of sovereign States to international congresses and conferences, which are becoming increasingly frequent, also constitutes *ad hoc* diplomacy in the form of special delegations and delegates, and they rightly regard this as a virtual revival of the institution of *ad hoc* diplomacy. This is not all, however. The ever-growing influence of political control, the democratization of State political systems in general, the increasingly active participation of politicians, and particularly of Heads of Government and Ministers for Foreign Affairs, in international relations, and the closer and more direct “summit” and “high-level” contacts have resulted in the transference of a large volume of affairs from resident to *ad hoc* diplomacy. As statesmen become more mobile, communications more rapid, and the diplomatic apparatus more bureaucratic, and as it becomes necessary to find speedy solutions to international political problems, *ad hoc* diplomacy has assumed new forms and a new content. The real importance of “flying diplomacy” increases daily. Travel by high-ranking representatives of States, contacts between them, rapid discussions of a range of subjects, and “high-level” negotiations between States, have never been so common as they

are today. It is no exaggeration to state that the regular duties of Ministers for Foreign Affairs include flying to other States for negotiations, or to prepare for negotiations, with their colleagues, and in turn receiving these in their own home countries. One of the chroniclers of our age tells us that, in the great capital cities, there are “queues” of ministers from foreign countries “awaiting their turn”, because *ad hoc* diplomacy has not yet succeeded in emancipating itself from certain rules of protocol which prohibit the simultaneous reception of more than one senior official if they are not taking part in joint negotiations. He foresees that this rule of protocol will soon have to be dropped, so that “flying diplomacy” may be recorded in a number of separate columns in the host’s appointments book. This alone suffices to show how far *ad hoc* diplomacy has become a real necessity in advanced international relations and in their emancipation from the monopoly of resident diplomacy as the sole instrument of international negotiations, outside international congresses and conferences.

29. A further point is that international relations are no longer purely political and consular. There is no field of social life today in which direct contacts between States are lacking. It would be wrong to assume that technical contacts between sovereign States are concentrated entirely in such international organizations as the specialized agencies. On the contrary, the specialized agencies, despite their desire to become centres of international life in specific technical fields, generally stimulate and encourage direct bilateral contacts among their own members; in some cases, the agencies even impose an obligation on their members to maintain relations with each other, either permanently or at intervals, for negotiations, the conclusion of agreements, the exchange of information, and the solution of current affairs. A mere glance at the activities of this kind carried on by the International Civil Aviation Organization suffices to prove this. The practical implementation of its instruments, as multilateral treaties, requires permanent contacts between the member countries of the Organization, while the latter confines itself to registering and studying the results of those contacts and taking action to smooth out any resulting difficulties. The list of contracts registered — bilateral, multilateral, restricted and regional — which is published by ICAO shows clearly how many international contacts were necessary before results were achieved. In studying documents of this kind, the Special Rapporteur could not fail to note that most of the contracts to which they relate were brought into being through *ad hoc* diplomacy, whereas arrangements concluded through negotiations and contacts between resident missions and representatives of the receiving State in which the treaty was concluded are very rare. Needless to say, this example applies to all fields.

30. In his desire to go thoroughly into the question of *ad hoc* diplomacy, the Special Rapporteur is obliged to point out that, according to one school of thought, such diplomacy is limited entirely to strictly political missions, and the notion of *ad hoc* diplomacy does not extend to “technical” missions. In his view, this conception is fundamentally unsound and not in keeping with the notion of diplomacy in general. The characteristic of

diplomacy is that it represents the State in its relations with another subject (or with the other subjects) of international law. The object of these relations is any situation in which the relation of sovereignty is manifest. Any action in this category is international in nature, and consequently political in nature also; for all such questions are complex, in that they have both a technical aspect and a political aspect, although the latter is not present to the same degree in all such matters. It emerges more clearly in some situations, less clearly in others, but it is nevertheless everywhere present, and any international relation is a relation between sovereignties. Whenever any international contact takes place, it is the duty of diplomacy to represent the State in relations of that kind, and therefore special missions and special delegates responsible for dealing with these problems are *ad hoc* diplomats. It may be that, apart from the general rules, certain special rules also apply to such diplomats because of the specific nature of their functions, but their status must be, in substance, that of *ad hoc* diplomats, and everything which in general attaches to the status of *ad hoc* diplomats therefore, of necessity, applies also to them.

31. In view of the multiplicity of special missions and of special delegates with technical functions, and of the fact that international co-operation is constantly expanding in these areas and that such functions are of a recent character, it is clear that the notion of *ad hoc* diplomacy is acquiring new and greater importance and must be given special attention. This special attention must be devoted, not only to studies of an international phenomenon, but also to the need for establishing adequate rules of positive law setting out with precision the rights and obligations of *ad hoc* diplomacy and, as a corollary, regulating mutual relations between States which send and receive representatives of this kind.

32. The lack of special rules on this subject in positive public international law is due to the traditional idea that the time of *ad hoc* diplomacy is past, that it is now only employed in exceptional cases (ceremonial missions and international meetings), that it is limited to official visits of Heads of States and Governments (for which there are, moreover, special rules), and that its sporadic manifestations may be regulated by the analogous application of the rules of public international law concerning resident diplomacy. It took courage to present the problem of *ad hoc* diplomacy as a special subject for study and regulation, first to the International Law Commission and later to the General Assembly of the United Nations. This proposal was received favourably in principle, but it did not bear fruit. Established traditions, indeed, are not easily changed. For this, new conceptions are necessary, and as a first step, the new phenomena must be faced and analysed. The Special Rapporteur would not venture to assert that the idea of establishing rules on this subject on new foundations was entirely rejected. However, the only result of this proposal within the Commission was the confirmation of the old rule concerning the application by analogy of the rules governing resident diplomacy. This was due, on the one hand, to lack of time for a detailed survey of a new phenomenon, which had been inadequately explored in theoretical studies despite the abundant practice, and, on the other hand, to an error in the choice

of method used in approaching the problem. According to Article 13 of the United Nations Charter and to the Statute of the International Law Commission, there are undoubtedly two methods of formulating rules of international law, namely codification and progressive development. Although the Commission acknowledges in theory the need for an interpenetration of these two methods, the Special Rapporteur, as a member of that Commission who has participated in its work for the past ten years, must nevertheless confess that preference is still given to the straight codification method. In the present case, the Commission has also sought substantiation in existing positive international law. It is the Commission's practice, in adapting the existing system to new developments to amend and correct it.¹⁴ However, it has not hitherto shown either enough determination or enough courage to take account of recent developments in international relations and, abandoning rules previously in force which are already obsolete in practice, to establish adequate new rules. That is why its 1960 draft convention on *ad hoc* diplomacy proved abortive at the Vienna Conference on Diplomatic Relations (1961). The brief reference to the application by analogy of the rules governing permanent missions appeared weak and inadequate to the States participating in that Conference. They sought sounder and more comprehensive solutions, more consistent with the increasingly frequent instances of *ad hoc* diplomacy. That Conference, moreover, took a coupling of the functional theory and the representative theory as its starting point and as the fundamental idea for permanent diplomatic missions. In the Vienna Convention on Diplomatic Relations all the provisions were thought out in terms of the actual situation and the functioning of the permanent missions. To put forward the abstract idea that the functioning of *ad hoc* diplomacy was identical with that of permanent missions would be to ignore the facts. However, in order to bring these facts to light and to establish the legal rules appropriate to them, a detailed analysis must be made of international relations as they really exist. That is why this problem is again on the agenda of the International Law Commission. The international community of today expects that this question will be resolved as soon as possible and that the convention on *ad hoc* diplomacy will become the third chapter in a code of modern diplomatic law, the first two chapters of which have already been written.¹⁵ A decision has already been taken to prepare the fourth chapter also (on relations between States and inter-governmental organizations), which — as conceived by the International Law Commission — will include certain matters concerning *ad hoc*

¹⁴ Admittedly the Commission had deliberately abandoned this method and was seeking new solutions, when it displayed a preference for the progressive development of international law in its draft which, at the first Conference on the Law of the Sea (Geneva, 1958) gave rise to Convention III (on the Living Resources of the High Seas), but the reason for that is to be found in the relevant resolutions of FAO and the United Nations General Assembly.

¹⁵ These are the Vienna Convention on Diplomatic Relations, 1961, i.e., on the legal relations applicable to permanent diplomatic missions, and the Vienna Convention on Consular Relations, 1963.

diplomacy (question of the status of State delegations to international meetings).¹⁶ State practice is impatiently awaiting this part of the diplomatic code. It would not be wrong to say that it is an absolute necessity of contemporary international law. To meet the needs, however, this part should not only be based on thorough analysis and be in accord with the functional theory of the position of the organs whose status it is to regulate, but should also take account in its rules of the contemporary conditions of the international community and of the progress and transformation of international law. In other words, these rules should be a contribution to the further progressive evolution of international law, chiefly by their adaptation to the principles serving the further development of friendly and peaceful relations among peoples, and should seek to be an instrument of peaceful coexistence.

33. The Special Rapporteur will seek to set out here, from the legal viewpoint, the status of *ad hoc* diplomacy, the ways and prospects of finding solutions, and the rules governing *ad hoc* diplomacy in public international law, confining himself exclusively to that area of *ad hoc* diplomacy which should constitute a separate subject, according to the conception of the International Law Commission. Consequently, he will exclude from his report certain phenomena which otherwise, in his opinion, would form an integral part of the notion of

¹⁶ In the Special Rapporteur's view, the considerations that led the Commission to isolate the legal status of State delegations to international meetings from the domain of *ad hoc* diplomacy and to transfer it to the system of rules governing international organizations were unduly pragmatic and practical. The Commission's decision was based on two special considerations: (a) since most present-day international meetings are held under the auspices of international organizations and the latter have standardized rules concerning the status of delegations participating in such meetings, the Commission in practice made no distinction between those meetings and the meetings of the main and subsidiary organs of the international organizations (which, in the Special Rapporteur's opinion, is not correct); (b) the legal rules concerning meetings held under the auspices of international organizations must be expected to crystallize and be applied also to other international meetings not convened by or connected with international organizations. To try to find and codify special legal rules for this second group would be a duplication of work. The task will be easier when the rules to be applied to meetings taking place under the auspices of international organizations have been established. It should be noted that for both groups there are abundant positive law sources not only in the standardized provisions of international organizations (although these have their distinguishing features — for example, the system of *curiae* in the International Labour Organisation), but also in the customary rules and the regulations of a number of international conferences and congresses. In both cases the Commission could make much more use of the codification method, using for this purpose also the abundant literature dealing with the practice, customs and rules pertaining to international meetings. This literature has developed principally in commentaries and studies on the functioning of the League of Nations, the United Nations, the specialized agencies and their organs. In its work on special missions, the Commission has shown some flexibility on the issue whether the status of delegations to international conferences should be finally separated from the principles and rules relating to special missions. Consequently, the Commission decided that the Special Rapporteur on relations between States and inter-governmental organizations and the Special Rapporteur on special missions should jointly study that question and submit a report to the Commission so that it might reach a final decision.

ad hoc diplomacy. Accordingly, in this report he does not propose to deal with matters relating to:

(a) Visits by Heads of States and Governments and by Ministers for Foreign Affairs, when they are State or official visits to another State, even though on such occasions certain diplomatic actions may be undertaken and consequently, such visits represent, in substance, the performance of an *ad hoc* diplomatic mission. The reason for excluding them is that the status of the participants in these actions and that of their collaborators and of the persons in their party are regulated by special rules hallowed by usage which distinguish this group of actions from the notion of *ad hoc* diplomacy;

(b) Specialized permanent missions existing side by side with or replacing the ordinary diplomatic missions, for these are extraordinary permanent missions and not *ad hoc* diplomatic missions and consequently by definition they do not come under the notion of *ad hoc* diplomacy. At present there are no general rules of international law applicable to these missions, but their status is generally regulated by treaty between the sending State and the receiving State;

(c) The activities, even if performed regularly, of delegates of States to institutional commissions which are established by international agreement and whose status is regulated in advance. These are permanent organs in which *ad hoc* diplomats participate, but their status is the subject of special provisions;

(d) Delegates and delegations to permanent international organizations. This is a new form of resident diplomacy, which is wholly unrelated to *ad hoc* diplomacy.

34. On the other hand, it should be understood, even when it is not stated explicitly, that the Special Rapporteur's report covers the notion of *ad hoc* diplomacy in the more limited sense, including not only periodic missions and delegates with purely political functions, but also those whose tasks are considered as being of a technical character. He regards them all as *ad hoc* diplomats. Modern international relations can no longer remain wedded to the conservative view that *ad hoc* diplomacy is composed of special missions of a ceremonial character or possibly of persons who carry out certain political missions or hold a specific diplomatic rank. Even the functions of resident diplomats are today no longer exclusively diplomatic and political. More new technical activities are assigned to them each day, in the light of the development of international relations at the present time. For this reason permanent missions today include an ever increasing number of experts styled special attachés, and of advisers of diplomatic rank or at least with diplomatic status. As long as they perform their functions by representing their sovereign State and maintaining international relations, nobody thinks of contesting their diplomatic character. If this is true of the members of permanent missions, it should *a fortiori* be true of the members of special missions and special delegates. They should, indeed they must, be included in the ranks of *ad hoc* diplomats.

35. Consequently, this report deals with a specific international phenomenon which, the Special Rapporteur

is convinced, has particular importance for modern international relations.

36. Although the expression "*ad hoc* diplomacy" is certainly correct from the standpoint of theory, the Special Rapporteur, following the opinion of the majority of the Commission, has replaced it with the expression "special mission" in his draft rules. The expression "*ad hoc* diplomacy" has aroused the disapproval and opposition of career diplomats who consider that it might lead to confusion of the ideas of resident diplomacy and *ad hoc* diplomacy, particularly as that expression would be used to designate persons performing either form of diplomacy. However, the adoption of a different expression does not change the substance of the preceding statement.

2. *Preliminary question: should the rules governing special missions cover the regulation of the legal status of delegations and delegates to international conferences and congresses?*

37. At its fifteenth session, the International Law Commission did not take a definitive position on this question. It decided not to take a final decision until it had received the recommendations of the Special Rapporteur on the topic of special missions and of the Special Rapporteur on the relations between States and inter-governmental organizations.

38. The Special Rapporteur on the topic of special missions has come to believe that the status of delegations and delegates to international inter-governmental conferences and congresses should be viewed from two angles. On the one hand, consideration should be given to congresses and conferences convened by international organizations or held under their auspices. In view of the widespread and, today, almost universally adopted practice whereby the status of such delegations and delegates is determined in advance either by the rules of the organization convening the conference or congress or by the letter of convocation, and whereby, in such cases, a legal relationship is created between the delegations and delegates to such meetings, on the one hand, and, simultaneously, the convening organization and the participating States on the other hand, the Special Rapporteur considers that the status of such delegations and delegates could be regulated under the legal rules governing the relations between States and international organizations, even though these delegations are essentially identical with those taking part in conferences and congresses held outside international organizations. The status of delegations and delegates to conferences and congresses convened by one or more States outside the international organizations is similar in all respects to the status of special missions and, in the Special Rapporteur's opinion, should be regulated by the rules on special missions. He would point out, however, that the distinction between the two types of delegations is purely formal, the criterion being who convenes the meeting.

39. The Special Rapporteur suggests that, as this question is a preliminary one, it should be discussed before the main question is taken up.

40. It should here be noted that delegates attending international conferences and congresses are the most common example of *ad hoc* diplomats. Although the Special Rapporteur does not intend to deal with this category of diplomacy which, in the opinion of the International Law Commission, should be considered with the rules concerning relations between States and inter-governmental organizations (a view with which he is only partly in agreement), he is nevertheless compelled to stress here one point only referring to this kind of *ad hoc* diplomacy. The membership of special missions of this kind sometimes includes representatives of the sending State who are diplomats already permanently accredited to particular States. Since other rules exist concerning the activities in public of permanently accredited diplomats (courteous conduct in public with respect to the State to which they are accredited) and there is the rule regarding the full freedom of representation of a State at international conferences, even though the State concerned may be exposed to severe judgements and possibly violent opposition and critical statements in the public meetings of the conference, there is undeniably a certain conflict in this case, at least so far as protocol is concerned. However, the idea that during the conference and in the performance of the delegate's function, his status as an *ad hoc* diplomat takes precedence over his status as a resident diplomat¹⁷ is gaining more and more ground.

41. During the period that such a representative is an *ad hoc* diplomat, he does not cease to be a resident diplomatic agent as well. That depends on the circumstances and the capacity in which he acts. Undeniably such situations are not always desirable or agreeable. That is why, when preparations are being made for a conference of this kind and if the situation during the conference is likely to be unpleasant, heads of permanent diplomatic missions urge their Governments to excuse them from the responsibility of acting as the head or a member of such delegations and recommend that these missions should be entrusted to third persons. They generally argue that such missions may adversely affect the performance of their diplomatic functions after the conference has ended.¹⁸

42. On the other hand, the sending States consider it practical and less expensive to entrust these functions to the heads of their permanent diplomatic missions at the place where the conference is to be held.

43. Obviously, when the head of the permanent mission ceases to act as an *ad hoc* diplomat, he retains his standing as a resident diplomat and loses his duality of functions. He can no longer act in the receiving State as an *ad*

¹⁷ At the Vienna Conferences on Diplomatic Relations (1961) and Consular Relations (1963) many States had appointed the heads of their permanent diplomatic missions accredited in Austria to head their delegations. In some cases they were obliged to challenge the views of the Austrian delegation or else those of the President of the Conference, who was the head of the Austrian delegation. Nevertheless, both sides should have understood that the delegations in question were acting in a dual capacity.

¹⁸ This is one of the reasons why the ambassadors of the United States and the United Kingdom were not included in the delegations of their States to the Vienna Conferences in 1961 and 1963.

hoc diplomat, with respect to the State to which he is accredited.

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

45. The Commission did not come to a decision to treat this as a different subject and to entrust it to a separate special rapporteur for the "law of conferences". At its seventeenth session, however, it was still in favour of having the Special Rapporteur on special missions and the Special Rapporteur on relations between States and inter-governmental organizations study this question and submit their opinions and recommendations.

3. *Preliminary question: with respect to special missions, should there or should there not be an additional protocol to the Vienna Convention on Diplomatic Relations or a special draft linked to that Convention by a reference clause?*

46. This question was left pending by the International Law Commission at its fifteenth session, in the belief that the time was not yet ripe for deciding it and that the Commission should await the Special Rapporteur's recommendation on the subject.

47. 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". His study of the functioning of special missions has convinced the Special Rapporteur that simply to append the draft articles to the rules governing diplomatic relations would not be adequate for some special missions, so far as their status is concerned.

48. The Special Rapporteur has also adopted in part, the argument, put forward at the meetings of the Commission by Mr. Rosenne, that although special missions represent sovereign States in international relations they cannot, because of their functions, always be treated as diplomatic missions but should, in some cases, be treated as consular missions.¹⁰ Consequently, it must be

anticipated that the rules relating to special missions will contain a reference to the Vienna Conventions on Diplomatic Relations (1961) and on Consular Relations (1963) also. This reference will be parallel and will depend on the nature of the special mission and on the requirements of each individual case.

49. The Special Rapporteur believes, however, that no attempt should be made to settle this question until the final clauses of the draft rules are taken up.

50. At the time when the Special Rapporteur was asked to undertake this task, the Commission considered the preliminary question whether the instrument it would be drafting would be complementary to the Vienna Convention on Diplomatic Relations or a separate convention.

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

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

53. Following up this idea, the Commission considered whether the rules to be laid down in the instrument should be regarded as *jus cogens* or *jus dispositivum*. Mr. Rosenne maintained that the draft articles should contain elements of both. He described *jus dispositivum* rules as "residual rules" which he defined as "a set of rules made available to States for incorporation in their own agreements as desired" (SR. 725, paras. 8-10). Mr. Yasseen gave a much more stringent definition of these residual rules, since he made a reservation limiting the rights of States. In his view a State would be free to derogate from the general convention by means of bilateral agreements, to the extent that such derogations *did not conflict* with *jus cogens* rules (SR.725, para. 21). Mr. Castrén was also of this opinion; he said that only exceptionally could the rules be rules of *jus dispositivum* (SR.725, para. 23). Still more light was thrown on the subject by Mr. de Luna, who expressed a like opinion, saying that the articles which the Commission was drafting involved inviolable rules of *jus cogens*, or rules of *jus dispositivum* which ranked as residual rules in cases where States had not otherwise provided by bilateral

¹⁰ See summary record of the 711th meeting, para. 77, in *Yearbook of the International Law Commission, 1963*, vol. I, p. 260.

agreement (SR.725, para. 26). Mr. de Luna's view therefore was that the text itself would decide from which rules it would be possible to derogate, whereas Sir Humphrey Waldock thought that the Commission should follow the example of the two Vienna Conferences and refrain from trying to determine which rules governing special missions were of the character of *jus cogens* (SR.725, para. 35). The Special Rapporteur considers that when the Commission drafted the rules in the operative part of the articles, it followed the course suggested by Mr. de Luna; a clear instance will be found in the language of article 9.

54. Similarly, at the sixteenth session of the Commission, the question was raised whether the Commission should draft an additional protocol to the Vienna Convention on Diplomatic Relations, 1961, or a separate instrument. This was another of the preliminary questions, and three opinions were expressed during the general debate in the Commission.

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

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

57. This view was shared by Mr. Verdross, who held that the convention should be complementary to the two existing Vienna Conventions (SR.723, para. 62). Sir Humphrey Waldock expressed a like opinion (SR.723, para. 68), but later changed his mind (see below).

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

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

60. The third point of view was that, for the time being, the Commission should deal with the substance of

the topic; later, after completing its work, it might see whether the results showed that the rules relating to special missions corresponded with or, on the contrary, differed from the provisions of the Vienna Convention on Diplomatic Relations, and then decide whether it would adopt the first or the second of the opinions described above. This was the view put forward by Mr. Tunkin (SR.725, para. 24) and it was supported by Sir Humphrey Waldock (SR.725, para. 45) and Mr. Ago (SR.725, para. 48). Mr. Tunkin gave the reasons for his attitude in a further statement (SR.725, paras. 33 and 34), which was supported by Mr. Tsuruoka (SR.725, para. 47) and by Sir Humphrey Waldock (SR.725, paras. 35-36).

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

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

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

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

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

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

67. Mr. Rosenne stated that, although certain special missions fulfilled quasi-consular functions, as, for

example, when they dealt with migration problems, he had in no way wished to suggest in his statement at the 711th meeting (SR.711, para. 77) that there should be separate rules for special missions which fulfilled quasi-consular functions. He was of the opinion, however, that the Commission should not only draw inspiration from the Vienna Convention on Diplomatic Relations but should also bear in mind the contents of the Vienna Convention on Consular Relations (SR.724, para. 63).

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

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

70. Mr. Verdross raised the question of the position of the rules relating to special missions in the general code of diplomatic law. His view was that the Commission should codify the whole of diplomatic law: if it wanted its work to be useful it should leave no point uncovered. In addition to the Convention on Diplomatic Relations and the Convention on Consular Relations, the field to be covered included relations between States and inter-governmental organizations and the other problems of special diplomacy in the broadest possible sense of the term (SR.723, para. 62). The same opinion was voiced by Mr. Castrén (SR.724, para. 12; SR.725, para. 23), Mr. Elias (SR.725, para. 30) and Mr. Yasseen (SR.725, para. 21). Mr. Tabibi (SR.725, para. 12), Mr. Rosenne (SR.725, paras. 3-11) and Mr. El-Erian (SR.725, para. 37) held that all those rules were interrelated.

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

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

73. Mr. Jiménez de Aréchaga supported Mr. Yasseen (SR.723, paras. 49 and 50).

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

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

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

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

78. During 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 delegation 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 Relations and the 1963 Vienna Convention on Consular Relations.²⁰

79. 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.

80. The Czechoslovak delegation said that "the draft articles should be embodied in an international treaty".²¹

81. The Swedish delegation pointed out that "a convention on special missions had been deemed necessary to complement the 1961 Vienna Convention on Diplomatic Relations".²²

82. The Greek delegation said that the law on special missions should be codified in order to supplement the Vienna Conventions on Diplomatic and Consular Relations,²³ i.e., both conventions, not merely that on Diplomatic Relations.

83. The Romanian delegation expressed itself 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.²⁴

84. The French delegation 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.²⁵

85. The delegation 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.²⁶

²⁰ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 840th meeting, para. 14.*

²¹ *Ibid.*, 843rd meeting, para. 17.

²² *Ibid.*, 844th meeting, para. 9.

²³ *Ibid.*, 845th meeting, para. 45.

²⁴ *Ibid.*, 848th meeting, para. 12.

²⁵ *Ibid.*, 849th meeting, para. 20.

²⁶ *Ibid.*, 849th meeting, para. 34.

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

86. Only the delegation of the Netherlands advocated codification in the form of "one unified statute book".²⁷

87. 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.

88. The Yugoslav Government has 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.

89. 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.²⁸ 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."

90. 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.

91. The Commission also took a position on this question during its eighteenth session and, in its report to the General Assembly on the work of that session, of which the Assembly took note in resolution 2167 (XXI) of 5 December 1966, stated that:

During its fifteenth session, at the 712th meeting, the 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 1961 Vienna Convention, or should be embodied in a separate Convention or put in

any other appropriate form; it decided to await the Special Rapporteur's recommendations on that subject. During 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. In the light of those opinions and of the written comments by Governments, the Commission requested the Special Rapporteur to continue his work on the draft articles on special missions on the assumption that the draft would be in the form of a separate instrument, though keeping as closely as possible to the structure of the Vienna Convention on Diplomatic Relations.²⁹

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

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

4. Relationship with other international agreements

94. In his second report on special missions 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.

95. 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.

96. 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.

²⁷ *Ibid.*, 847th meeting, para. 7.

²⁸ *Yearbook of the International Law Commission, 1964*, vol. II, p. 74.

²⁹ *Yearbook of the International Law Commission, 1966*, vol. II, p. 276, para. 65.

97. 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.

98. Although only three Governments stated their views on this question, the Special Rapporteur took the view that it was incumbent on the Commission to revert to it and take a final decision.

99. The Commission took a position on this question at its eighteenth session and, in its report to the General Assembly, it stated the following conclusions:

In paragraph 50 of its report on the work of the first part of its seventeenth session (1965), the Commission referred to the question whether the draft articles on special missions should include a provision on the relationship between the articles and other international agreements, corresponding to article 73 of the Vienna Convention on Consular Relations. After considering the comments by Governments and the Special Rapporteur's views on the point, the Commission asked the Special Rapporteur to submit a draft article on the subject based on the Convention on the Privileges and Immunities of the United Nations, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.³⁰

5. *Body competent to adopt the instruments relating to special missions*

100. Neither the Special Rapporteur nor the Commission, during the preparation of the draft articles on special missions, concentrated on determining what body would be competent to establish the instrument by which the articles relating to special missions would be adopted as rules of international law. The Special Rapporteur and the Commission considered that the question depended on the procedure laid down by the Statute of the International Law Commission and that it could be raised only when the preparation of the preliminary draft by the Commission was concluded. Nevertheless, the question was raised during the discussion in the Sixth Committee at the twentieth session of the General Assembly and in the written comments later submitted by the Governments of Member States.

101. The delegation of Israel said it was not convinced at present that the draft articles on special missions should be put before a diplomatic conference.³¹ The 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 the Convention into being.

102. The delegation of Brazil hoped that the text on special missions would be adopted by an international conference.³²

103. The Romanian delegation considered that there should be a "single separate convention to be drafted at a special conference of plenipotentiaries".³³

104. 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.

105. The Special Rapporteur considered that it was his duty to inform the Commission of the above opinions and recommended 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.

106. At its eighteenth session the Commission only touched on the question without taking a final decision on it. In its report to the General Assembly it defined its position as follows:

Although the Commission did not ask Governments how, in their opinion, the text of the instrument relating to special missions should be adopted, several Governments expressed their views on this question, either in the Sixth Committee of the General Assembly or in their written comments. The Commission deferred its decision on this question until its next session.³⁴

6. *Is it possible in this connexion to seek historical continuity with the rules relating to special missions which formerly existed (explanation of the method to be used in seeking sources)?*

107. The Special Rapporteur will not dwell on the well-known historical truth that permanent diplomatic missions are of comparatively recent origin. All sources show that, in the earliest years of the modern era, Heads of State exchanged temporary agents and emissaries for specific purposes and on limited missions, with the result that several special envoys from one Head of State might be present at one court at the same time. The question how long permanent diplomatic missions have existed is of little importance for the purposes of this report, although it has given rise to much debate and to attempts to establish that this historic turning point came in the period between the Treaties of Westphalia (1648) and the Congress of Vienna (1815).

108. Suffice it to note that, between the Congress of Vienna and the outbreak of the Second World War, *ad hoc* missions occurred only sporadically, and their use has declined with the growth of permanent diplomatic missions.

109. A survey of diplomatic practice, as it grew up during the Second World War, and more particularly since 1945, discloses that *ad hoc* missions have taken on a new lease of life. They are becoming more and more frequent, more and more important in the functions they perform, and more and more diversified in the subjects with which they have to deal.

³⁰ *Ibid.*, para. 64.

³¹ *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 840th meeting, para. 7.

³² *Ibid.*, para. 14.

³³ *Ibid.*, 848th meeting, para. 12.

³⁴ *Yearbook of the International Law Commission, 1966*, vol. II, p. 276, para. 66.

110. The question arose whether this was a revival of something which had died out, or at least had become more rare; is the repeated use of such missions something new, or is it an extension of something which existed in the past? There are two opposing schools of thought on this question. The first holds that *ad hoc* missions never ceased to be used; they declined in number, but the institution remained in existence. Consequently, if their use has been revived, there has been no substantial change in the notion and the workings of the institution itself; there has merely been an increase in the number of instances. It follows that the institution as such must be re-examined, since there is an historical continuity between what was in the past and what is now, and we are thus dealing with a single juridical phenomenon in public international law, with all its legality. What was valid in the past and was maintained through sporadic application still remains the legal rule and must be applied. Opposed to this interpretation is another school of thought, which asserts that special missions generally have changed in substance and have acquired new importance and a new content. It follows that, although the *ad hoc* diplomacy of the past resembles that of the present day in a formal sense — since we are accustomed to classify institutions according to their outward forms — we are now dealing with something entirely different in substance. The spirit and the needs of the new age have perhaps not entirely destroyed the old form of *ad hoc* diplomacy, and more particularly its representative character, but they have produced, side by side with it, a new form which is usually functional in character. Special missions are dispatched, not solely for the purpose of communicating the will of the sovereign, but primarily to settle the political and technical problems which confront States. This is a natural consequence of the evolution of social life and of relations within the international community, and this is why a legal institution, ancient in its form, has become new in its content. This very fact makes it necessary to provide for a new legal regulation of this phenomenon. The old rules have become inadequate and, indeed, too cumbersome because, as a logical result of the representative character of *ad hoc* missions, they attached too much importance to the ceremonial and etiquette aspect. These rules could no longer serve the new *ad hoc* diplomacy, and they are not in keeping with current conceptions of life in the international community. The tendency to dispense with empty forms of protocol, the rapid pace of life, and the sphere of action of the new *ad hoc* diplomacy require new legal rules for the latter, adequate to protect its functioning. Some writers draw attention to the fact that the multiplicity of *ad hoc* missions in the present age is one factor necessitating the simplification of the old rules in the interest of the receiving State, which is no longer able to receive, escort and offer hospitality to the *ad hoc* missions coming to its territory. It is necessary to reduce all this to reasonable proportions, to stop being guided by the representative principles of an earlier age, and to adapt to the necessities imposed by reality, by applying the functional theory to *ad hoc* diplomacy.

111. The foregoing shows that, in these times, legal arguments concerning *ad hoc* diplomacy can scarcely

remain the same as in a period when it was something sporadic and representative in character. With the change in its character, its substance has also changed, and that is why new forms have appeared in States which dispatch *ad hoc* diplomats. It follows that it would be vain to attempt to argue on the juridical basis of a certain continuity between the old and the new *ad hoc* diplomacy, irrespective of all other considerations. This does not mean that some *ad hoc* missions have not retained a representative character and are not treated according to the old rules of protocol; but in these days they are, if not an anachronism, at least rare vestiges of the past, which are dying out with the passing of the remnants of conservative forms of political structure.

112. There is, however, one norm which shows why the quest for historical and legal continuity between the old and the new *ad hoc* diplomacy must be abandoned; it is the general conception of the nature of diplomacy. On the occasion of the most recent codification of diplomatic law relating to permanent missions (Vienna Convention on Diplomatic Relations, 1961), it was made clear that the guiding principle of the new clauses must be not only the representative theory but especially the functional theory. Once this is accepted for permanent missions, it applies even more to *ad hoc* diplomacy, which is seeking, in new forms, appropriate solutions which the old rules governing *ad hoc* diplomacy could not provide. It follows from the foregoing that continuity irrespective of all other considerations is impossible. In the new circumstances, a new study of the institution and new rules for its operation are needed.

7. *Are there or are there not any rules of positive public international law concerning special missions?*

113. All the research carried out by the Special Rapporteur to establish the existence of universally applicable rules of positive law in this matter has produced very little result. Despite abundant examples of the use of special missions, the Special Rapporteur has failed to establish the existence of any great number of sources of law of more recent origin which might serve as a reliable basis for the formulation of rules concerning special missions. His research has led him to the following conclusions:

114. (I) Although the dispatch of special missions and itinerant envoys has been common practice in recent times and, as the Special Rapporteur would agree, represents the use of the most practical institutions for the settlement of questions outside the ordinary run of affairs arising in international relations, whether multilateral or bilateral, they have no firm foundation in law. Whereas ordinary matters remain within the exclusive competence of permanent missions and there are many sources of positive international law which relate to these organs of international relations — in fact, a complete system, with the Vienna Convention on Diplomatic Relations (1961) as its culminating point — the rules of law relative to *ad hoc* diplomacy and the sources from which they are drawn are scanty and unreliable. There are very few studies which relate to the period prior to the Treaties of Westphalia (1648),

or even to that prior to the Congress of Vienna (1815), in which juridical sources for this matter can be sought. It is probable that the increased use and expansion of permanent missions, and even the work of temporary delegates in co-operation with permanent missions, have somewhat obscured this juridical matter. The Special Rapporteur is prepared to admit that the provisions of the Regulation of Vienna (1815) are much to blame for this, although concerned merely with rank.³⁵ In article 3 it is stated that "diplomatic officials on extraordinary missions shall not by this fact be entitled to any superiority of rank".

115. From the records and documentation of the Congress of Vienna, it might be deduced that the rule applied only to special formal or ceremonial missions, and that other missions were not taken into consideration. Hence the belief that those missions are on the same footing as permanent missions with regard to rank, that their heads should have the rank of ambassador,³⁶ in order to have representative character, and that the general rules of diplomatic law apply to those missions. This, in the Special Rapporteur's opinion, had two consequences:

(a) First, after the Congress of Vienna, *ad hoc* diplomacy was involved only in the case of special ambassadors, i.e., those with ceremonial or etiquette functions;

(b) Secondly, the old rules governing *ad hoc* diplomacy, which covered special missions and itinerant envoys used for other purposes, were abandoned.

116. (II) One question has exercised jurists, both as a matter of practice and of doctrine: what is the scope of the facilities, privileges and immunities to which such missions are entitled and which the receiving States are obliged to guarantee to them? In the absence of other rules, attempts have been made to find rules in the comity of nations and to discover analogies with the rules of diplomatic law.

117. When *ad hoc* diplomacy was once again practised on a larger scale, there was little time or opportunity to undertake the codification of the question, although it raised difficult problems for the League of Nations and aroused special concern in the Preparatory Commission of the United Nations. As a result, at the first regular session of the United Nations General Assembly (London, 1946), the question arose in connexion not only with the privileges and immunities of the United Nations staff, but also with those of the representatives of the States participating in the work of the United Nations.³⁷ Although the International Law Commission now considers that the question of the regulation of the status of *ad hoc* diplomats should be distinguished from the

question of relations between States and inter-governmental organizations and that of delegates sent by a State to international conferences (whether or not under the auspices of international organizations), the rules of *ad hoc* diplomacy established in the United Nations are of great importance for the future development of the system of rules of public international law relating to *ad hoc* diplomacy. In the first place, it was not quite certain whether the position adopted was that the rules applicable to *ad hoc* diplomacy should be identical with or analogous to those applying to resident diplomacy. With regard to the regulations required for the functioning of the United Nations, the representative principle was rejected in favour of the functional theory,³⁸ together with the theory that immunities belong not to the *ad hoc* diplomat personally but to his State, as guarantees of the normal exercise of his functions without interference on the part of foreign States.

118. (III) This state of affairs was reflected in the literature also. Most writers on public international law have touched on the question of special missions and *ad hoc* delegates, with particular reference to the sending of special missions for ceremonial purposes as a special form of *ad hoc* diplomacy, but without going into details regarding the determination of the status of such missions.³⁹ Hence, the work of the majority of authors could not serve as a guide in preparing future draft rules of law on the subject along any specific lines. Without making any comprehensive analysis of the subject, they repeated the rule relating to the right of *ad hoc* diplomacy to benefit by such rules as exist in positive international law concerning resident diplomacy. Writers on inter-

³⁸ The coupling of these two theories was also adopted at the Vienna Conference on Diplomatic Intercourse and Immunities (1961) and was inserted in the preamble to the Convention on Diplomatic Relations. The theory of functional immunity has come to prevail and has been adopted as a general principle. The emphasis on the special representative character of the *ad hoc* diplomat, recognized under article 2 of the Vienna Protocol only in the case of ambassadors has been generally abandoned. This is a result of the trend towards the equalization — still incomplete — of the various classes of heads of diplomatic missions, as they all now bear the single title of ambassador, and towards the general use of the rank of ambassador. Ambassadors are no longer merely the representatives exchanged exclusively by the great Powers.

³⁹ A similar notion is to be found in the principal works dealing with the status or history of diplomacy, of which the following are cited as examples: Bluntschli, *Le droit international codifié*, Paris, 1870; Krause, *Die Entwicklung der Ständigen Diplomatie*, Leipzig, 1885; Pessôa, *Projecto de Código de Direito Internacional Público*, Rio de Janeiro, 1911; Fiore, *International Law Codified*, New York, 1918; K. Strupp, *Réforme et codification du droit international*, Vienna, 1926; Lord Phillimore, *Proposed Codification of the Law Regarding the Representation of States*, London, 1926; Wriston, *Executive Agents in American Foreign Relations*, Baltimore, 1929; Feller and Hudson, *Diplomatic and Consular Laws and Regulations*, Washington, 1931; Genet, *Traité de diplomatie et de droit diplomatique*, 3 volumes, Paris, 1931; Potemkin, *Histoire de la diplomatie*, Paris, 1948; Satow, *Guide to Diplomatic Practice*, London, 1957; Waters, "The Ad Hoc Diplomat" (*Wayne Law Review*, 1959-1960); Wriston, "The Special Envoy" (*Foreign Affairs*, January 1960); Cahier, *Le droit diplomatique contemporain*, Geneva, 1962; Blishchenko, *Durdenevsky, Diplomaticheskoe i konsulskoe pravo*, Moscow, 1962; Waters, *The Ad Hoc Diplomat — A Study in Municipal and International Law*, The Hague, 1963; Sen, *A Diplomat's Handbook of International Law and Practice*, The Hague, 1965.

³⁵ G. F. de Martens, *Nouveau Recueil général de traités*, vol. II, p. 449; the text of the Regulation is also cited in *Yearbook of the International Law Commission*, 1957, vol. II, p. 135, foot-note 6.

³⁶ Article 2 of the Regulation of Vienna on the classification of diplomatic agents.

³⁷ When the draft Convention on the Privileges and Immunities of the United Nations with particular reference to representatives of States was discussed at Church House, London, no clear idea of the status of permanent delegations (missions) and representatives to the United Nations had yet emerged, so that at that time the question remained more or less unresolved. Attention was devoted exclusively to *ad hoc* representatives.

national law, obsessed with this idea, have generally been blind to the special problems raised by *ad hoc* diplomacy.

119. (IV) There is a whole series of bilateral conventions which regulate the status of *ad hoc* diplomats in their ordinary relations, covering, for instance, the guarantee of complete diplomatic immunity to members of frontier demarcation commissions or the right of return of envoys. Among these, however, isolated and widely differing *ad hoc* solutions would appear to predominate, offering nothing that may be regarded as evidence of any uniform international practice and, accordingly, useless as sources of international law except as concerns relations between the contracting parties. In these circumstances, where there are no general conventions and where bilateral conventions are sporadic and differ not only as between different States but also as between the same States at different periods and under different circumstances, there can hardly be said to be any conventional sources of international law on this subject capable of supporting certain broader conclusions; it is very doubtful, indeed, whether these sources are worth quoting here, as they are not in the nature of universal rules of law.

120. (V) With no well-established juridical customs and no clearly defined practice, with changes occurring in general criteria, even in those relating to resident diplomacy, with no well-grounded positions in the literature and with no institutions which can be described as accepted by the civilized nations (i.e., the nations at present forming the international community), it is interesting to find that those who have sought to create international law *de lege ferenda* have failed to make any advance. All the proposals made for this purpose merely mention the existence of *ad hoc* diplomacy and recognize its rights by analogy with the status of resident diplomacy. That was the case at the meetings of the Institute of International Law (Cambridge 1895), of the International Law Association (Vienna 1926) and of the Sixth International American Conference of States (Havana 1928).

121. This general paucity of rules of positive law on the subject eliminated all possibility of codification by the method of collecting and redrafting existing rules of international law and integrating them into a system. Moreover, the confusion caused by differences in past and present realities created fresh difficulties when attempts were made to apply in combination the methods of codification and progressive development of international law. These combined methods together represent the evolution both of existing trends and of developments it is desired to bring about, i.e., the unification of the rules *de lege lata* and the rules *de lege ferenda* in a single consistent system. It is difficult to apply this method when there are no established rules and it is not clear what rules should be introduced.

122. (VI) The International Law Commission was faced with this situation when it had to make a decision on the establishment of the rules of law relating to special missions. It was clear to all the members of the Commission that there were no definite rules of positive law which could serve as a basis for the preparation of

the rules of law on *ad hoc* diplomacy. The Secretariat reached the following conclusion:

Whilst the various instruments and studies referred to above do not purport to reflect the actual practice of States in every particular, it is probable that they represent the position adopted by the majority of States in respect to special missions. Four broad principles at least appear to be generally recognized: (i) that, subject to consent, special missions may be sent; (ii) that such missions, being composed of State representatives, are entitled to diplomatic privileges and immunities; (iii) that they receive no precedence *ex proprio vigore* over permanent missions; and (iv) that the mission is terminated when the object is achieved.⁴⁰

123. But these four principles extracted from the abundant sources on special missions were not sufficient to guide the Commission in the task of preparing the new positive law concerning special missions.

124. (VII) The secretariat of the International Law Commission had received the impression that there were only three different positions on this subject in the Commission, namely:

(a) What might be described as the idea of the *limited application to ad hoc* diplomacy of the rules relating to permanent missions. This was the idea of the Commission's previous Special Rapporteur, Mr. A. E. F. Sandström, who made the following general statement:

Broadly speaking, it seems natural that rules relating to special features of a permanent mission which do not obtain in respect of special missions should not apply, whereas rules inspired by considerations of the similar nature and aims of the functions in question should be applied.⁴¹

125. The present Special Rapporteur cannot endorse that idea and considers the theory false, although it was accepted by the majority in the Commission. Not only do special missions not have all the features of permanent diplomatic missions, but they have their own special features. These would lead us not only to apply to *ad hoc* diplomacy the rules governing permanent diplomacy and to determine whether all those rules are applicable, but also to seek solutions in accordance with those rules. It is difficult in life generally, and hence in international relations also, to follow a set path and to classify everything under existing headings. Life gives rise to and shapes the most diverse events. Each of those events requires legal regulation, and although social events may be influenced by means of legal rules, the law itself must none the less reflect social reality. Its object cannot be to have everything that deviates from the norm considered as a departure from the legal system. Although the Special Rapporteur does not accept "case law" and is not in favour of the establishment of exceptions at any price, it is nevertheless true that those responsible for formulating rules of law must bear in mind that the law is only the product of society. The international community as a social form is constantly subject to transformations, which have become especially marked since the end of the Second World War. *Ad hoc* diplomacy is in fact a new phenomenon,

⁴⁰ From the working paper on special missions prepared by the United Nations Secretariat, document A/CN.4/155, para. 11, in *Yearbook of the International Law Commission*, 1963, vol. II.

⁴¹ *Yearbook of the International Law Commission*, 1960, vol. II, p. 108, para. 7.

because it can hardly be described as a mere revival of past practice; in this Rapporteur's view, it would in fact be wrong to do so. New forms of *ad hoc* diplomacy have been evolved which must be regulated, and this cannot be done by a mere blanket rejection of everything which does not apply to *ad hoc* diplomacy but continues to apply to resident diplomacy.

126. Although he is a member of the International Law Commission, the Special Rapporteur considers that the Commission is very far from having found a satisfactory solution to the problem. Because of the limited time it had at its disposal, the Commission was unable to get to the heart of the matter. It is difficult to speak of any complete analogy between two institutions which have neither the same purpose nor the same consequences. That, in the Special Rapporteur's opinion, is why a more thorough analysis should first have been made: if that had been done the Commission would not have remained wedded to this theory.

(b) The dissenting opinion concerning the Sandström report expressed in the Commission by Mr. Jiménez de Aréchaga⁴² is considered as constituting the second approach.

127. In stating his views before the Commission, Mr. Jiménez de Aréchaga took the position that all provisions of diplomatic law concerning permanent missions applied also to special missions, with the difference that additional provisions were required arising out of the special nature or specific assignments of special missions. From this point of view, his theory might be called an *integration* theory. He himself expresses it as follows:

... all the provisions of the 1958 draft are relevant to special missions and should be made applicable to them, with the proviso that article 3 (Functions of a diplomatic mission) should be interpreted as applying only within the scope of the specific task assigned to the special mission.

The only additional provision which seems to be required in the case of special missions is one concerning termination of the mission on fulfilment of the entrusted assignment. . .⁴³

128. The Special Rapporteur cannot say that he entirely agrees with this theory of integration either. In the first place, it is not correct that all the provisions of public international law relating to permanent missions should be applied to special missions. Among those provisions, there are some which are not consistent with the very nature of an *ad hoc* mission. On the other hand, the rule formulated by Mr. Jiménez de Aréchaga is correct in the sense that the nature of an *ad hoc* mission also calls for special rules; in other words, it is necessary to elaborate them and to include them in a document with supplementary material.

(c) The third approach formulated in this connexion is that reflected in the suggestion by Sir Gerald Fitzmaurice that the draft rules relating to permanent diplomacy should in principle apply to *ad hoc* diplomacy, but only *mutatis mutandis*.⁴⁴ According to this theory, there

is unquestionably a similarity of situation between permanent missions and *ad hoc* missions but there are also differences. That was why Sir Gerald expressed the view that the rules relating to permanent missions should be applied to *ad hoc* diplomacy in principle but such application should be limited to the extent that the rules are applicable to the particular case. Thus, Sir Gerald's suggestion was also based on the idea of analogy. On the other hand, his suggestion also reflects the general approach of Anglo-Saxon law — a great latitude in the application of general rules by relying on the rule of reason, so that by use of the "case method" a uniform body of law is developed for those cases which do not fit the general rule. If international law at its present stage of development offered the necessary guarantees for the evolution of a uniform system of applying rules in accordance with the principles mentioned above, the Special Rapporteur could agree with Sir Gerald's proposal. However, it must be borne in mind that the provisions of international law have to be universal in their application, they have to be applied by the most diverse agencies of all States, using the most varied legal criteria, and they have to lend themselves to concrete analysis. That is why international law demands specific solutions for specific circumstances. It seeks rules that are not liable to very broad interpretation and consequently to circumvention. They are supposed to eliminate disputes, and not to give rise to new disputes in connexion with their interpretation and application. For this, the method of analogy quite obviously does not offer the necessary guarantees. If, in addition, this method is to be applied *mutatis mutandis*, it will become impossible with such an approach to achieve the objective set by the United Nations General Assembly or to establish order and a firm foundation for the application of international law in this field.

129. (VIII) In not accepting any one of these three approaches, the International Law Commission adopted a position of principle, though taking as its point of departure for the study of the status of *ad hoc* diplomacy the rules applicable to permanent missions. This position of principle is expressed by the idea that in view of the similarity between the activities of permanent missions and those of special missions, it is natural that the rules governing the status of permanent missions should to a large extent also apply to special missions.⁴⁵

130. Nevertheless, the Commission was not able to establish this similarity as an absolute rule. It was obliged to note that there were many institutions and provisions relating to permanent missions which could not be applied to special missions. These are the rules dealing with the establishment, functioning and status of permanent diplomatic missions. On the other hand, the nature of the activities the two types of mission engage in calls for the same guarantees. That was why the Commission took the view that the provisions of sections II, III and IV of the 1958 draft on diplomatic intercourse (i.e. the

⁴² *Ibid.*, pp. 115 *et seq.*

⁴³ *Ibid.*, p. 117, paras. 18 and 19.

⁴⁴ *Yearbook of the International Law Commission, 1960*, vol. I, summary record of the 565th meeting, para. 16.

⁴⁵ This thought is expressed in paragraph (1) of the commentary of the International Law Commission to article 2 of the draft articles on special missions. See *Yearbook of the International Law Commission, 1960*, vol. II, p. 180.

Vienna Convention of 1961) should also apply to *ad hoc* diplomacy.⁴⁶

131. The Special Rapporteur is quite convinced that this approach is wrong in its very essence. The functions are not the same in the two cases, and it is with an eye to the security of functions that the rules relating to permanent diplomatic missions were drawn up. He is of the opinion that each question should be studied in greater detail and a solution found which is not based on the *mutatis mutandis* rule but on the needs, which are different.

132. The *mutatis mutandis* method is too abstract. It does not take account of real needs but limits itself to the course of least resistance. The Special Rapporteur recognizes that it is very difficult to find a sure way of resolving all these problems. That is why the International Law Commission has tried to dispose of this question by agreeing to a kind of solution which, by its own admission, was not based on "the thorough study it would normally..." have given the topic.⁴⁷

133. (IX) What is its normal way of studying a topic? An attempt to initiate a normal study was made by Mr. Sandström, the previous Special Rapporteur. He outlined two alternative approaches to a solution of this problem which would have resulted in a study of the application of certain rules of resident diplomacy to *ad hoc* diplomacy. These outlines had gaps; they had not been thoroughly analysed and were therefore wide open to criticism. Moreover, the Commission had very little time in which to prepare the text containing the rules relating to *ad hoc* diplomacy wanted for the Vienna Conference, which was soon to convene. All this contributed to the Commission's deciding on a principle. It did so basically, by turning to the *mutatis mutandis* theory.⁴⁸

134. However, this solution was not accepted at the Vienna Conference in 1961. The representatives of States were not satisfied with a procedure that consisted simply in stating a principle, and they were not convinced that was an adequate solution of the problem. They wanted the problem restudied, and precise rules worked out consistent with the nature of *ad hoc* diplomacy. It was the private opinion of most of the members of the Sub-Committee, of which the Special Rapporteur as head of the Yugoslav delegation had the honour to be a member, that it would have been better to do without any new rule of law than to give an indication which every State could interpret as it pleased. Above all, it was argued that the functional theory should be taken as the point of departure and that the status of *ad hoc* diplomacy should be regulated in the light of actual needs and circumstances and not in accordance with certain standards which would not always be applicable to actual conditions but which would serve the purposes of *ad hoc*

diplomacy by conceding to it more than is strictly necessary.

135. (X) The Special Rapporteur believes that the positive sources of public international law relating to *ad hoc* diplomacy are, at present, in a condition which is worse than critical. There is not even an authoritative text *de lege ferenda*, for the Vienna Conference on Diplomatic Intercourse and Immunities did not adopt the International Law Commission's draft which was submitted to it for approval. In effect, it rejected the draft with a polite explanation:

... although the draft articles provided an adequate basis for discussions, they were unsuitable for inclusion in a final convention without extensive and time-consuming study, which could only properly take place after a complete set of rules on permanent missions had been approved. In view of the short time available to the Sub-Committee in which to carry out such a study, or for its results to be considered by the Committee of the Whole and by the Conference itself, the Sub-Committee determined that it should recommend to the Committee of the Whole that the Conference should refer the question of special missions back to the General Assembly; it was suggested that the Assembly should recommend to the International Law Commission the task of further study of the topic in the light of the Convention to be established by the Conference.⁴⁹

136. The present situation demands that a solid foundation for a positive system of law in this field be laid without delay and that the rules of such a system be formulated in detail. The old has been found wanting, the new does not exist, and every day brings new concrete situations which require a solution. Reality demands it.

137. During the discussion at the Commission's sixteenth session, many members stressed the question of the legal basis of the rules relating to special missions.

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

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

⁴⁶ See the reservations in paragraphs (2) to (6) of the commentary to article 2 and in the text of, and commentary to, article 3 of the Commission's 1960 draft, *loc. cit.*

⁴⁷ *Ibid.*, p. 179, para. 37.

⁴⁸ Although the Commission rejected Sir Gerald's suggestions in a formal vote.

⁴⁹ From the working paper on special missions prepared by the United Nations Secretariat, document A/CN.4/155, para. 44, in *Yearbook of the International Law Commission, 1963*, vol. II.

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

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

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

143. During the sixteenth session, the question was raised whether the Commission, when drafting the rules relating to special missions, should stress codification or progressive development. It is the invariable practice of the Commission when drafting articles incorporating rules of international law to combine straightforward codification (if there are sufficient customary or written rules of international law) with the method of progressive development of international law (in cases where, although there are no such rules, certain trends exist in international relations, or in cases where it is necessary to make good a deficiency or to alter existing rules).

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

8. *Legal status of the articles relating to special missions*

145. This question has been considered on several occasions by the International Law Commission. The problem is 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.

146. The Swedish Government particularly stressed that point in its comments. It expressed its opinion 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."⁵⁰

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 régime 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.

147. 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 inter-

⁵⁰ 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.

national 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.

148. Concerning this point, the Commission during its eighteenth session took the following decision, which was recorded in its report to the General Assembly:

After examining the comments by Governments on this point, the Commission decided to ask the Special Rapporteur to base his draft on the view that the provisions of the draft articles on special missions could not in principle constitute rules from which the parties would be unable to derogate by mutual agreement. The Special Rapporteur was asked to submit to the Commission a draft article which would convey that view and indicate specifically which of the provisions, if any, should in his opinion be excepted from this principle.⁵¹

149. In accordance with this decision, the Special Rapporteur has prepared a special article in the final clauses of the draft articles relating to special missions in which he has indicated the clauses from which, in his opinion, there may be no derogation, even if the States concerned have agreed otherwise. To assist the members of the Commission in their consideration of this matter, the Special Rapporteur has added at the end of the commentary on each article his opinion concerning the nature of the article in that regard.

150. After the eighteenth session of the Commission, the Government of the Netherlands submitted the following comments:

Scope and legal status of the regulation

Although the far-reaching privileges and immunities (codified in the Vienna Convention of 1961) that are extended to permanent diplomatic missions can be explained as being a result of the inclination to respect what history has made conventional, this cannot be said of "ad hoc diplomatic missions". This and the fact that such a variety of intergovernmental activities are covered by the term "special mission" * are arguments in favour of the narrowest regulation possible. Where necessary the Governments concerned can always make additional arrangements for each of certain special missions separately, or bilaterally, or regionally in the relations between certain States.

Another argument in favour of narrow regulations is the frequency of special missions.

Next, the Netherlands Government would point out the danger inherent in the creation of precedents. If the present arrangement is raised to the level of that in force for permanent diplomatic missions before adequate assurance has been obtained that each of the rules is a *sine qua non* for the independent discharging of duties, the status of government representatives at international conferences and the status of officers of international organizations might be determined too readily by the same regulations.

Finally, the difference in function between special missions from countries with centrally planned economies and from countries with market economies should be borne in mind. Not only is the number of cases in which the study of commercial possibilities or the establishment of commercial relations figure among the duties of government representatives greater in countries with centrally planned economies than in countries with market

economies, but views on the duties of governmental commercial missions in countries where all commerce is a state activity differ from those in countries where commerce is left primarily to private enterprises. To grant privileges and immunities to commercial missions acting on behalf of a State would mean favouring these States more than those that usually leave the sending of commercial missions to trade and industry.

Against the arguments in favour of limitation is the fact that in some regions, particularly in the newly independent countries, privileges and immunities for government representatives are valued more highly than in countries with long-standing diplomatic traditions. Some newly independent countries look upon such privileges and immunities not only as means of facilitating the discharge of duties but also as symbols of their recently acquired independence.

Moreover, missions to territories lacking stable governmental control might need additional safeguards to enable them to discharge their duties smoothly and without interruption.

Therefore the Netherlands Government would not wish to narrow down the regulations by leaving out any rule that cannot be applicable to all categories of special mission. Many of the rules drafted by the I.L.C., although not applicable under all circumstances, may without doubt be of great value in some situations and constitute a contribution towards the progressive development of international law.

It would be much better if restriction could be secured by giving States greater liberty to depart from the drafted rules whenever it is desirable to do so.

The special rapporteur's idea (see para. 26 of the second report by Mr. Bartoš (A/CN.4/179) was that it should be apparent from the text of each of the articles from which rules the parties would be free to derogate. There is evidence of the same idea in expressions such as "except as otherwise agreed" in articles 6 (3), 9 (1), 13 (1), 21 and 41, and in the wording of the articles e.g., "normally" in article 7, "in principle" and "the receiving State may reserve" in article 14; see also the second sentence in article 34.

Therefore the Netherlands Government suggests that the rules that will apply to each special mission be made narrower than is proposed by the I.L.C. (*jus cogens*) and that on the other hand more liberty be given than is given in the I.L.C. draft (*jus dispositivum*):

- To suspend some rules by mutual consent (i.e. "unless otherwise agreed . . .") or
- To supplement the rules by mutual consent by the simple method of declaring additional rules already drawn up incidentally applicable ("at the request of the sending State, and provided the receiving State does not object . . .").

Apart from this, additional agreements of greater scope may naturally be entered into, but it is not necessary specifically to provide for this in the present draft.

It is this train of thought that has prompted the Netherlands Government's comments on each article. This arrangement is also better suited to the progressive development of this chapter of international law, much of the substance of which has yet to be moulded and refined in accordance with the dictates of practical experience gained by States.⁵²

151. The Special Rapporteur considers that the comments of the Netherlands Government quoted above may be very useful in determining the categories of clauses relating to special missions which should be generally obligatory for States bound by the instrument relating to special missions and for those States which consider them as *jus dispositivum* which they may change

⁵¹ *Yearbook of the International Law Commission, 1966*, vol. II, p. 276, para. 60.

* Cf. the categories enumerated in paras. 79 to 117 on p. 43 ff. of the first report by Mr. Bartoš (A/CN.4/166).

⁵² See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

at will, but he cannot recommend that the Commission should adopt the general idea that all clauses relating to special missions are exclusively of that character, for that would serve neither legal certainty in international relations nor the development of international law.

9. Controversies concerning the concept of special missions

152. There is much controversy about what is comprised in modern *ad hoc* diplomacy. It is a question with which the International Law Commission, too, had to deal in drafting rules concerning special missions. After several detours the Commission arrived at the following definition:

The expression "special mission" means an official mission of State representatives sent by one State to another in order to carry out a special task. It also applies to an itinerant envoy who carries out special tasks in the States to which he proceeds.⁵³

153. This might be called definition by specification. The point of departure is the view that a "special mission" is an exception to the rule, which is the resident diplomatic mission. This is a view that is also found in Satow, i.e. that, in addition to the head of the permanent mission, another diplomatic agent may be accredited for special purposes.⁵⁴

154. The Special Rapporteur considers that this approach is too incomplete to serve as a sufficient basis for a definition. Apart from the distinction between a special mission and a permanent mission of a general character, an *ad hoc* diplomat should not be entrusted with a special mission if it is of a lasting nature. More and more frequently in recent times, in addition to the regular general diplomatic missions, recourse is being had to the creation of specialized but permanent diplomatic missions. In performing special duties they function in the foreign countries concerned side by side with the regular general diplomatic mission, in the same State and in the same place but with a specific task. This category of missions includes, for example, a reparations delegation of one State in another (but not a delegation to an international organization). Also in this category are separate permanent diplomatic missions concerned with economic and technical co-operation between two countries, etc. These are specialized permanent missions, a particular type of resident diplomacy, and not special missions or *ad hoc* diplomacy. The distinguishing feature of a mission dealt with through *ad hoc* diplomacy is its limited and provisional character. A few words are in order on the question of this provisional character. "Provisional" does not mean "brief" in the strict sense; but even if the mission is prolonged, its duration depends on the completion of a specific task, which may take a relatively long time.⁵⁵

⁵³ *Yearbook of the International Law Commission, 1960*, vol. II, p. 179.

⁵⁴ Sir Ernest Satow, *A Guide to Diplomatic Practice*, London, 1957, p. 115. It must be pointed out that in paragraph 186 of his book Satow does not regard a person as an *ad hoc* diplomat unless he is accredited for reasons of ceremony or protocol.

⁵⁵ For example, delegations responsible for the demarcation of frontiers, but not missions for the maintenance of order and the settlement of incidents, which are permanent functions; the

155. In the opinion of the Special Rapporteur, the concept of *ad hoc* diplomacy also embraces the delegates which represent a State at certain international meetings: congresses, conferences, etc. This was also the view of Mr. Sandström, the previous Special Rapporteur.⁵⁶ However, the Commission, without finally rejecting this idea, took the position that such delegates were a special kind of State representatives, that they ought to be dealt with separately and that it was more correct to treat them as members of missions concerned with relations between States and international organizations, including diplomatic conferences. That is why today such missions are not technically covered by the concept of *ad hoc* diplomacy, although logically they should be. The reason is probably that a constantly growing number of special legal rules and even separate systems and régimes are being created for this type of *ad hoc* diplomacy, so that it is assuming a distinct and special form.⁵⁷ To try to bring it within the general rules of *ad hoc* diplomacy might lead to a twofold confusion. On the one hand, the special rules already established for such missions do not correspond in all respects with the rules relating to diplomacy in general, and it would be difficult to form a common system. On the other hand, the contractual privileges granted to delegates attending meetings of the United Nations and the specialized agencies could not, without difficulty, be recognized as general standards applicable to *ad hoc* diplomacy as a whole. For those two reasons, a technical distinction has to be made between this type of periodic diplomacy and the general concept of *ad hoc* diplomacy.

156. The International Law Commission drew the practical consequences of this approach. It took the position that diplomatic missions which are responsible for relations of States with international organizations or which take part in international conferences or congresses should be studied as a separate topic and it appointed a Special Rapporteur for the purpose. This is why the author has decided to omit treatment of this topic from the present report, although he realizes that the matter could have been handled in other ways.⁵⁸

157. Nevertheless, the procedure of the International Law Commission described above involved a logical as well as a practical error. There are some international conferences which are not connected with international

United States diplomatic missions after the Second World War responsible for tracing the whereabouts of the remains of United States soldiers and for their transportation to the United States, but not the missions for the maintenance of military cemeteries; repatriation missions, but not missions responsible for dealing with a country's own citizens in a foreign country, etc.

⁵⁶ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 113 and 114.

⁵⁷ It is sufficient to note that for this type of diplomacy — periodic State delegations and delegates — the United Nations and the specialized agencies have drawn up a series of conventions, laid down detailed procedures and concluded special treaties with the States in which their headquarters are situated or in which their international conferences are held.

⁵⁸ Decision of the Commission at its fourteenth session (1962). Mr. Abdullah El-Erian was appointed Special Rapporteur on relations between States and inter-governmental organizations (see *Yearbook of the International Law Commission, 1962*, vol. II, p. 192, para. 75).

organizations, and in those cases *ad hoc* diplomacy is involved; in their case, the rules which led the Commission to take into account the newly formed juridical systems concerning delegations and delegates of States to international meetings do not apply. Such cases, in the opinion of the Special Rapporteur, are cases of *ad hoc* diplomacy in the full meaning of the term.

158. In connexion with this reduction in the number of missions and persons that fall under the concept of *ad hoc* diplomacy, the Special Rapporteur considers it necessary to note that most writers on diplomatic law in fact include the representatives of States to congresses and conferences in the concept of *ad hoc* diplomacy.⁵⁹

159. The Special Rapporteur has already indicated in the introduction the limitations of the concept of *ad hoc* diplomacy and considers that in its strict sense *ad hoc* diplomacy should be understood to apply only to State agents having the following characteristics:

(a) They must be delegated or appointed by a State for the purpose of carrying out a special task with respect to another State or to several other specific States;

(b) Their mission must not be regarded as permanent but must be linked to the performance of a specific temporary task;

(c) Their task must consist in representing the State as the lawful holder of sovereignty vis-à-vis the other State (or other States) and must not be concerned with matters in which the State does not appear as the holder of sovereignty or with relations with particular individuals or bodies corporate which are not subjects of public international law.

160. The Special Rapporteur is convinced that unless these three constituent elements are all present a case cannot be deemed to fall within the sphere of *ad hoc* diplomacy.

161. On the other hand, he rejects certain criteria which have been laid down for the purpose of determining whether a particular agent of a foreign State is, or owing to certain circumstances is not, an *ad hoc* diplomat. Among these criteria he would include those resulting from the view:

(a) That a person cannot be considered an *ad hoc* diplomat unless he holds diplomatic rank. Under present circumstances this condition has become meaningless.

(b) That he is engaged purely in a so-called "diplomatic" mission, or ceremonial and representative mission, to the exclusion of any idea that the mission of an *ad hoc* diplomat may include technical duties. Present-day diplomacy is marked by its functional and not its representative character. On the other hand, the functions of

diplomacy are expanding as is the whole sphere of international relations. The narrow approach characteristic of the aristocratic conception of the diplomat, which held diplomacy to be purely political and representative and which persisted even after its bureaucratization, rejected the very notion that a diplomat could perform technical duties. Little by little, diplomacy began to bring economic and financial relations within its scope. This marked the beginning of its transformation. The technical duties with which diplomacy was concerned continued to increase. Technical assistants became more and more numerous in permanent missions. Thus life itself imposed a change in the concept of diplomatic duties. Ultimately, it was concluded that any action implying the representation of the sovereign State at the international level in its relations with other subjects of public international law comes within the scope of diplomacy in general, and consequently, of *ad hoc* diplomacy also.

162. The question is whether the agents of a State who are not part of its internal diplomatic machinery or, more specifically, of its Ministry for Foreign Affairs, and who are not career diplomats, may be classed as diplomats if they are given the task of representing their State's interests temporarily in contacts, generally in the form of negotiations, with the representatives of other States, even if those contacts take place in the territory of their own State. This is what generally happens in bilateral negotiations. In principle, the negotiators on both sides — those of the foreign country and those of the host country — have the same duties and character. Strictly speaking, therefore, the agents of the host State, though performing their task in their own territory, are *ad hoc* diplomats. Consequently, they should be regarded as *ad hoc* diplomats during the exercise of their functions or at least in their relations with their foreign counterparts. However, because they are in the territory of their own State and, consequently, cannot claim any special privileges, their character as diplomats is generally disregarded in practice as well as in theory. The question is not even raised with much insistence. Nevertheless, the Special Rapporteur believes that this is wrong and that these diplomats, at least in their relations with their foreign counterparts, should be aware of their diplomatic role and of their duty to comport themselves as *ad hoc* diplomats towards them, since in these relations, except for certain specific features, the rights and duties of the two parties are equal although the host country has more duties. The Special Rapporteur will limit himself here to emphasizing that these persons, under certain specific conditions, fall within the category of *ad hoc* diplomats, and it is not his intention, in the remainder of this report, to enter too deeply into a study of their status.

163. As already mentioned above, the notion of *ad hoc* diplomacy requires some study of the causes of the recent numerical increase in the functions of *ad hoc* diplomacy. In this connexion, the following points may be noted:

164. There is much discussion of the question of the nature of the special missions which have become increasingly frequent since the Second World War and of the

⁵⁹ Sir Ernest Satow, *op. cit.*, p. 208; Convention on Diplomatic Officers adopted by the Sixth International Conference of American States, signed at Havana, 20 February 1928, article 2 *in fine* (text in League of Nations, *Treaty Series*, vol. CLV; also in United Nations Legislative Series, vol. VII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations publication, Sales No.: 58.V.3); Dr. Karl Strupp, *Réforme et Codification du droit international* — Report of the Thirty-Fourth Conference of the International Law Association, London, 1927, pp. 426 *et seq.*

reasons why, despite an expansion of the staffs of permanent diplomatic missions, the services of *ad hoc* diplomacy are being used more and more.

165. In looking closely at the development of international relations, the Special Rapporteur cannot help noting that diplomatic missions are being progressively reduced to the level of bureaucratic machines and that embassies are becoming a kind of headquarters for the organization of work, for observation, and for the performance of the special tasks for which they are responsible. For this reason, regular diplomatic missions are increasingly being relieved of high political functions and also of purely technical duties.

166. In the first place, many political questions of principle have been removed from the ambit of bilateral relations to that of meetings at the headquarters of international organizations and at wider international conferences. This does not mean, however, that embassies are relieved of the duty to deal with these questions, but they do not participate in their settlement at the decisive stage. The final settlement is a matter for international meetings. Nevertheless, resident diplomacy continues to be responsible for testing reactions to proposals, for obtaining information on the attitudes of the other State, for bringing the desired influence to bear, and even for seeking proper instructions for delegations participating in such meetings. Similarly, resident diplomacy resumes its activities — once a decision has been taken in the organizations or at international meetings — in connexion with the attitude of States towards the measures adopted, the way in which and the extent to which they are implemented, and even the sabotaging of such decisions. This indicates that, although many of the duties of resident diplomacy which are of general interest have been transferred to a special type of *ad hoc* diplomacy — to delegations — it would nevertheless be a mistake to believe that, generally speaking, such work has been taken completely out of the hands of the regular diplomatic missions. In a sense, it forms an integral part of the link between the regular diplomatic machinery and *ad hoc* diplomacy, since the representation of a State in international relations should be regarded as an integrated whole.

167. It has also been noted that negotiation and the search for answers to certain political questions of the highest importance are more and more frequently carried on, in relations between the State to which the permanent mission belongs and the State to which it is accredited, without the participation of the regular ambassadors. There is a vast difference between the conferences of ambassadors which used to meet in London before the First World War to decide the fate of the world and the contacts between ambassadors in a capital city in the present age. When the settlement of an important political question is to be worked out, there appears on the scene — notwithstanding preliminary feelers and negotiations through the regular diplomatic channel — *ad hoc* diplomacy, personified in meetings between the highest representatives of the States involved, often Heads of Government (less frequently Heads of State, although this practice has been revived in recent years)

or Ministers for Foreign Affairs. At these meetings, and during these contacts, decisions are taken on vital political and military questions affecting the mutual relations of the participating States. Although ambassadors are not reduced to the role of passive observers in these activities and are not relieved of the duty to prepare for the negotiations and although in most cases they are members of the delegations, there is little doubt that their importance in this respect is diminishing, that they are usually assigned a secondary role in the negotiations, and that the lustre of their rank is dimmed by the presence of leaders who take the most prominent part in contacts of this kind. On the one hand, regular diplomacy is being relieved of the most important political questions, and on the other, such questions are passing more and more into the competence of *ad hoc* diplomacy, as represented at the appropriate time by responsible political figures from the countries invited to take part, with the result that the importance of such *ad hoc* diplomats undoubtedly exceeds that of regular diplomats.

168. A further point is that the volume of affairs which give rise to the formation of international relations, the widening competence of the international organs, and the growing importance of the machinery of State in connexion with specific matters involved in bilateral relations, are bringing about qualitative changes in the functions of regular diplomacy. Some diplomatic historians state that the “classic” diplomat of the second half of the nineteenth century had to be guided by questions of protocol and by an understanding of the political interests of his own country. High politics and routine work were the typical functions of regular diplomatic missions. With the passage of time, many purely technical tasks were also transferred to diplomacy, and this modified its structure in two ways. In addition to his regular staff, versed in general diplomacy, the head of the regular diplomatic mission acquires an ever-increasing number of specialized technical staff who have, in a sense, a particular sphere of competence and are subject only to the over-all political supervision of the head of the diplomatic mission. They establish relations — albeit through the diplomatic channel — with the technical organs of the receiving State. It becomes necessary, from time to time, to enter into negotiations or to discuss the most important problems of this kind between the two States. For such negotiations a country must, of course, delegate qualified experts with authority to seek a settlement of the problems involved. This is a new kind of *ad hoc* diplomacy, and it places regular diplomacy in a very precarious position. The permanent missions maintained at first that such special diplomats occupied a secondary position and were merely assistants to the head of the permanent diplomatic mission. In time, however, such “technical” missions, or negotiators, were able to free themselves almost completely from the influence of the regular missions. They would arrive from their own country with quite precise instructions, with special full powers, and with the right and the duty to maintain direct relations with the competent central authorities; as a result, their position was soon consolidated and they were emancipated from the machinery of the permanent missions, to which they

were linked only through the central organs of government. Consequently, these *ad hoc* diplomats, during their stay in a country, did not become part of the permanent mission.

169. It follows from the foregoing that *ad hoc* diplomacy appears in two forms, according to its functions. It may be responsible for the most important political functions, or it may be a mission qualified to maintain technical relations. The latter, a complete enumeration of which is difficult because of their great diversity, may be said to include primarily trade relations, financial relations, cultural relations, scientific relations, relations in the matter of communications, and in particular sea and air transport, and so forth. A certain rivalry exists between permanent missions and *ad hoc* diplomacy with respect to their mutual relations. The permanent missions assert their primacy, and *ad hoc* diplomacy its authority to treat directly at the international level; but in relation to the outside world, i.e., to the receiving country, *ad hoc* diplomats have a special legal status and do not form an integral part of the permanent mission.

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

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

172. All those who spoke in the general debate stressed that one of the essential characteristics of special missions was their temporary nature. This point was made for instance by Mr. Cadieux (SR.723, para. 26). Mr. Tsuruoka described the special mission as "sporadic and partial" (SR.724, para. 5). Mr. Tunkin made further reference to that characteristic in his statement and suggested therefore that the term "special mission" should be dropped in favour of "temporary mission" (SR.724, paras. 16 and 53). Mr. Amado made a distinction between permanent contacts through ordinary missions and temporary contacts through special missions (SR.724, para. 20). He said later that temporary diplomacy had become a tree in the forest of law (SR.725, para. 43). Mr. Verdross (SR.724, para. 39) and Mr. Ago (SR.724, para. 59) stressed the same characteristic.

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

174. There was also a lively discussion as to whether the idea of special missions should be limited only to special missions of a political character. This question was considered in the general debate at the sixteenth session. Many members of the Commission spoke on the question whether the expression "special missions" should be construed to mean only those of a definitely political character or also those which represented States in matters of a technical nature. Mr. Verdross was the first to speak on the subject. He considered that special missions of a technical character as well as those of a political character were employed in official relations between States and that the rules should therefore cover all special missions (SR.723, paras. 15 and 16). Mr. Yasseen expressed the same view (SR.723, para. 17). Mr. de Luna did not think that a distinction should be drawn between special missions of a political character and those of a technical character (SR.723, para. 19). Mr. Cadieux likewise considered that it was not so important to stress the political or technical character of the special mission as to take into account the level and importance of that mission (SR.723, para. 26). Mr. Pal said that there was no reason to restrict the concept of special missions to purely political activities; in the light of recent developments, it was clear that special technical missions should also be covered (SR.723, para. 29). Mr. Elias thought that it was difficult to differentiate in special missions between political and technical matters (SR.723, para. 30). Mr. Ago was even more categorical. He thought that it would be absurd to try to draw a distinction between a political special mission and a technical special mission (SR.723, para. 33). Mr. El-Erian agreed that it was not easy to draw a distinction between political special missions and other special missions (SR.723, para. 24). Mr. Jiménez de Aréchaga said that, while he agreed that technical special missions should be studied as well as political special missions, their inclusion did not mean that all special missions should be subject to the same body of rules (SR.723, para. 49). Mr. Tsuruoka thought that the distinction between political and technical missions was not very great in practice (SR.724, para. 7). Mr. Castrén was prepared to accept that view in principle but thought that rules governing special missions might vary according to the functions assigned to them (SR.724, para. 10). Mr. Tunkin agreed with the general view that it was immaterial whether a mission was to carry out a political or a technical task; the essential point was that it should represent the State in its relations with another State (SR.724, paras. 13-15). Mr. Amado, the last speaker in the debate on this point, drew a logical conclusion when he said with regard to the substance of the question: "The Commission was right to resist the idea that technical missions should be regarded as a special class, for in modern times sovereignty found expression in technical matters as much as in the traditional processes of politics" (SR.724, para. 20).

175. Thus all those who spoke in the general debate expressed their unanimous belief that special missions may have a purely political or technical character, but in either case they represent the same concept. At the same time, some speakers pointed out that the

level, importance and particular function of special missions should be taken into account (Mr. Cadieux, Mr. Jiménez de Aréchaga, Mr. Castrén and Mr. Tunkin). Hence, in the case of certain missions there could be special rules (a view expressed by Mr. Cadieux, Mr. Jiménez de Aréchaga and Mr. Castrén).

176. The question of the extent and basis of the privileges and immunities of a special mission and its members and of the members of its staff was also discussed at length in the general debate at the sixteenth session.

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

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

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

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

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

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

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

184. Mr. Tunkin said that in any discussion on limitations of privileges and immunities the functional needs of special missions should be considered. No limitations

should be imposed that would hinder them in the performance of their tasks (SR.724, para. 53).

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

186. Some members of the Commission thought that uniform rules should govern privileges and immunities in general. Mr. Elias thought that identical rules should be made in the matter for members of special missions and United Nations experts (SR.723, para. 65). Mr. El-Erian pointed out that a like problem arose in connexion with special missions to international organizations (SR.723, para. 70). The same point was also raised by Mr. Jiménez de Aréchaga, who opposed a difference in treatment as between special missions in bilateral relations and special missions participating in conferences convened by international organizations. Mr. de Luna said that the Commission would have to prepare rules covering delegations to conferences convened by States (SR.723, para. 73).

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

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

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

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

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

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

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

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

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

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

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

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

10. Some special aspects of special missions

199. The Special Rapporteur believes that the first questions to be settled are whether certain types of missions may be regarded as special missions, and where the demarcation line separating them from regular diplomacy lies. He is of the opinion that the categories listed below should be considered special missions. The question whether the status of these categories should be governed by the legal rules relating to special missions depends on the preliminary decision of the Commission. The Special Rapporteur believes that these categories should be

recognized as special missions (with the possible exception of categories D, G, H, and I, where he hesitates between the arguments for and against, since in practice they appear to be equally plausible).

A. Special missions with ceremonial functions

200. The Special Rapporteur will not deal at great length with this category of *ad hoc* diplomacy, although it was for a time the most common type and has remained largely in use up to the present day. It is mentioned only for the sake of completeness. It should be pointed out that the generally accepted practice before the First World War was to appoint ambassadors, other than the permanent diplomatic representatives, as special envoys of a State for special missions to another State on extraordinary occasions. The Soviet author Potemkin supposes them to be ambassadors appointed to represent their countries at such national ceremonies as the coronation, marriage or funeral of a sovereign or of his heir. Conversely, Potemkin says, it was customary for kings and emperors to send special ambassadors to one another to announce their accession to the throne. These ambassadors, of course, had purely ceremonial functions.⁶⁰

201. Potemkin regards the dispatch of such occasional ambassadors as not only customary but required by etiquette.⁶¹ Failure to send such ambassadors was interpreted as a breach of the rule that honour should be rendered where it was due. Consequently, Potemkin says, if the State in question was unable, for justifiable reasons, to send an ambassador of this kind, its omission might nevertheless be regarded as a breach of etiquette. In order to avoid this, the practice grew up of designating the permanent diplomatic representative in the country in question as special, or *ad hoc*, ambassador to the very country to which he was accredited. Two offices are then merged in the person of the one ambassador, but only for the duration of the ceremonies. Throughout that period — before, during and after the ceremony — he is still the head of the permanent mission, and during the ceremonies he is also the *ad hoc* ambassador. This is important, as emphasizing the presence of a special ambassador; moreover, during the ceremony, *ad hoc* ambassadors have precedence over regularly accredited ambassadors. Notwithstanding the fact that an ambassador may be regularly accredited, he must be specially accredited as *ad hoc* ambassador.

202. In the countries of Latin America, the rule that *ad hoc* ambassadors should participate in the ceremonies known as the inauguration of the President of the Republic is jealousy applied.

203. As a general rule, where an *ad hoc* mission is sent to such a ceremony, the head of the permanent mission in the country concerned is not usually head of the *ad hoc* mission, but is simply one of its members. In this case, he occupies his special rank in the *ad hoc* mission, which differs from the rank to which he is entitled as head of the permanent diplomatic mission.

⁶⁰ V. Potemkin, *Histoire de la diplomatie*, Paris, 1947, vol. III, p. 800.

⁶¹ *Ibid.*

204. Genet refers to a mission of this kind as a courtesy mission. It is interesting to note that he also regards missions of apology, which no longer exist today, as occasional missions. The custom now is not to send special missions or a special ambassador to apologize, but to perform this act through resident diplomacy.⁶²

B. Ad hoc diplomacy with special functions

205. As has been noted above, such special functions may be very diverse, and the essential point appears to be that they should be defined by agreements (formal or tacit) between the sending State and the receiving State concerning the mission's assignment.

206. The Special Rapporteur's researches have shown that various categories of special missions, classified according to the tasks they are required to perform, are encountered in practice. The main categories are:

(a) Special missions with purely political functions, either in bilateral relations or at multilateral meetings, organized outside the international organizations and without their participation. Some of these missions have been not only highly political, but also historic; one need only mention special missions for the conclusion of political or peace treaties.

(b) Special missions with military functions. This category includes not only missions responsible for concluding military agreements, but also missions with specific operational military assignments. Some authorities also include among these missions the representatives of foreign armed forces attending manœuvres of other armed forces.

(c) Special missions for the settlement of frontier problems, and in particular for the tracing and maintenance of demarcation lines and the placing of frontier marks.

(d) Special missions with police functions, operating either within the framework of co-operation between the States concerned or in frontier areas.

(e) Special missions to negotiate on transport questions. In practice, such missions are considered to be political in nature where they are concerned with policy relating to all forms of transport (sea, air, rail, river, road, and posts and telecommunications), while they are regarded as technical missions if they are concerned only with the practical application of established principles.

(f) Special missions concerned with water-supply problems. These missions are sub-divided in the same way as those mentioned in group (e).

(g) Special economic missions, including, in particular, missions for the purpose of concluding agreements on questions of trade, finance, and currency.

(h) Special missions to resolve specific customs problems.

(i) Special missions concerned with veterinary and phytopathological services.

(j) Special missions concerned with questions relating to health services.

(k) Special missions for the purpose of tracing and repatriating citizens of the sending State.

(l) Special missions of a humanitarian character, which may be very varied in nature.

(m) Special missions for the recruitment of labour and the control of immigration.

(n) Special missions for the purpose of tracing the graves of soldiers killed in action and repatriating their remains.

207. The purpose of this list, which is by no means exhaustive, is simply to draw the Commission's attention to the fact that special missions are very varied in nature and, consequently, have different functional needs. There has for years been a difference of opinion, in the various meetings connected with the Administrative Committee on Co-ordination (between the United Nations and the specialized agencies), as to whether all such missions should be placed in one category, so that they would all be subject to the same rules of international law, particularly as regards facilities, privileges and immunities, or whether a distinction should be drawn between missions to be recognized as diplomatic in nature and others of a strictly technical nature, which could operate normally without being treated as diplomatic in nature. The latter might, perhaps, be granted something akin to consular status. Some of them require special rules. The Special Rapporteur considers that the Member States should have an opportunity to regulate finally by common agreement the status to be granted to individual types of special missions.

C. The ad hoc diplomat as messenger

208. There very often appears in a third country an *ad hoc* diplomat of a special kind. He is usually a person of high political standing or occupying an important post in his country's administration who is sent on a special mission by the Head of State or Head of Government to carry, present or communicate a message to a high official of the same rank in the other country. Such an envoy is not a delegate, since he does not enter into negotiations. He may possibly receive a reply or comments on the written or oral message which he has conveyed. He is not a diplomatic courier, because the message he brings is delivered directly either to the Head of State or to a high official of a foreign country, whereas the diplomatic courier operates between the administration of his State and its representative abroad. A messenger of this kind is today regarded as an *ad hoc* diplomat, and not as a courier, and he is received with special courtesy.

209. Here again, the question of the relations between an *ad hoc* diplomat of this kind and the permanent diplomatic mission arises. Protocol practice does not always dissociate this category of *ad hoc* diplomat from the permanent mission. As a rule, the permanent mission requests that the messenger should be accepted and received. He is introduced, on rare occasions accompanied (depending on the messenger's rank), and presented by the head of the permanent diplomatic mission. However, the latter is not necessarily aware of the terms of the message and does not always have to be present at the

⁶² Raoul Genet, *Traité de diplomatie et de droit diplomatique*, Paris, 1931, vol. I, pp. 85-92.

discussion between the messenger and the person to whom the message has been delivered. It might be said that, in this case, there is only an outward link between the *ad hoc* diplomat and the permanent mission, and that so far as the substance of his assignment is concerned there is no link.

210. The practice of sending messengers as *ad hoc* diplomats was very common in the past, particularly in relations between monarchs. Special messengers of very high rank were the bearers of messages known as *lettres de cabinet*. Very often, these were family letters or courtesy communications on such occasions as a marriage, a birth or the presentation of condolences, or they might be notes concerning changes in the family affairs of the sender. Even then, however, it was common, and it has become more so today, to employ such messengers for missions whose purpose was to transmit political communications, containing notices of action to be taken, appeals for joint action, statements of views and positions on important political problems, or warnings from the Head of State or of Government to his counterpart concerning the serious consequences which might arise in a period of crisis. Several examples of the use of messengers in modern times may be cited — for instance the famous mission of Colonel Donovan, who took a message from President Roosevelt of the United States to the Heads of State of the Balkan countries on the eve of Hitler's drive into the Balkans (1941). At the time of the Cuban crisis (1962), there was a many-sided exchange of messages by special messenger between Heads of State. In this connexion, a distinction should be drawn, from the political but not from the juridical standpoint, between the dispatch of a messenger to a given country with a special message and what are known as circular messages, delivered to various countries by one messenger. This makes no difference from the juridical standpoint, and the messenger's status is the same in both cases.

211. The question arises whether a diplomat who is the head, or a member of a permanent mission, when performing the function of a messenger to the Head of State or any official of the State to which he or his mission is accredited, has the status of a permanent diplomat or that of an *ad hoc* diplomat. The existence of such a distinction is assumed by analogy to the distinction between the functions of a permanent ambassador and those of a special envoy merged in one person in cases where the head of the permanent mission is given special powers or credentials to represent his State, particularly on ceremonial occasions (e.g., a wedding or an enthronement). It is asserted, on the other hand — and the Special Rapporteur agrees with this view — that the transmission of written or oral messages is one of the normal functions of the head of the resident diplomatic mission, and that in transmitting or forwarding such messages he retains his status as a permanent diplomat. This is important for certain courtesy reasons and also, more particularly, for political reasons. The sending of certain messages by special messenger was regarded, in the case of etiquette messages, as a gesture of special courtesy, and in the case of political messages this act accentuated the special importance of the message, whereas its importance is

definitely diminished when it is delivered through the regular diplomatic channel.

212. As regards the question of the messenger as an *ad hoc* diplomat, it is often emphasized that messengers were used much more often before the age of open diplomacy, for usually the messengers were also secret emissaries, and it was only in exceptional circumstances that the arrival of the messenger and the contents of the message were made public. In the past, the normal practice was to give publicity to such missions and messages in the case of ceremonial and formal missions, while in the case of political messages publicity was very rare, and indeed exceptional, being given especially when it was intended, in certain circumstances, to make clear to world public opinion the importance of the agreement which had been reached or the notice which had been received. Today, however, publicity is much more general, but it would be a mistake to believe that the messenger is not, even now, sometimes a secret messenger, that public opinion is always informed of the contents of the message, and in particular that the full text of the latter is sure to be published.

213. The Special Rapporteur ought to draw attention to one characteristic of the messenger as an *ad hoc* diplomat — his representative character. Irrespective of the powers given to him, the messenger represents the person who commissioned him to deliver the message, and for this reason he is treated with the courtesy due, not to his personal rank, but to the rank to which a special envoy of the author of the message is entitled. Precisely because of this capacity, however, it is customary for the messenger, as an *ad hoc* diplomat, to be of special personal standing or to occupy a high position in his own country. It is discourteous to entrust a mission of this kind to persons of inferior rank, although, even if that were done, such an *ad hoc* diplomat would possess in every respect the legal status of a messenger. It is known that on several occasions during the Second World War, the Heads of State of the United Nations coalition made use of such messengers, who were military officers of no particularly high rank. They were known as liaison officers, but no one questioned either their status as messengers or their capacity as *ad hoc* diplomats. They were regarded, in their capacity as the technical bearers of messages, as persons enjoying special confidence.

D. Secret emissaries

214. The oldest type of *ad hoc* diplomat is probably the so-called secret emissary, who is instructed by one State, which he represents, to make contact with another State, neither State having the right to disclose his presence or the nature of his functions, by virtue of an agreement between them and in the light of the circumstances.

215. A secret emissary may be sent by one Government to another, whether or not normal diplomatic channels exist. Where such relations exist, it is presumed that the head of the permanent diplomatic mission is not aware of the nature of the secret emissary's mission, or at least that it lies outside his own sphere of activity (this often causes the permanent ambassador to protest

or even to resign, since strictly speaking all relations are within his competence). Where there are no normal diplomatic channels, the two Governments, or at least one of them, do not wish the existence of such contacts to be divulged.⁶³

216. In practice, references are found to several categories of secret emissaries, who may be regarded as *ad hoc* diplomats. Among such emissaries, the following should be noted:

(a) The secret messenger, who has been discussed in a separate section. He is usually regarded today as being relatively secret. In many cases, his role, or at least his visit, is not made public until he has left the country in which he had a function to perform. Whether the contents of the message he was carrying will be published is a question apart, the answer to which depends on agreements between the Governments.

(b) The confidential envoy or secret negotiator. He discusses or concludes, on behalf of his Government, agreements on matters which must be kept secret, at least during the conversations. With the establishment of the rule that international treaties must be made public, this category is disappearing, although secret negotiations still take place. It would be a mistake to believe that this category of agent no longer exists at all. There are numerous instances to prove that States still resort to the practice of using secret emissaries who put out feelers, i.e., pass on information and study the possibilities of opening official negotiations on specific matters. Such was the mission of Prince Sixtus of Bourbon-Parma, who in 1917 probed the possibility of concluding a separate peace between Austria-Hungary and the Entente Powers; and such is the role of those who today prepare the ground for either the resumption of diplomatic relations which have been broken off between two States or the recognition of a new State.

(c) The confidential observer residing in the territory of a State, who has the secret mission of sending information to his Government, with the permission of the country of residence, but whose mission is regarded as temporary, who is not a member of the diplomatic mission, and whose presence is not made public.

(d) The secret agent who keeps watch on citizens of the sending State and who has been authorized by the receiving State to do so (generally in close collaboration with the security organs or intelligence service of the latter). In this connexion, mention may be made in particular of the police of Czarist Russia and the intelligence service of Nazi Germany in countries where the Hitler régime had influence.

217. A distinctive characteristic of these categories of secret envoys and others who are accorded the status of *ad hoc* diplomats is that the receiving State has agreed to admit them to its territory and has granted them the right to perform specific activities (often by tacit agreement). The two parties are bound to regard these agents and their mission as confidential and to ensure that their activities are not discovered. Another characteristic of

these categories of envoys is that they are accorded the privileges and immunities necessary for the performance of their duties.

218. Not to be confused with envoys whose functions come under the heading of *ad hoc* diplomacy are the agents whom a Government unilaterally sends to the territory of a foreign State, including those whose presence is tolerated by the State of residence even though without any obligation to accord them recognition. There are a number of categories of such agents, including unofficial observers, unauthorized informants (who may be spies) and voluntary envoys, who often have a decisive influence on relations between the countries concerned and are more reliable channels of communication than the permanent ambassadors but nevertheless do not have the status of *ad hoc* diplomats.⁶⁴

E. Observers as *ad hoc* diplomats

219. Potemkin notes the existence of a special category of *ad hoc* diplomats — the observers who appear on the international scene as special diplomatic envoys to attend international conferences or other meetings to which their States have been invited but in which they have refused to participate. This refusal may be prompted by considerations of principle, where the State in question does not approve of the meeting and its purpose, or may be due to its inability or unwillingness to adopt that particular course of action. Potemkin points out that, although such a country declines actually to participate in the meeting, the sending of observers shows that it takes a special interest in the matter under consideration and wishes either to influence the course of deliberations through its observers or to obtain direction information. Potemkin attributes this practice to the United States.⁶⁵ In the opinion of the Special Rapporteur, however, this is a more general phenomenon whose causes can be traced back further than the period between the two wars; today, the practice is widespread.

220. The role of an observer is by its very nature a diplomatic one. It is temporary and is limited to the period of the meeting. The status of an observer varies in accordance with the meeting's rules of procedure or its decisions. Nowadays, it is the practice in all cases to permit an observer to take part in discussions, though

⁶⁴ Genet (*loc. cit.*) cites one such voluntary envoy who worked on behalf of the Duc de Richelieu. The envoy in question was Fr. Joseph Leclerc du Tremblay, who was referred to by his contemporaries as the *Eminence grise*. During the Second World War, Hitler made use of such secret envoys in every State on which he wished to exert pressure, choosing them from among the nationals of the State concerned. Through these individuals, he was able to hint at the direst consequences without accepting any responsibility for their statements, even though it was perfectly obvious that they were authorized to make them. According to a book published in Yugoslavia in 1941 during the occupation of that country, the author, Dr. Danilo Gregorić, played such a role in Yugoslavia on the eve of the war. There were envoys of this kind in every European country at that time. Important though they in fact were, however, they must be distinguished from secret envoys having the status of *ad hoc* diplomats. Under international law, they are regarded as mere agents.

⁶⁵ V. Potemkin, *op. cit.*, vol. III, p. 880. Raoul Genet, *op. cit.*, vol. I, p. 97.

⁶⁸ Raoul Genet, *op. cit.*, vol. I, p. 31.

without the right to participate in votes or in decisions. As a general rule, observers are accorded the same honours, privileges and immunities as delegates to the conference.⁶⁶

221. In United States diplomatic practice, according to Genet, observers are divided into two categories: official observers, who represent their Government, and unofficial observers, who are confined to the role of technical observers. The Soviet Union followed this practice for a time. The Swiss Government has recognized the existence of these two categories, the practical line of demarcation between which is not very clear, since both make the same claim to all privileges and immunities and in fact enjoy them. In theory, observers of the first type are entitled to make observations on behalf of their Governments; whereas unofficial observers merely gather information and passively attend meetings and negotiations.⁶⁷

222. Mention might also be made of those observers who are secret envoys. In their case, however, the special rules apply.

F. Ambassadors at large

223. The diplomatic machinery of some States includes a category of special officials whose predetermined function it is to carry out *ad hoc* diplomatic missions. In the United States, it is customary to give these officials the title of "ambassadors at large". They are not accredited to a particular country but are empowered to conduct negotiations with various States on behalf of their own State and to attend various international conferences. When they deal with foreign countries, they are accorded the same honours as ambassadors.⁶⁸

224. Genet holds that it is possible not only for ambassadors but for all diplomatic agents to be, in a broad sense, without ties to any particular Government. In his opinion, however, they are also a part of general diplomacy.⁶⁹

225. The Special Rapporteur believes that the title of ambassador at large indicates only that the person to whom it is given is responsible for the exercise of various functions connected with special missions or international meetings. That still does not mean, however, that such a person, simply because he bears such a title, may be classified as a special delegate; he will become one only if he has been entrusted with a special mission.

⁶⁶ Protests have been raised by other participants in negotiations against the right of observers to take part in discussions or to make suggestions and statements of any kind. In the opinion of the Turkish delegation to the Lausanne Conference, for example, their presence gives rise to a situation of inequality between States. Although observers do not have the right to vote, since they do not wish to have it, they assume the right to make suggestions and to sound warnings; thus, the influence they wield is of an irresponsible kind, since the adoption of any suggestion they make is not binding on the State they represent. For that reason, the Turkish delegation took the position that observers should confine themselves to a passive role, so that theirs would be a function of secret diplomacy (of observation).

⁶⁷ Genet, *loc. cit.*

⁶⁸ V. Potemkin, *op. cit.*, vol. III, p. 800.

⁶⁹ Raoul Genet, *op. cit.*, vol. I, p. 79.

G. The suite of a Head of State considered as an *ad hoc* mission

226. Some writers hold that the suite accompanying a Head of State on an official visit to another State constitutes a special mission, regardless of the powers conferred on its members, and that the latter are in all cases to be regarded as *ad hoc* diplomats.⁷⁰

227. The commencement of the special mission of a member of the suite of a Head of State need not entirely coincide with the official visit of the Head of State. The Special Rapporteur holds the view that the mission may begin earlier when he arrives in the host State, in a State of transit, or in a third State, to make preparations for the visit of the Head of State; it may also continue in being even after the return of the Head of State if the member of the suite has been made specially responsible for winding up the relations established by the visit.

228. The Special Rapporteur is undecided about the status of these persons. They are *ad hoc* diplomats, since as members of the suite they perform an official function and the person whom they are accompanying is carrying out a mission as a representative of his State. On the other hand, it is difficult to define what is their personal role in the performance of this function. Hence, there is probably equal justification for taking a different view, viz. that these are distinguished foreigners who must be shown special courtesy. The Special Rapporteur is undecided on this point because he knows from personal observation of such missions that the suite includes both persons with duties to perform and persons who are simply "guests" of the Head of State and who form what is known as the private section of the suite, which, as a matter of courtesy on the part of the host State, is not separated from the official party (for example, an intimate friend of the Head of State accompanying him on an official journey). This point is even clearer if the Head of State is on a private rather than an official visit.

229. Those members of the suite who are responsible for the personal safety of the Head of State receive special attention, and it might also be noted that a special body of practice is developing with regard to the authority granted to such persons and the manner in which they work with the security organs of the receiving State.

230. Of late, the crews of the means of transport employed (particularly the crews of vessels, aircraft, trains and special coaches, drivers, etc.) have also come to be regarded as part of the suite. It is becoming customary to treat them as also forming a special category under the heading of *ad hoc* diplomacy. Higher-level personnel, including officers, are placed on an equal footing with persons performing functions of *ad hoc* diplomacy who possess diplomatic status, while lower-level personnel are, in practice, grouped with the technical personnel of permanent diplomatic missions. In all cases, all members of the suite come within the ambit of *ad hoc* diplomacy in the broad sense.

⁷⁰ Sir Ernest Satow, *op. cit.*, p. 43.

231. The Special Rapporteur did not cover in his first report (A/CN.4/166) the special missions which take place in connexion with the visit of a foreign Head of State, on the ground that, in the opinion of learned authors, such missions are governed by international custom. Nevertheless, during the discussion on this report at the sixteenth session of the Commission several members expressed the opinion that the question should be covered in the part of the report dealing with special aspects of special missions.

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

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

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

H. Political agents not possessing diplomatic status

235. Genet includes in this category all temporary envoys (and even permanent ones, who are not under discussion here) sent by one State to another State or Government for the purpose of carrying out a political mission.⁷¹ According to Genet, these agents do not have diplomatic status because they are not part of the diplomatic corps. He also includes in this category the delegates of States whose sovereignty has not been recognized (a situation which antedates the adoption of the United Nations Charter), of *de facto* Governments (i.e. those which have not yet obtained international recognition), and of insurgents who are recognized as belligerents in a civil war (the representatives of forces participating in the colonial peoples' struggle for independence, such as the FLN delegates at Evian, may also be placed in this category).

236. The Special Rapporteur includes in this group, in particular, the envoys of Governments which are in process of formation and of embryonic political bodies in developing countries, i.e. envoys who function during a period of transition towards independence and the assumption of sovereignty. Modern history contains a number of instances of the so-called peaceful transfer of sovereignty, so that this question is not necessarily linked — although it may be — with civil war and the armed struggle of peoples in exercise of their right of self-determination. One such instance was the case of Kenya during the interval between the decision to grant the country its independence in the near future — a period

during which it already had its own Government — and the time of its assumption of sovereign rights over its national territory, i.e. the so-called effective date of sovereignty. In the case of Kenya and of a number of other countries, these "States about to be born" entered into *de facto* diplomatic relations through special missions before the effective date of sovereignty. The Special Rapporteur believes that such political agents should be accorded the status of special missions. However, he considers that the Commission will have to take a decision on this point.

237. In considering this point, the Commission adopted the view that the sending of special missions might occur between States which did not maintain, or had not yet established diplomatic relations, and even between States and insurgents. (See the commentary on draft articles 1 and 2.)

238. The Special Rapporteur considers that the functions of these envoys are at least partly diplomatic, in nature, even though they are not part of the diplomatic corps. In his opinion, what is involved is *ad hoc* diplomacy *sui generis*, and experience shows that the treatment of such envoys reflects recognition of that fact.

I. Private agents

239. The so-called private agents of a Head of State are also regarded as *ad hoc* diplomats. The Head of State sends them abroad on his own behalf and not on behalf of the State which he represents. Genet⁷² denies diplomatic status to such agents. A similar view can be inferred from the definition given by the International Law Commission, according to which an agent, to qualify for recognition as an *ad hoc* diplomat, must be entrusted by one State with the carrying out of a task in another State.⁷³

240. Genet says that the Head of State usually entrusts such agents with certain matters of a private, non-diplomatic nature, such as handling personal relations and private business and managing his property abroad. Because of this, Genet states categorically that the individuals in question never have diplomatic status.

241. The Special Rapporteur cannot accept this view. He considers that private agents are often entrusted with political functions, and in particular with taking political soundings in matters regarding which the Head of State has no authority to send official agents without the consent of some other organ. This is true of the personal envoys whom the President of the United States sends on his own behalf and who are essentially — even though the nature of their functions is such that they do not represent the State but merely the Head of State as an individual — equivalent to the *ad hoc* diplomats of other States. In theory and strictly speaking, all special ambassadors who are sent on a ceremonial mission should also be included in this category if they act on behalf of the Head of State and not on behalf of the State itself. Owing to certain traditional usages, however,

⁷² Raoul Genet, *op. cit.*, vol. I, p. 83.

⁷³ *Yearbook of the International Law Commission, 1960, vol. II, p. 179, draft article 1.*

⁷¹ Raoul Genet, *op. cit.*, vol. I, p. 80.

this practice is not followed, and, in everyday life, this kind of special ambassador is considered an *ad hoc* diplomat.

242. Nevertheless, since the State's sphere of competence is constantly expanding by virtue of the sovereign authority it wields in economic relations with foreign countries, the question arises whether the status of private agents or that of *ad hoc* diplomats should be accorded to envoys sent to foreign countries by some States (and not by the Heads of State) in order to negotiate and establish economic relations and conclude specific transactions, e.g. to negotiate a loan, conduct exploratory talks or conclude a delivery contract (regardless of whether the State in question is placing the order or making the delivery). The trend is increasingly towards the view that such individuals should be accepted as *ad hoc* diplomats by the host State. This practice is often carried even further in that the envoys in question are accorded this status even when they conduct their business with persons who are not subjects of international law (e.g. a banking syndicate with which they are negotiating a State loan). This shows that the notion of what constitutes an *ad hoc* diplomat is becoming broader, but it is uncertain whether this broadening process rests on international law (which seems doubtful) or on such precarious foundations as tolerance and courtesy. The Special Rapporteur is inclined to take the latter view. The difference is not a very great one, however, since in either case the host State has the right to deny its hospitality. Yet, a difference exists in that the State in question, while declining to accord the status of *ad hoc* diplomats to such agents, should not deny them hospitality; it can simply inform them that they will no longer enjoy the privileges, facilities and immunities previously accorded to them and that they will be subject to its jurisdiction in all respects. Hence, these envoys' status as *ad hoc* diplomats is a precarious one.

243. The Special Rapporteur believes that each of these categories should have a place in the body of legal rules relating to special missions, and he will endeavour to submit appropriate proposals to the Commission.

244. Of late, however, certain types of special missions have appeared which, in the opinion of the Special Rapporteur, cannot be said to represent universally accepted practice under international law. He considers, therefore, that the proposed rules should make no provision for missions of these types, which are the following:

(a) Joint State and party delegations of the kind exchanged by the socialist States and by these States and the States developing along socialist lines;

(b) Technical assistance missions, which do not follow any uniform practice and are usually based on bilateral agreements;

(c) Visits made for study purposes, by prior agreement between the Governments concerned, which do not constitute missions, since their object is not the performance of an official task within the scope of international relations as between States.

245. The Special Rapporteur has also thought it inadvisable to deal with the status of distinguished foreigners or with semi-official visits by prominent

persons, even if arranged officially. He deems it particularly important, however, to stress that it is wrong to consider as special delegates persons who, because of their regular functions, hold diplomatic passports and who travel in the territory of another State for matters in which they do not represent their State as a sovereign subject of international law, but perform a different mission, even though it may be of an honorary character (giving lectures, attending ceremonies, etc.).

11. Competence of special missions

246. The question of the line of demarcation between the competence of resident diplomacy and of special missions was discussed by the Commission during its sixteenth session.

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

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

249. During the general debate some members of the Commission said that great caution was needed in formulating rules on special missions, for if an equal right to represent the State was granted both to regular missions and to special missions, the unity of expression of the sovereign will of States might be jeopardized. Mr. Cadieux, in particular, drew attention to this point, saying that the Commission would have to be very tactful in its handling of diplomats of the traditional kind

(SR.723, para. 28). Mr. Tsuruoka was even more explicit; he said:

... the co-existence of those two forms of diplomacy raised a question of responsibility. Conflict between the permanent diplomatic mission and a special mission of one State in another State was not inconceivable. However, the presumption was always that the will of the State was single: both missions had the same purpose and the special mission became part of the permanent diplomacy.

He thought that even in the case of a visit by a Head of State the responsibility in any case fell on the ambassador (SR.724, para. 6). Although the Special Rapporteur pointed out that the maintenance of the unity of the State's will was a question which should be settled within the State, whereas international legal relations required that statements made by special missions should have binding force, Mr. Tsuruoka insisted that such questions must be regulated by international law since the fact that the will of the State was expressed in two different ways might affect relations between two States (SR.724, para. 28). Mr. Ago, speaking as Chairman, agreed that the problem was an extremely delicate one which he thought was connected rather with the Law of Treaties, the attribution to the State of the will expressed by its representative. He suggested that for the time being the Commission consider only the question of privileges and immunities (SR.724, paras. 31 and 32).

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

12. *Categories of special mission staff*

251. At its sixteenth session, the Commission took up the question of the classes of special missions and, in addition, that of the division of mission staff into categories. The members of the Commission have not reached the formal conclusion that missions should be treated in different ways.

252. The opinion which emerged during the general debate was that not all missions and not all the mission staff could have the same legal status, but that this status depends on the specific class of the mission and its staff.

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

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

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

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

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

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

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

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

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

262. Concerning the division of mission staff into categories, the Commission followed in general the categories laid down in the Vienna Convention on Diplomatic Relations (1961).

263. However, the question of the distinction between the different kinds of special missions arose again in the Sixth Committee of the General Assembly. The delegations of several States expressed their opinion on this question. The opinion of the delegation of Brazil is quoted by way of example:

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.⁷⁴

The delegation of Czechoslovakia expressed the following opinion:

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.⁷⁵

264. 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 a political character and the second 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.⁷⁶

265. 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.

266. 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.⁷⁷

267. 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.⁷⁸

268. 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).

269. 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.

270. During its eighteenth session, the Commission considered the question of the distinction between the different kinds of special missions and took the following position:

The Commission gave attention to the comments by Governments on this point and in particular to the possibility of distinguishing between special missions of a political character and those which were of a purely technical character. The question thus arose whether it was not desirable to distinguish between special missions in respect of the privileges and immunities of members of missions of a technical character. The Commission reaffirmed its view that it was impossible to make a distinction between special missions of a political nature and those of a technical nature; every special mission represented a sovereign State in its relations with another State. On the other hand, the Commission concluded that there was some justification for the proposal by Governments that the extent of certain privileges and immunities should be limited in the case of particular categories of special missions. The Commission requested the Special Rapporteur to re-examine the problem, more particularly the question of applying the functional theory and the question of limiting the extent of certain privileges and immunities in the case of particular categories of special missions. The Commission instructed the Special Rapporteur to submit to it a draft provision on the subject which would provide *inter alia* that any limitation of that nature should be regulated by agreement between the States concerned.⁷⁹

⁷⁴ *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 840th meeting, para. 15.

⁷⁵ *Ibid.*, 843rd meeting, para. 17.

⁷⁶ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

⁷⁷ *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 845th meeting, para. 21.

⁷⁸ *Ibid.*, 850th meeting, para. 3.

⁷⁹ *Yearbook of the International Law Commission, 1966*, vol. II, p. 276, para. 61.

271. The Special Rapporteur still believes that all special missions must be assured all the privileges, immunities and facilities which they require to represent properly the State whose sovereign will they express and to exercise without hindrance the functions entrusted to them, but he confirms the opinion which he had previously expressed in his third report, namely, that there should be inserted in the draft articles a clause providing that the States concerned, which are best qualified to assess the extent of the freedom and guarantees necessary for their special missions, shall be responsible for determining by agreement among themselves the outer limits of the privileges, immunities and facilities to be guaranteed to special missions.

13. Draft provisions concerning so-called high-level special missions

272. This led the Special Rapporteur to submit to the Commission, in his second report, draft provisions concerning so-called high-level special missions. However, the Commission did not discuss this draft in detail, but merely reproduced it as an annex to its report to the General Assembly on the work of its seventeenth session,⁸⁰ and indicated that it would appreciate the opinion of Member States on this matter and hoped to receive their suggestions.

273. On the one hand, the Special Rapporteur understands the arguments of the members of the Commission who hold the view that particular importance must be accorded to high-level special missions, i.e., the special missions led by Heads of States, Heads of Governments, or persons holding high office in the States concerned. On the other hand, he considers that this would give exaggerated prominence to the representative character of such missions whereas the purpose of the draft drawn up by the Commission is the protection of the free exercise of functions by special missions. Consequently, he also sympathizes with States which are not prepared to establish a distinction for the benefit of high-level special missions. He takes the liberty of adding that the character of a special mission which has already commenced may be changed in the course of its functions, by the arrival of a person to lead the mission who would cause it to be ranked as a high-level mission, or his departure, without any change in the nature of its assignment.

274. The Commission, on the basis of the reports submitted by the Special Rapporteur, resumed the discussion of this question and reached the following decision at its eighteenth session:

At its sixteenth session, the International Law Commission decided to ask the Special Rapporteur to submit at its next 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. In his second report (A/CN.4/179), the Special Rapporteur submitted to the seventeenth session of the Commission a set of draft provisions concerning so-called high-level special missions. The Commission did not discuss this draft at its seventeenth session, but considered whether special rules of law should

or should not be drafted for so-called high-level special missions, whose heads hold high office in their States. It said that it would appreciate the opinion of Governments on this matter, and hoped that their suggestions would be as specific as possible. After noting the opinions of Governments, the Commission recommended the Special Rapporteur not to prepare draft provisions concerning so-called high-level special missions, to include in part II of the draft articles a provision concerning the status of the Head of State as head of a special mission, and to consider whether it was desirable to mention the particular situation of this category of special missions in the provisions dealing with certain immunities. The Special Rapporteur was, accordingly, instructed to undertake the necessary studies on this subject and to submit appropriate conclusions to the Commission.⁸¹

275. In accordance with this decision of the Commission, the Special Rapporteur prepared a special article concerning the status of the Head of State as head of a special mission and included it in the draft articles, which are set out in chapter III of this report. As to the other cases of so-called high-level special missions, he still holds the view that they should have the ordinary status of special missions, unless the States concerned adopt explicit and special agreements laying down other rules governing their status.

276. During the twenty-first session of the General Assembly, the representative of the Byelorussian Soviet Socialist Republic proposed in the Sixth Committee that an explicit provision concerning high-level special missions should be included in the draft articles.⁸² The representatives of the other States expressed no interest in this question.

14. Introduction of a provision prohibiting discrimination and requiring reciprocity in the application of the articles

277. In his second report on special missions (A/CN.4/179), 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 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 session⁸³ (1965) 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*".

278. 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 Conven-

⁸¹ *Yearbook of the International Law Commission, 1966*, vol. II, p. 277, para. 69.

⁸² *Official Records of the General Assembly, Twenty-first Session, Sixth Committee*, 908th meeting, para 11.

⁸³ *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009.

⁸⁰ *Yearbook of the International Law Commission, 1965*, vol. II, pp. 192 and 193.

tion on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations.⁸⁴

(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.⁸⁵

(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.⁸⁶

279. 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.

280. The Commission considered this question again at its eighteenth session and took the following decision:

After reviewing the comments by Governments and their opinions on the question raised by the Commission in paragraph 49 of its report on the work of the first part of its seventeenth session (1965), the Commission reconsidered its previous decision on the point and requested the Special Rapporteur to submit a draft article prohibiting discrimination, based on article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations. The article would, however, have to allow for the diversity of the nature and tasks of special missions and for the fact that circumstances might lead to distinctions being made in practice.⁸⁷

281. The Special Rapporteur, in accordance with this decision, laid down the rule of non-discrimination, but stipulated that it should be limited to special missions which were related *inter se*.

282. The Commission also considered the question of reciprocity in the application of the articles relating to special missions.

283. In its written comments on the draft articles, the Belgian Government expressed the view that "there should be a provision on reciprocity in the application of this draft."

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

285. At its eighteenth session, the Commission endorsed the Special Rapporteur's opinion concerning reciprocity in the future application of the articles relating to special missions. It stated its position in the following terms:

The Commission took note of one Government's opinion that there should be a provision on reciprocity in the draft article on special missions. The Commission, however, endorsed the Special Rapporteur's opinion that reciprocity was a condition underlying the provisions of any treaty; it was therefore unnecessary to

include in the draft articles on special missions an explicit provision to the effect that the principle of reciprocity must be observed.⁸⁸

15. Introductory article

286. In recent times, the conventions and other international instruments drawn up by the United Nations have regularly included a special article containing definitions of the concepts used in these texts, but it is customary to place these definitions in an introductory article which is drafted only at the end of the preparatory work on the convention. In this case, the same procedure has been followed.

287. In this connexion, it will be recalled that 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 might be simplified and condensed".

288. 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.

289. During the discussions in the Sixth Committee, the representatives of Hungary,⁸⁹ Turkey⁹⁰ and Ceylon⁹¹ spoke in favour of an introductory article comprising definitions. The representatives of Israel⁹² and Finland⁹³ 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,⁹⁴ Sweden⁹⁵ and France⁹⁶ also expressed this view, whereas the representative of Jordan⁹⁷ said that only the 1961 Vienna Convention on Diplomatic Relations should be taken into consideration.

290. It is interesting to note that the delegation of Afghanistan⁹⁸ 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.

291. 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 mean-

⁸⁸ *Ibid.*, para. 63.

⁸⁹ *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 843rd meeting, para. 36.

⁹⁰ *Ibid.*, 847th meeting, para. 24.

⁹¹ *Ibid.*, 850th meeting, para. 8.

⁹² *Ibid.*, 840th meeting, paras. 6 and 7.

⁹³ *Ibid.*, 850th meeting, para. 3.

⁹⁴ *Ibid.*, 843rd meeting, para. 37.

⁹⁵ *Ibid.*, 844th meeting, para. 12.

⁹⁶ *Ibid.*, 849th meeting, para. 20.

⁹⁷ *Ibid.*, 842nd meeting, para. 42.

⁹⁸ *Ibid.*, 850th meeting, paras. 23 and 26.

⁸⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Yearbook of the International Law Commission, 1966*, vol. II, p. 276, para. 62.

ings 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.⁹⁹

292. 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.¹⁰⁰

293. In accordance with the Commission's decision and with the opinions expressed by delegations and Governments, the Special Rapporteur proposed the introductory article, set out below, which contained definitions of the expressions used in several articles of the draft, and explained that if the Commission adopted this article, the texts of a number of articles could be shortened, since the repetition of descriptive definitions could be avoided.

294. The text of the introductory article proposed by the Special Rapporteur in his third report 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 adminis-

trative 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;

(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.

295. The Commission did not consider this text during its eighteenth session, and merely took a general decision in the following terms:

In paragraph 46 of its report on the work 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 might be simplified and condensed. This idea met with general approval, both in the discussion in the Sixth Committee of the General Assembly and in the written comments of Governments. In pursuance of the Commission's decision and in the light of the opinions expressed by Governments, the Special Rapporteur submitted to the Commission at its eighteenth session a draft introductory article defining the terms and concepts used in several articles of the draft on special missions. This draft introductory article gives definitions for a number of the following terms: special mission, permanent diplomatic mission, consular post, head of a special mission, representative, delegation, members of a special mission, members and staff of the special mission, members of the staff of the special mission, members of diplomatic staff, members of the administrative and technical staff, members of the service staff, private staff, sending State, receiving State, third State, task of a special mission, and premises of the special mission. The Commission recognized the usefulness of an article of this kind which, if it were adopted, would help to shorten the text of a number of articles. The Commission decided to defer consideration of the introductory article, and instructed the

⁹⁹ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹⁰⁰ *Ibid.*

Special Rapporteur to consider this new article again and, if necessary, to revise it, and to submit it to the Commission.¹⁰¹

296. Although the Commission did not discuss the introductory article, some comments were made concerning the terms and definitions used; mention should be made in particular, of the remarks of Mr. Castrén during the eighteenth session of the Commission and the written comments of the Netherlands Government. The Government of Pakistan stressed the usefulness of a revision of the terms and definitions.

297. In this connexion, the Special Rapporteur refers to his third report and stresses the fact that the introductory article was preceded by the following sentence:

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.¹⁰²

298. The discrepancies pointed out by Mr. Castrén and by the Netherlands Government were known to the Special Rapporteur, but he did not think that he should make changes because such discrepancies would be finally conditioned by the terminology and the definitions of the introductory article.

299. The Special Rapporteur considers, moreover, that many of these remarks cannot be endorsed, for they adhere too closely to the Vienna Convention of 1961 without taking into account the difference between the nature and functions of permanent diplomatic missions and the nature and functions of special missions.

16. *Question of the preamble of the future instrument relating to special missions*

300. In his first two reports, the Special Rapporteur did not raise the question of the preparation of a preamble to the future instrument. He had taken the view that this question, as a general rule, was not within the competence of the International Law Commission, but that it should be raised in the organs which would prepare the final draft of the future instrument.

301. In his third report, he noted, however, that 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.¹⁰³

302. In bringing this statement to the attention of the Commission, the Special Rapporteur explained that he thought that the Commission should not take any further action on this desideratum of the Yugoslav Government.

303. The Commission considered this question at its eighteenth session and stated its position in the following terms:

Although it is not current practice for the Commission to prepare preambles to the drafts which it submits to the General Assembly, one Government, in its written comments, expressed

¹⁰¹ *Yearbook of the International Law Commission, 1966*, vol. II, p. 277, para. 70.

¹⁰² *Ibid.*, document A/CN.4/189 and Add.1, para. 269.

¹⁰³ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

the view that the preamble to the convention on special missions should give a definition of a special mission and emphasize the differences between special missions and permanent diplomatic missions. After discussing the matter, the Commission instructed the Special Rapporteur to draft a preamble and submit it to the Commission.¹⁰⁴

304. The Special Rapporteur took the view that the preparation of the draft preamble should be entrusted to a legal body and that a text of this kind should not be drafted directly by the representatives of States, since the preamble, despite debatable opinions concerning its binding character, was at all events, according to the rules generally accepted by text-writers and judicial decisions, an aid in the interpretation of the provisions of the instrument in question. Disregarding the decision at San Francisco that the Preamble of the United Nations Charter was a binding text, which was an exception, the Special Rapporteur thinks that it is difficult to deny legal significance to the text of a preamble, and he is convinced that in the future the better practice would be for the Commission to submit a draft preamble with any draft instrument which it transmits to the General Assembly.

305. The Special Rapporteur accordingly has included a draft preamble in the draft articles relating to special missions which are set out in chapter III of this report.

17. *Legal status of special missions in relation to third States*

306. The International Law Commission took the view that special missions were not simply institutions which functioned between the sending State and the receiving State, but that they also concerned third States, whether they passed through the territory of a third State or they received permission to carry out certain assignments there.

307. Diplomatic history abounds in examples of special missions making their appearance in the territories of third States, particularly where the sending State and the receiving State are not directly contiguous or the frontiers are closed as in the case of armed conflict. In the past, third States have, as a courtesy, permitted transit through their territory or have made it possible for missions of the States concerned to meet on their territory. The Commission took the view that this question must not depend on *comitas gentium*, but should be determined *ex jure*.

308. At the Commission's sixteenth session, during the general debate, it was pointed out on several occasions that the rules concerning the legal status of special missions should also in certain cases, apply to third States as well as to the States sending and receiving special missions. That was emphasized by Mr. Rosenne (SR.723, para. 23) and Mr. Ago (SR.723, para. 35).

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

¹⁰⁴ *Yearbook of the International Law Commission, 1966*, vol. II, p. 277, para. 67.

CHAPTER III

Draft articles on special missions¹⁰⁵PART I. GENERAL RULES¹⁰⁶

310. This part reproduces the text of the different articles and the commentaries as they were adopted by the Commission and submitted to the Governments of Member States for their comments and suggestions.

311. It is followed by the comments of Member States on the articles and commentaries submitted to them. These in turn are followed by the Special Rapporteur's conclusions and his proposals when it is necessary to amend the text of an article or the commentary.

312. If the Special Rapporteur is of the opinion that the text should be amended for drafting reasons, in the light of the draft definitions contained in article 0, which appears at the end of the draft articles, the proposed amendment is also given in the conclusions accompanying each article.

313. At the end of his comments on each article, the Special Rapporteur states whether in his opinion the provision in question should be generally compulsory or optional.

Article 1.¹⁰⁷ — The sending of special missions

1. For the performance of specific tasks, States may send temporary special missions with the consent of the State to which they are to be sent.

2. The existence of diplomatic or consular relations between States is not necessary for the sending or reception of special missions.

Commentary

(1) Article 1 of the draft on special missions differs from the provisions of the Vienna Convention on Diplomatic Relations. The difference is due to the fact that the tasks and duration of special missions differ from those of regular missions.

(2) A special mission must possess the following characteristics:

(a) It must be sent by a State to another State. Special missions cannot be considered to include missions sent by political movements to establish contact with a particular State, or missions sent by States to establish contact with a movement. In the case of insurrection or civil war,

¹⁰⁵ Articles 1-16 were adopted by the Commission at its sixteenth session (1964) on the basis of the Special Rapporteur's first report (A/CN.4/166). Articles 16-36 of that report were not discussed by the Commission and were replaced by articles 17-40 of the Special Rapporteur's second report (A/CN.4/179) which was discussed by the Commission at its seventeenth session and formed the basis of articles 17-44 of these draft articles.

¹⁰⁶ Title adopted at the 819th meeting.

¹⁰⁷ Introduced as article 1 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 757th and 758th meetings of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 772nd meeting. The Commission decided that this article would be preceded by a definitions article.

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

(b) It must not be in the nature of a mission responsible for maintaining general diplomatic relations between the States; its task must be precisely defined. But the fact that a task is defined does not mean that its scope is severely limited; in practice, some special missions are given far-reaching tasks of a general nature, including the review of relations between the States concerned and even the formulation of the general policy to be followed in their relations. But the task of a special mission is in any case specified and it differs from the functions of a permanent diplomatic mission, which acts as a general representative of the sending State (article 3, paragraph 1 (a) of the Vienna Convention on Diplomatic Relations). In the Commission's view, the specified task of a special mission should be to represent the sending State in political or technical matters.

(c) A State is not obliged to receive a special mission from another State unless it has undertaken in advance to do so. Here, the draft follows the principle set out in article 2 of the Vienna Convention, but the Commission points out that the way in which consent is expressed to the sending of a permanent diplomatic mission differs from that used in connexion with the sending of a special mission. In the case of a special mission, consent usually takes a more flexible form. In practice, such an undertaking is generally given only by informal agreement; less frequently, it is given by formal treaty providing that a specific task will be entrusted to the special mission; one characteristic of a special mission, therefore, is that consent for it must have been given in advance for a specific purpose.

(d) It is of a temporary nature. Its temporary nature may be established either by the term fixed for the duration of the mission or by its being given a specific task, the mission usually being terminated either on the expiry of its term or on the completion of its task.¹⁰⁸ Regular diplomatic missions are not of this temporary nature, since they are permanent (article 2 of the Vienna Convention on Diplomatic Relations). However, a permanent specialized mission which has a specific sphere of competence and may exist side by side with the regular permanent diplomatic mission is not a special mission and does not possess the characteristics of a special mission. Examples of permanent specialized missions are the United States missions for economic co-operation and assistance to certain countries, the Australian immigration missions, the industrial co-operation missions of the socialist countries, and commercial missions or delegations which are of a diplomatic nature, etc.

(3) The sending and reception of special missions may — and most frequently does — occur between States which maintain regular diplomatic or consular relations with each other, but the existence of such relations is not an essential prerequisite. Where such

¹⁰⁸ See article 12.

relations do exist and the regular diplomatic mission is functioning, the special mission's particular task may be one which would have been within the competence of the ordinary mission if there had been no special mission. During the existence of the special mission, however, States are entitled to conduct through the special mission relations which are within the competence of the general mission. The Commission deemed it advisable to stress that the existence of diplomatic or consular relations between the States in question is not a prerequisite for the sending and reception of special missions. The Commission considered that special missions can be even more useful where such relations do not exist. The question whether special missions can be used between States or Governments which do not recognize each other was also raised. The Commission considered that, even in those cases, special missions could be helpful in improving relations between States, but it did not consider it necessary to add a clause to that effect to article 1.

(4) The manner in which the agreement for sending and receiving a special mission is concluded is a separate question. In practice, there are a number of ways of doing so, namely:

(a) An informal diplomatic agreement providing that a special mission will be sent and received;

(b) A formal treaty providing that certain questions will be discussed and settled through a special mission;

(c) An offer by one State to send a special mission for a specific purpose, and the acceptance, even tacit, of such a mission by the other State;

(d) An invitation from one party to the other to send a special mission for a specific purpose, and the acceptance of the invitation by the other party.

(5) Where regular diplomatic relations are not in existence between the States concerned — whether because such relations have been broken off or because armed hostilities are in progress between the States — the sending and reception of special missions are subject to the same rules cited above. Experience shows that special missions are often used for the settlement of preliminary questions with a view to the establishment of regular diplomatic relations.

(6) The fact that a special mission is sent and received does not mean that both States must entrust the settlement of the problem in question to special missions appointed by the two parties. Negotiations with a delegation sent by a State for a specific purpose may also be conducted by the regular organs of the receiving State without a special mission being appointed. Both these practices are considered to be usual, and in the second case the special mission acts on the one side and the Ministry (or some other permanent organ) on the other. The Commission did not deem it necessary to refer to this concept in the text.

(7) Cases also arise in practice in which a specific delegation, composed of the head or of members of the regular permanent diplomatic mission accredited to the country in which the negotiations are taking place, appears in the capacity of a special mission. Practice provides no clear-cut answer to the question whether this is a special

mission in the proper sense or an activity of the permanent mission.

New suggestions by Governments

(8) 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 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.¹⁰⁹

(9) 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

¹⁰⁹ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

amendment of the actual text of the article. Nevertheless, they should be included in the commentary.

(10) 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 refer to characteristics of a special mission which should be stated in the definition.¹¹⁰

(11) 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.

(12) 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.¹¹¹

(13) 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.

(14) 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.¹¹²

(15) 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”.

(16) During the discussion which took place 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.¹¹³ The Special Rapporteur is unable to accept that proposal, and points out that, according to the International Law Commission, special missions are very often used in practice — to the great advantage of international

relations — precisely in cases where no diplomatic relations exist.¹¹⁴

(17) 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 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).

(18) 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.¹¹⁵

(19) 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.

(20) 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 with 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

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 850th meeting, para. 8.*

¹¹⁴ *Yearbook of the International Law Commission, 1964, vol. II, p. 211, para. (3) of commentary to article 1.*

¹¹⁵ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

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.¹¹⁶

(21) 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.

(22) 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.¹¹⁷

(23) The Special Rapporteur does not agree with the United Kingdom Government. Admittedly, members of a regular 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.

(24) In their written comments, the Governments of the USSR and the Ukrainian SSR concentrate 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. These Governments consider that the text of the draft articles should be made quite clear on this point, and propose that article 1, paragraph 2 of the draft should be worded as follows:

Neither diplomatic and consular relations nor recognition is necessary for the sending and reception of special missions.¹¹⁸

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

(26) The comments of the Netherlands Government, which relate to articles 1 and 2, are as follows:

These articles do not indicate clearly under what circumstances a mission has the status of "special mission". Although the rules governing special missions cannot be meant to apply to every conceivable group of travelling government representatives, articles 1 and 2 create the impression that every mission charged with a specific duty and accepted by the receiving State (or possibly accepted tacitly only, as is implied in para. 4 (c) of the I.L.C. commentary on art. 1) is a "special mission". This imprecision might result in a receiving State that did not wish to object to the announced visit of some mission being caught unawares by the sending State demanding for the mission the status, including the privileges and immunities, of a special mission after the mission's arrival.

The Netherlands Government believes that a mission should only be a special mission if both sending State and receiving State desire to accord it the status of special mission. Accordingly, the Netherlands Government proposes that art. 2 be amended to read:

"The task of a special mission *and its status as such* shall be determined by mutual consent . . . etc."

With reference to the question in para. 5 of the I.L.C. commentary on art. 2, the Netherlands Government can see no need for any rule delimiting the special mission's and the permanent mission's competencies. In practice it might be a good thing if governments were at liberty to consult one another through different channels.¹¹⁹

(27) The Special Rapporteur is of the opinion that the nature of special missions does not depend on the fact that Governments have agreed to confer the status of special mission on a group of representatives but that special missions are specific institutions in international law. He therefore considers that articles 1 and 2 should not be combined and that article 1 should be a general and compulsory provision.

(28) Accordingly, the Special Rapporteur considers that:

(a) Article 1, paragraph 2, should be amended as proposed by the Governments of the USSR and the Ukrainian SSR, so that the text would read as follows: "Neither diplomatic and consular relations nor recogni-

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

tion is necessary for the sending and reception of special missions”.

(b) There should be inserted in the commentary on article 1 the Swedish Government's comment on the capacity of insurgents to send and receive special missions, followed by the Belgian Government's suggestion that the sending and reception of special missions do not prejudice the question of recognition of States and Governments. As far as the other suggestions are concerned, the Special Rapporteur considers that they should not be included in the commentary on the final text, even for polemical purposes, and that no negative opinion should be given on the suggestions in the commentary. It is open to the Commission to do so, however, if it thinks fit.

(c) It is not necessary to amend the text for drafting reasons.

(d) The amended text of this article should be of a generally compulsory character.

Article 2.¹²⁰ — The task of a special mission

The task of a special mission shall be specified by mutual consent of the sending State and of the receiving State.

Commentary

(1) The text of this article differs from the corresponding article (article 4) of the Vienna Convention on Diplomatic Relations.

(2) The scope and content of the task of a special mission are determined by mutual consent. Such consent may be expressed by any of the means indicated in paragraph (4) of the commentary on article 1. In practice, however, the agreement to the sending and reception of special missions is usually of an informal nature, often merely stating the purpose of the mission. In most cases, the exact scope of the task becomes clear only during the negotiations, and it frequently depends on the full powers or the authority conferred on the representatives of the negotiating parties.

(3) Diplomatic history records a number of cases where special missions have exceeded the task for which they were sent and received. The customary comment is that this is done to take advantage of the opportunity, and that any good diplomat makes use of such opportunities. There are also a number of cases showing that special missions for ceremonial and formal purposes have taken advantage of propitious circumstances to conduct negotiations on other matters. The limits of the capacity of a special mission to transact business are normally determined by full powers, given in good and due form, but in practice the legal validity of acts by special missions which exceed the missions' powers often depends upon their acceptance by the respective Governments. Though the Commission considered this question

to be of importance to the stability of relations between States, it did not deem it necessary to propose an article dealing with it and considered that its solution was closely related to section II (Conclusion of treaties by States) of part I of the draft articles on the law of treaties.¹²¹

(4) The tasks of a special mission are sometimes determined by a prior treaty. In this case, the special mission's task and the extent of its powers depend on the treaty. This is so, for instance, in the case of commissions appointed to draw up trading plans for a specific period under a trade treaty. However, these cases must be regarded as exceptional. In most cases, on the contrary, the task is determined by informal, *ad hoc* mutual agreement.

(5) In connexion with the task and the extent of the powers of a special mission, the question also arises whether its existence encroaches upon the competence of the regular diplomatic mission of the sending State accredited to the other party. It is generally agreed that the permanent mission retains its competence, even during the existence of the special mission, to transmit to the other contracting party, to which it is accredited, communications from its Government concerning, *inter alia*, the limit of the special mission's powers and, if need be, the complete or partial revocation of the full powers given to it or the decision to break off or suspend the negotiations; but all such actions can apply only to future acts of the special mission. The question of the parallel existence of permanent and special missions, and the problem of overlapping authority, are of considerable importance for the validity of acts performed by special missions. Some members of the Commission held that, during the existence of the special mission, its task is assumed to be excluded from the competence of the permanent diplomatic mission. The Commission decided to draw the attention of Governments to this point and to ask them to decide whether or not a rule on the matter should be included in the final text of the articles, and if so, to what effect.

(6) If the special mission's activity or existence comes to an end, the full competence of the permanent diplomatic mission is usually restored, even with respect to matters relating to the special mission's task, except in cases where special missions have been given exclusive competence, by treaty, to regulate relations in respect of certain matters between the States concerned.

New suggestions by Governments

(7) 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

¹²⁰ Introduced as article 2 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 758th meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 772nd meeting.

¹²¹ See *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, chap. II, sect. B, arts. 4 and 5, pp. 164-166.

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.¹²²

(8) 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”.

(9) 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.¹²³

(10) 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.¹²⁴

(11) 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.

(12) 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.¹²⁵

(13) 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 missions. For that reason, the Commission left it to States themselves to determine what they would regard as a special mission.

(14) 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. It is among the few Governments that were kind enough to reply to the question put by the Commission in the last sentence of this paragraph of the commentary. 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

¹²² See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

difficulties are likely to arise, they can be dealt with by an *ad hoc* arrangement on the subject.¹²⁶

(15) 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.

(16) 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.¹²⁷

(17) 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.

(18) 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 article 26 *et seq.*¹²⁸

(19) 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 (6) above.

(20) 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 the section devoted to article 19.

(21) 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.

(22) The comments of the Netherlands Government on this article were reproduced under article 2 and the Special Rapporteur considers that they need not be repeated here.

(23) Accordingly, the Special Rapporteur considers that:

(a) All the comments indicate that it is not necessary to amend the existing text of the draft article, which the Commission drafted in such a way that it is merely a principle;

(b) Paragraph (5) of the commentary should be expanded along the lines of the comments made by the Governments of Belgium, Upper Volta, and Yugoslavia;

(c) There is no need to amend the text for drafting reasons;

(d) The article should be of a generally compulsory nature and by its nature guarantees the freedom of the contracting States to determine the task of a special mission.

Article 3.¹²⁹ — Appointment of the head and members of the special mission or of members of its staff

Except as otherwise agreed, the sending State may freely appoint the head of the special mission and its members as well as its staff. Such appointments do not require the prior consent of the receiving State.

Commentary

(1) In regard to the head of the special mission, the text of article 3 differs from the rule in article 4 of the Vienna Convention on Diplomatic Relations. Whereas the head of a permanent diplomatic mission must receive the *agrément* of the receiving State, as a general rule no *agrément* is required for the appointment of the head of a special mission. In regard to the members and staff of the special mission, article 3 is based on the idea expressed in the first sentence of article 7 of the Vienna Con-

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ Introduced as article 3 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 760th meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

vention on Diplomatic Relations: that the sending State may freely appoint them.

(2) The Commission notes that, in State practice, consent to the sending and receiving of a special mission does not ordinarily imply acceptance of its head, members or staff. The Commission does not share the view that the declaration of acceptance of the persons forming the special mission should be included in the actual agreement to receive the mission; it considered that consent to receive a special mission and consent to the persons forming it are two distinct matters.¹³⁰

(3) The proposition that no *agrément* or prior consent shall be required for the head, members or staff of a special mission in no way infringes the sovereign rights of the receiving State. Its sovereign rights and interests are safeguarded by article 4 (persons declared *non grata* or not acceptable).

(4) In practice, there are several ways in which, in the absence of prior agreement, the receiving State can limit the sending State's freedom of choice. The following instances may be quoted:

(a) Consent can be given in the form of a visa issued in response to a request from the sending State indicating the purpose of the journey, or in the form of acceptance of the notice of the arrival of a specific person on a special mission.

(b) The receiving State can express its wishes with regard to the level of the delegations.

(c) In practice the formal or informal agreement concerning the sending and reception of a special mission sometimes includes a clause specifically designating the person or persons who will form the special mission. In this case the sending State cannot make any changes in the composition of the special mission without the prior consent of the State to which it is being sent. In practice all that is done is to send notice of the change in good time, and in the absence of any reaction, the other party is presumed to have accepted the notice without any reservation.

(5) In some cases, although less frequently, it is stipulated in a prior agreement that the receiving State must give its consent. This occurs primarily where important and delicate subjects are to be dealt with through the special mission, and especially in cases where the head of the mission and its members must be eminent politicians.

(6) The question arises whether the receiving State is recognized as having the right to make acceptance of the person appointed conditional upon its own consent. In this case it sometimes happens that the State which raises the objection asks to be consulted on the selection of the person. Its refusal does not mean that it considers the person proposed *persona non grata*, being of an objective and procedural rather than a personal nature, although it is difficult to separate these two aspects in practice. The Commission considers that this is not the general practice and that provision for such a situation should be made in a special agreement.

(7) The head of the special mission and its members are not in practice designated by name in the prior agreement, but in certain cases an indication is given of the qualifications they should possess. This applies either to meetings at a specific level (e.g., meetings of Ministers for Foreign Affairs or of other eminent persons) or to missions which must be composed of specially qualified experts (e.g., meetings of hydraulic engineers or other experts). In such cases, the special mission is regularly composed of its head and its members possess certain qualifications or hold certain posts and thus the sending State is subject to certain restrictions with respect to the selection and the composition of its special mission. Even though this is a widespread practice, the Commission considered that there was no need to include a rule to that effect in article 3, but that the situation was already covered by the proviso "except as otherwise agreed".

(8) The Commission also took into consideration the practice whereby certain States (by analogy with the provision contained in the last sentence of article 7 of the Vienna Convention on Diplomatic Relations) require prior consent in the case of members of the armed forces and persons of similar standing. The Commission considers that this rule is out of date and not universally applied.

New suggestions by Governments

(9) 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".¹³¹ 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.

(10) 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.¹³²

(11) With regard to this comment by the Swedish Government, the Special Rapporteur wishes to point out that the aim throughout 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 our opinion, this expression cannot be omitted in all cases, because that would suggest that all the provisions without distinction were of a residual nature.

¹³¹ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 843rd meeting, para. 37.*

¹³² See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

¹³⁰ For the contrary view, see *Yearbook of the International Law Commission, 1960, vol. II, pp. 112-117.*

(12) The Netherlands Government submitted some suggestions on articles 3 and 4.¹³³ They take as their starting point the opposite idea to the one expressed in the second sentence of article 3 that appointments of the head of a special mission and the other persons belonging to it do not require the prior consent of the receiving State. The Special Rapporteur considers it a sounder idea not to require the prior consent of the receiving State as a kind of *agrément* for the head and other members of a mission.

(13) The Special Rapporteur does not consider that articles 3 and 4 should be combined in a single article, because they contain two ideas. Article 3 is based on the idea that prior consent is not necessary and article 4 on the receiving State's right at any time to deny hospitality, if necessary, to a person it considers undesirable. The Special Rapporteur, therefore, will state his views on article 4 when he has dealt with that article.

(14) Accordingly, the Special Rapporteur considers that:

(a) It is not necessary to amend the text of article 3 as suggested, because the expression "except as otherwise agreed" is a warning that the provision contained in the first sentence of the article is a rule which, if necessary, can be waived by prior agreement between the parties;

(b) It is not necessary, either, to amend the commentary on article 3, because the idea expressed by the phrase "except as otherwise agreed" is dealt with at sufficient length in the present paragraphs (2), (3), (4) and (5) of the commentary;

(c) As far as drafting amendments are concerned, in view of the definition proposed in the introductory article, the expression "the head of the special mission and its members as well as its staff" should be replaced by "the members and staff of the special mission".

(d) The provision contained in the second sentence of the article should be of a generally compulsory nature as one of the principles applicable to the institution of special missions; as far as the expression "except as otherwise agreed" is concerned, it indicates that the provision is taken to be compulsory unless it can be shown that there is an agreement to the contrary. This condition that the existence of such an agreement must be demonstrated is necessary, because what is involved is limits on the authority of the State over the composition of its special missions.

Article 4.¹³⁴ — Persons declared non grata or not acceptable

1. The receiving State may, at any time and without having to explain its decision, notify the sending State that the head or any other member of the special mission or a member of its staff is *persona non grata* or not acceptable.

¹³³ *Ibid.*

¹³⁴ Introduced as article 4 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 760th meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

2. In any such case, the sending State shall either recall the person concerned or terminate his functions with the special mission. If the sending State refuses to carry out this obligation, the receiving State may refuse to recognize the person concerned as the head or a member of the special mission or as a member of its staff.

Commentary

(1) The text of article 4 follows article 9 of the Vienna Convention on Diplomatic Relations.

(2) Whether or not the receiving State has accepted the mission, it unquestionably has the right to declare the head or a member of a special mission or a member of the mission's staff *persona non grata* or not acceptable at any time. It is not obliged to state its reasons for this decision.¹³⁵

(3) It may be added that, in practice, a person is seldom declared *persona non grata* or not acceptable if the receiving State has already signified its acceptance of a particular person; but the majority of the Commission takes the view that even in that case the receiving State is entitled to make such a declaration. Nevertheless, the receiving State very rarely takes advantage of this prerogative; but in practice it may sometimes inform the sending State, through the regular diplomatic channel, that the head or a certain member of the special mission, even though consent has already been given to his appointment, represents an obstacle to the fulfilment of the mission's task.

(4) In practice, the right of the receiving State to declare the head or a member of the special mission *persona non grata* or not acceptable is not often exercised inasmuch as such missions are of short duration and have specific tasks. Nevertheless, instances do occur. In one case, the head of a special mission sent the minister of the receiving State a letter considered offensive by that State, which therefore announced that it would have no further relations with the writer. As a result, the activities of the special mission were virtually paralysed, and the sending State was obliged to recall the head of the special mission and to replace him.

(5) Where the meetings with the special mission are to be held at a specific level, or where the head or the members of the mission are required to possess certain specific qualifications and no other person in the sending State possesses such qualifications, it must be presumed that in practice the person concerned cannot be declared *persona non grata* or not acceptable, and that the only course is to break off the conversations, since the sending State is not in a position to choose among several persons with the necessary qualifications. The receiving State cannot, for instance, ask the sending State to change its Minister for Foreign Affairs because he is regarded as *persona non grata*, for that would constitute interference in the domestic affairs of the sending State. Nevertheless, it is under no obligation to enter into contact with an undesirable person, if it considers that refusal to do so

¹³⁵ This was also the opinion of the International Law Commission in 1960. See *Yearbook of the International Law Commission, 1960*, vol. II, pp. 112-115 and p. 180.

is more advantageous to it than the actual contact with the other State. This, however, is not a juridical question, and the Commission therefore decided not to deal with this situation or to regulate it in the text of the article.

New suggestions by Governments

(6) 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.¹³⁶

(7) The Government of Israel expresses the same view and also proposes the insertion of the expression "as appropriate".¹³⁷ The Special Rapporteur finds these proposals acceptable.

(8) In its comments, 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.¹³⁸

(9) 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 has 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 arising after its acceptance of the person concerned.

(10) The Hungarian delegation also commented on this article in connexion with the membership of the mission and in particular of its staff.¹³⁹ The Special Rapporteur considers that this comment has already been replied to in principle in connexion with the discussion on article 3.

(11) 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.¹⁴⁰ 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 Rapporteur

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

(12) The suggestions made by the Netherlands Government on articles 3 and 4 together were reproduced under article 3. The Special Rapporteur is of the opinion, as he stated above, that it is not necessary to combine articles 3 and 4 and considers it superfluous to repeat his reasons. He considers, moreover, that the Netherlands amendment would not achieve the Commission's purpose. The article is not concerned solely with a static situation — a State's defence against undesirable members of a mission at the time of its formation and sending — but rather with a permanent safeguard consisting in the right of the receiving State to send such undesirable and inadmissible persons away throughout the existence and operation of the special mission.

(13) Accordingly, the Special Rapporteur considers that:

(a) It is not necessary to amend article 4, unless the Commission wants to include the expression "as appropriate" at the end of the first sentence of paragraph 2, which is a question of drafting and should be left to the Drafting Committee;

(b) It is necessary to include in the commentary a comment covering the Special Rapporteur's reply to the suggestion of the Netherlands and Yugoslav Governments, to the effect that the authority given to the receiving State to declare a person *persona non grata* or not acceptable should be irrevocable and permanent throughout the entire existence of the special mission;

(c) For drafting reasons, in accordance with the definition proposed in the introductory article, the expression "the head or any other member of the special mission or a member of its staff" in paragraph 1 and the expression "the head or a member of the special mission or as a member of its staff" in paragraph 2 can be replaced, *mutatis mutandis*, by the expression "the members and staff of the special mission";

(d) This article is of an institutional nature and is of fundamental importance for the existence of the special mission and consequently should be of a generally compulsory character.

Article 5.¹⁴¹ — Sending the same special mission to more than one State

A State may send the same special mission to more than one State. In that case the sending State shall give the States concerned prior notice of the sending of that mission. Each of those States may refuse to receive such a mission.

Commentary

(1) There is no corresponding provision in the Vienna Convention on Diplomatic Relations.

¹⁴¹ Introduced as article 5 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 761st meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

¹³⁶ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 843rd meeting, para. 37.*

¹⁴⁰ *Ibid.*, 847th meeting, para. 24.

(2) The International Law Commission scarcely considered this question in 1960, and it has been given scant attention in the literature. At that time the majority of the Commission took the view that it was completely unnecessary to make provision for the matter, and the previous Special Rapporteur, Mr. Sandström, believed that the question did not arise at all.¹⁴² Mr. Jiménez de Aréchaga, however, expressed the view on that occasion that the situation envisaged was by no means unusual. He pointed out that special missions were sent to a number of neighbouring States when changes of government took place in the sending States and on ceremonial occasions.¹⁴³ Subsequently studies have shown that cases of special missions being sent to more than one State occur in practice.

(3) Observations of practice indicate that there are two cases in which the problem of the appointment of a special mission to more than one State clearly arises. They are the following:

(a) Where the same special mission, with the same membership and the same task, is sent to several States, which are usually neighbours or situated in the same geographical region. In the case of political missions (e.g., goodwill missions), there have been instances of States refusing to enter into contact with a mission appointed to several other States with which they did not enjoy good relations. Thus the question is not simply one of relations between the sending and receiving States, but also of relations between the States to which the special mission is sent. Although this raises a political issue, it is tantamount, from the juridical standpoint, to a proviso that where special missions are sent to more than one State, simultaneously or successively, consent must be obtained from each of the States concerned.

(b) Although, according to the strict rule, a special mission is appointed individually, either simultaneously or successively, to each of the States with which contacts are desired, certain exceptions arise in practice. One custom is that known as circular appointment, which — rightly, in the view of the Commission — is considered discourteous by experts in diplomatic protocol. In this case a special mission or an itinerant envoy is given full powers to visit more than one country, or a circular note is sent to more than one State informing them of the intention to send a special mission of this kind. If the special mission is an important one, the general practice is to lodge a protest against this breach of courtesy. If the special mission is sent to obtain information regarding future technical negotiations, the matter is usually overlooked, although it may be observed that such special missions are placed on the level of a commercial traveller with general powers of agency. A distinction must be made between this practice of so-called circular appointment and the case of a special mission authorized to conduct negotiations for the conclusion of a multilateral convention which is not of general concern. In this case its full powers may consist of a single document

accrediting it to all the States with which the convention is to be concluded (e.g., the Bulgarian-Greek-Yugoslav negotiations for a settlement of certain questions connected with their common frontier).

(4) It should also be mentioned that, in practice, a special mission of the kind referred to in paragraph (3) (a) above, having been accepted in principle, sometimes finds itself in the position of being requested, because of the position it has adopted during its contacts with the representatives of the first State visited, to make no contact with another specific State to which it is being sent. This occurs particularly in cases where it is announced that the special mission has granted the first State certain advantages which are contrary to the interests of the second State. The latter may consider that the matter to be dealt with has been prejudged, and may announce that the special mission which it had already accepted has become pointless. This is not the same as declaring the head and members of the mission *persona non grata*, since in this case the refusal to accept them is based not on their subjective qualities but on the objective political situation created by the special mission's actions and the position taken by the sending State. It is, as it were, a restriction of diplomatic relations expressed solely in the revocation of the consent of the receiving State to accept the special mission. This clearly demonstrates the delicacy of the situation created by the practice of sending the same special mission to more than one State.

(5) The Commission found that in this case the sending State is required to give prior notice to the States concerned of its intention to send such a special mission to more than one State. This prior notice is needed in order to inform the States concerned in due time not only of the task of a special mission but also of its itinerary. This information is deemed necessary in order to enable the States concerned to decide in advance whether they will receive the proposed special mission. The Commission stressed that it was essential that the States so notified should be entitled only to state their position on the receivability of the special mission, and not to request that such a mission should not be sent to another State as well.

New suggestions by Governments

(6) 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 wishes, it could postpone telling State B about its intention to send the mission to State C until the mission has accomplished its task in State B.¹⁴⁴

(7) The Special Rapporteur does not consider that there are good grounds for these comments by the Swedish Government, since the sending of the same

¹⁴² *Yearbook of the International Law Commission, 1960*, vol. II, pp. 109 and 180.

¹⁴³ *Ibid.*, p. 116.

¹⁴⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

special mission to two or more States would give rise to disputes of a special kind.

(8) 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.¹⁴⁵

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

(10) The Government of the Ukrainian Soviet Socialist Republic has proposed the deletion of this article, without giving any detailed reasons.¹⁴⁶

(11) The Netherlands Government expressed the following opinion on this article:

There is no objection to this article, although it is doubtful whether there is any need for it.¹⁴⁷

(12) Accordingly, the Special Rapporteur considers that:

(a) There is no reason for him to change his position and the article should be retained;

(b) A new paragraph should be added in the commentary stating that some States had expressed contrary views, opposing the article;

(c) It is not necessary to amend the text for drafting reasons;

(d) The last provision in the article shows by its nature that the article is not of a generally compulsory nature.

Article 5 bis. — Sending of the same special mission by two or more States

New suggestions by Governments

(1) This is a proposal for a new article.

(2) The Belgian Government, while accepting the text of article 5, 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."¹⁴⁸

(3) From the point of view of doctrine, the Special Rapporteur sees no objection to this proposal of the Belgian Government's 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 more and more emphasis on the reasons against joint missions (the predominance of the strongest State in such a partnership, leading to inequality of rights, unequal protection of interests, conflict of interests between 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.

Article 6.¹⁴⁹ — Composition of the special mission

1. The special mission may consist of a single representative or of a delegation composed of a head and other members.

2. The special mission may include diplomatic staff, administrative and technical staff and service staff.

3. In the absence of an express agreement as to the size of the staff of a special mission, the receiving State may require that the size of the staff be kept within limits considered by it to be reasonable and normal, having regard to circumstances, to the tasks and to the needs of the special mission.

Commentary

(1) The text of article 6, paragraphs 2 and 3, adopted by the Commission is based on article 1 (c) and article 11, paragraph 1, of the Vienna Convention on Diplomatic Relations. The text of paragraph 1 of article 6 reflects the special features of the institution of special missions.

(2) In practice, a special mission may be composed of only one member or of several members. If the special mission is entrusted to only one member, the latter is then a special delegate, described by the Commission in article 6 as a "representative". If it has two members, the sending State decides which of the two will be the head or first delegate. If the special mission consists of three or more members, the rule observed in practice is that a head of the mission (chairman of the delegation) should be designated.

(3) Precedence within the delegation is fixed, according to general practice, by the sending State, and is communicated to the receiving State or published in the manner normally adopted with respect to multilateral meetings. Neither the rank of the delegates according to the protocol of the sending State nor the title or function of the indi-

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ Introduced as article 6, paragraphs 1 and 4 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 761st meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

vidual delegates authorizes *ex jure* any automatic change in the order of precedence established in the list communicated, without subsequent communication of an official rectification to the receiving State. However, according to international custom, a member of the Government takes precedence over other officials, and the head of delegation must not have lower diplomatic rank than the members of the delegation; but, as this custom is not observed in all cases and is not regarded as obligatory, it is not reflected in the text.

(4) In practice a special mission may include, in addition to the head, his deputy, the other titular members and their deputies. The Commission considered that the composition of the special mission and the titles of its members were a matter exclusively within the competence of the sending State and that in the absence of an agreement on it by the parties it was not governed by any international rule. Accordingly, the Commission did not think it necessary to include a rule on it in the article.

(5) Whether a special mission is composed of a single representative or of a delegation, it may be accompanied by the necessary staff. The Commission accepted the designation of the staff set out in article 1 (c) of the Vienna Convention on Diplomatic Relations, but pointed out that the staff of special missions often includes specific categories such as advisers and experts. The Commission considered that these were included in the category of diplomatic staff.

(6) In practice, even in special missions the problem of limiting the size of the mission arises. The rule relating to permanent missions is contained in article 11 of the Vienna Convention on Diplomatic Relations and the text of article 6, paragraph 3, proposed by the Commission is based on that rule.

(7) With regard to the limitation of the size of the special mission, attention should be drawn not only to the general rule, but also to certain particular cases which occur in practice. On this point:

(a) It is customary for the receiving State to notify the sending State that it wishes the size of the mission to be restricted because, for example, the housing, transport and other facilities it can offer are limited.

(b) Less frequently, in practice, the agreement on the establishment or reception of the special mission limits the size of the mission; in some cases the agreement specifies a minimum number of members (joint meetings) and even calls for a mission specifically composed of members having stated qualifications (generally according to the problems to be treated).

(c) With respect to the size of the mission, attention should also be drawn to the practice of "balancing rank". It is customary, during preliminary conversations and negotiations on the sending and receiving of a mission, to designate the rank and status of the head and members of the special mission, so that the other party may act accordingly and thus avoid any disparity, for if representatives were received by a person of lower rank than their own, it might be considered an affront to their country. This, however, is a question of protocol rather than of law.

New suggestions by Governments

(8) 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 sub-divided 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.¹⁵⁰

(9) 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".

(10) 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.

(11) 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.

(12) 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

¹⁵⁰ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

reason for not saying so explicitly. Besides, it is to be presumed that the "other members" also enjoy diplomatic status.¹⁵¹

(13) 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 the 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.

(14) 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. . . ." ¹⁵²

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

(16) 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 paragraph (8) of the commentary on article 5).

(17) 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 sixteenth session,¹⁵³ and he does not think that any new problems have arisen in this connexion.

(18) The Government of the Ukrainian Soviet Socialist Republic has also proposed that paragraph 3 of this article should be deleted.¹⁵⁴

(19) The Netherlands Government has made some comments, which the Special Rapporteur has not succeeded in understanding.¹⁵⁵ He hopes that these comments will be explained in the course of the Commission's session.

(20) Accordingly, the Special Rapporteur considers that:

(a) There is no new consideration which makes it necessary to amend article 6, except the Israel Government's proposal concerning the rewording of the beginning of paragraph 3. The Special Rapporteur adopts the proposed wording because it indicates more clearly which members of the mission are meant;

(b) A new paragraph should be added in the commentary explaining that some States are opposed to the idea contained in paragraph 3;

(c) There is no need for any drafting changes;

(d) Paragraphs 1 and 2 contain generally compulsory provisions, while paragraph 3 indicates that there is a principle giving the receiving State a right which can only be waived by an express agreement.

Article 7.¹⁵⁶ Authority to act on behalf of the special mission

1. The head of the special mission is normally the only person authorized to act on behalf of the special mission and to send communications to the receiving State. Similarly, the receiving State shall normally address its communications to the head of the mission.

2. A member of the mission may be authorized either by the sending State or by the head of the special mission to replace the head of the mission if the latter is unable to perform his functions, and to perform particular acts on behalf of the mission.

Commentary

(1) Article 7 is not derived directly from the Vienna Convention on Diplomatic Relations. Its text was drawn up on the basis of contemporary international practice.

(2) The main question from the legal point of view is to determine the rules concerning authority to act on behalf of the special mission. Only the head of a special mission is normally authorized to act on behalf of the special mission and to address communications to the receiving State. The Commission laid stress on the word "normally", as the parties may also make provision for other persons than its head to act on behalf of a special mission. These other possibilities are, however, exceptional.¹⁵⁷

(3) *Head of the special mission.* As explained in the commentary on the preceding article, if the mission is composed of three or more members, it must as a general rule have a head. If it is composed of only two members,

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Yearbook of the International Law Commission, 1964*, vol. I, pp. 249-252.

¹⁵⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹⁵⁵ *Ibid.*

¹⁵⁶ Introduced as article 6, paragraphs 2 and 3 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 761st meeting of the Commission. Drafting Committee's text, numbered 6A, discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

¹⁵⁷ See paragraphs (4)-(11) of this commentary.

the sending State decides whether one shall bear the title of first delegate or head of the special mission. Whether he is called first delegate or head of mission, he will be regarded as the head of the special mission by the receiving State, which will communicate with him and receive from him statements on behalf of the special mission. For this reason, the question of the existence of a head of mission is one of great importance, notwithstanding the fact that the International Law Commission did not deal with it in 1960. Mr. Jiménez de Aréchaga, on the other hand, considers that in practice a special mission has a head, but he does not go further into the question.¹⁵⁸ In the Commission's opinion, as expressed at its sixteenth session, the matter of the appointment of a head of the special mission is important from the legal standpoint.

(4) In article 7, paragraph 1, the Commission established a mere presumption that the head of the special mission is the person who gives any authorizations that may be required, but the sending State may in addition authorize the other members of the special mission to act on its behalf by giving them full powers. There are in practice instances of special missions whose members are delegates with equal rights under collective letters of credence for performing the tasks assigned to the special mission. Practice is not, however, uniform. Some States hold that the person mentioned first in the letters of credence issued to the special mission is its head. Others, particularly States which send delegations, claim equal rights for all members of such delegations. A common example is a mission composed of several members of a coalition government or of members of parliament representing various political groups. The advocates of the *in corpore* concept of equal rank argue that the composition of the delegation is a manifestation of the common outlook and the equal standing of the members of the delegation. The practice is not uniform.

(5) There are also instances in practice where the right to act on behalf of a special mission is held to vest only in some of its members who possess a collective authority (for the head and certain members of the mission to act collectively on its behalf) or a subsidiary authority (for a member of a mission to act on its behalf if the head of the mission is unable to perform his functions or if he authorizes him to do so). The Commission considers that these are exceptional cases falling outside normal practice and are determined by the practice of the sending State. It considered that there was no need to include rules covering such cases in the body of the article.

(6) The Commission did not cover in article 7, paragraph 1, the problem of the limits of the authority given to special missions. That is a question governed by the general rules.

(7) *Deputy head of special mission.* In speaking of the composition of the special mission, it was said that sometimes a deputy head of mission was also appointed. The deputy's function is indicated by the fact that he is designated by the organ of the sending State which also appointed the head of the special mission, and that as

a general rule the deputy head (who in practice is often called the vice-chairman of the delegation) acts without special appointment as head of the special mission whenever and wherever the head of mission is absent, unable to carry out his functions or recalled (in the last case, until the appointment of a new head has been notified to the other party). From the international standpoint, the rank of the deputy head in the special mission is considered to be next below that of the head of the mission. However, the deputy head does not take precedence of the members of the missions of other States with which his delegation enters into contact. His status as deputy head is effective only when he acts as head. The position of the deputy head of a special mission is referred to in article 7, paragraph 2.

(8) From the technical standpoint, a member of the special mission whom the head of the mission himself has designated as his deputy (i.e., the administrator of the mission) is not in practice regarded as the deputy head. The Commission did not, however, differentiate between these two classes of deputy head; it regarded them both as having the same status.

(9) *Chargé d'affaires ad interim of a special mission.* Very frequently the special mission arrives without its head or deputy head, that is to say, before them, since contact must be established and affairs conducted before their arrival. There may also be occasions when both its head and deputy head are absent during the course of its activities. In this case, a member of the mission provisionally assumes the duties of head of mission, acting on behalf of the head if the latter has so provided. The International Law Commission did not study this problem in 1960 and did not suggest that the rules of diplomatic law relating to *chargés d'affaires ad interim* should apply, in this connexion, to special missions.¹⁵⁹

(10) When a member of the mission is designated as *chargé d'affaires ad interim*, the rule in practice is for the appointment of the person to be entrusted with this function to be notified by the regular diplomatic mission of the sending State. This often occurs if the head of the mission is recalled "tacitly", if he leaves his post suddenly (as frequently happens when he returns to his country to get new instructions and remains there for some time) or if the mission arrives at its destination without its head and without his having given authorization in writing to the presumptive *chargé d'affaires*. The Commission regarded the position of such a person as comparable to that of an acting deputy and it provided that authority for him to carry out his duties could be given either by the sending State or by the head of the special mission.

(11) In the case of special missions dealing with a complex task, certain members of the special mission or of its staff are in practice given power to carry out specific acts on behalf of the special mission. The Commission considered this practice to be important from the legal point of view and it included a rule on the subject in the text (paragraph 2, *in fine*).

¹⁵⁸ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 116 and 179-180.

¹⁵⁹ *Ibid.*, pp. 110 and 179-180. Mr. Sandström, the Special Rapporteur, was even of the opinion that this had no bearing on special missions.

(12) The Commission takes the view that the rules applicable to the head of the special mission also apply to a single delegate, described in the text of article 6 as the "representative".

New suggestions by Governments

(13) In its comments the Yugoslav Government says it considers that, 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 2.¹⁶⁰

(14) 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.¹⁶¹

(15) 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".¹⁶² 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 norm. 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 on article 7. The Special Rapporteur therefore recommends that the proposal of the Belgian Government should be disregarded.

(16) 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.¹⁶³

(17) 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.

(18) 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 7.¹⁶⁴ 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.

(19) The Government of Pakistan made the following suggestions:

Ordinarily, only the Head of Specialized Missions is authorized by virtue of his functions to act on behalf of the Special Missions whereas paragraph 2 of Article VII seems to provide for the possibility of authorizing some other person as well. This could be spelt out more precisely by the addition of paragraph 3 to Article VII in the following terms:

"3. Any member of the Special Mission may be authorized to perform particular acts on behalf of the Mission."¹⁶⁵

The Special Rapporteur is convinced that the suggested amendment would not confuse the meaning of the present text of article 7. However, the idea is already included in paragraph 2 and, consequently, although he endorses this idea, the Special Rapporteur considers it unnecessary to adopt the amendment.

(20) Accordingly, the Special Rapporteur considers that:

- (a) There is no need to amend the text of article 7;
- (b) The idea expressed by the Pakistan and Yugoslav Governments should be stated in the commentary;
- (c) As far as drafting is concerned, the words "A member of the mission" at the beginning of paragraph 2 should be replaced, in accordance with the definitions proposed in the introductory article, by the words "A member of a special mission or of its staff";
- (d) The term "normally", which is used twice in this article, should be retained, since it indicates that this provision establishes a presumption which may be rebutted by an agreement between the parties; this means that the entire article is of an optional nature.

Article 8.¹⁶⁶ Notification

1. The sending State shall notify the receiving State of:
 - (a) The composition of the special mission and of its staff, and any subsequent changes;
 - (b) The arrival and final departure of such persons and the termination of their functions with the mission;
 - (c) The arrival and final departure of any person accompanying the head or a member of the mission or a member of its staff;
 - (d) The engagement and discharge of persons residing in the receiving State as members of the mission or as

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ Introduced as article 7 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

¹⁶⁰ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

private servants of the head or of a member of the mission's staff.

2. If the special mission has already commenced its functions, the notifications referred to in the preceding paragraph may be communicated by the head of the special mission or by a member of the mission or of its staff designated by the head of the special mission.

Commentary

(1) Article 8 is modelled on article 10, paragraph 1, of the Vienna Convention on Diplomatic Relations, with the changes required by the special features of the institution of special missions.

(2) In the case of special missions, too, the question arises to what extent the sending State is obliged to notify the composition of the special mission and the arrival and departure of its head, members and staff. As early as 1960, the International Law Commission adopted the position that in this respect the general rules on notification relating to permanent diplomatic missions are valid for special missions.¹⁶⁷

(3) In practice, however, the notification is not identical with that effected in the case of permanent diplomatic missions. In the first place, notification of the composition of a special mission usually takes place in two stages. The first is the preliminary notice, i.e., an announcement of arrival. This preliminary notice of the composition of the special mission should contain brief information concerning the persons arriving in the special mission and should be remitted in good time, so that the competent authorities of the receiving State (and the persons who, on its behalf, will maintain contact) are kept informed. The preliminary notice may in practice be remitted to the Ministry of Foreign Affairs of the receiving State or to its permanent diplomatic mission in the sending State. The second stage is the regular notification given through the diplomatic channel, i.e., through the permanent mission in the receiving State (in practice, the special mission itself gives this notification directly only if the sending State has no permanent mission in the receiving State and there is no mission there of a third State to which the sending State has entrusted the protection of its interests). The Commission has not indicated these two stages of notification in the text, but has merely laid down the duty of the sending State to give the notification.

(4) Consequently, there are in practice certain special rules for notification of the composition and arrival of a special mission. They arise from the need to inform the receiving State in a manner different from that used for permanent missions. The International Law Commission did not refer to this fact in 1960.

(5) On the other hand, it is not customary to give separate notifications of the special mission's departure. It is presumed that the mission will leave the receiving State after its task has been fulfilled. However, it is customary for the head and members of the special mission to inform the representatives of the receiving State with whom they are in contact verbally, either during

the course of their work or at the end of their mission, of the date and hour of their departure and the means of transport they propose to use. The Commission took the view that even in this case a regular notification should be given.

(6) A separate question is whether a head or member of a special mission who remains in the territory of the receiving State after his official mission has ended but while his visa is still valid should give notice of his extended stay. Opinion is divided on this question, and the answer depends on the receiving State's general laws governing aliens. If an extended stay of this kind does occur, however, it is an open question at what point of time the official stay becomes a private stay. Courtesy demands that the situation should be treated with some degree of tolerance. The Commission considers it unnecessary to include provisions governing this case in the text of the article.

(7) The right to recruit auxiliary staff for special missions locally is in practice limited to the recruitment of auxiliary staff without diplomatic rank or expert status, persons performing strictly technical functions (e.g., chauffeurs), and service staff. The rule observed in practice is that the receiving State should ensure the availability of such services, for the performance of the functions of the special mission is often dependent on them. In 1960 the International Law Commission inclined to the view that the availability of these services to special missions should be regarded as part of their general privileges. However, the receiving State is entitled to information on any local recruitment by special missions and, in the Commission's view, the latter must see that the authorities of the receiving State are kept regularly informed concerning the engagement and discharge of such staff, although all engagements of this kind, like the special mission itself, are of limited duration.

(8) In order to make notification easy and flexible in practice, the special mission, as soon as it begins to discharge its functions, effects notification direct, and not necessarily through the permanent diplomatic mission. The Commission has found this a sensible custom and has included a rule to that effect in the text of article 8, paragraph 2.

New suggestions by Governments

(9) 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 on that article, such as that given by the Special Rapporteur in paragraph 14 of the Summary Record of the 762nd meeting of the ILC.¹⁶⁸

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

(11) 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*),

¹⁶⁷ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 113 and 179-180.

¹⁶⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

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".¹⁶⁹

(12) 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.

(13) 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..."¹⁷⁰

(14) 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 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.

(15) 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.¹⁷¹

(16) 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.

(17) Accordingly, the Special Rapporteur considers that:

(a) There is no need to amend the text of article 8;

(b) The comments of the Israel and Yugoslav Governments should be included in the commentary, and the observations of the Belgian Government should be mentioned in a special paragraph in the commentary with the explanation that the Commission could not adopt them for the reasons stated above;

(c) In the light of the definitions contained in the proposed introductory article, some expressions in the text should be amended for drafting reasons: (1) in paragraph 1 (a), the words "of the special mission and of its staff" should be replaced by the expression "of the members and staff of the special mission"; (2) in paragraph 1 (b), the words "*des membres de la mission et du personnel*" in the French text should be replaced by the words "*des membres et du personnel de la mission spéciale*"; (3) in paragraph 1 (c) the words "the head or a member of the mission or a member of its staff" should be replaced by the expression "a member of the special mission or of its staff"; and in paragraph 1 (d), the words "as members of the mission or as private servants of the head or of a member of the mission or of a member of the mission's staff" should be replaced by the words "as members of the special mission or of its staff or as persons employed in the private services of the members or staff of the special mission";

(d) This article should include a new additional paragraph 3, which would read as follows:

The question of notification may be regulated differently or in more detail by agreement between the sending State and the receiving State.

It is the Special Rapporteur's view, however, that in the absence of such an arrangement, this provision would be considered as regularly compulsory, since the question of notification has often given rise to disputes in practice and is a sensitive matter involving the security of the receiving State.

Article 9.¹⁷² — General rules concerning precedence

1. Except as otherwise agreed, where two or more special missions meet in order to carry out a common task, precedence among the heads of the special missions

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² Introduced as article 8 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting

shall be determined by alphabetical order of the names of the States.

2. The precedence of the members and the staff of the special mission shall be notified to the appropriate authority of the receiving State.

Commentary

(1) The question of precedence among the heads of special missions arises only when several special missions meet, or when two missions meet on the territory of a third State. In practice, the rules of precedence among the heads of permanent diplomatic missions are not applied. The Commission did not consider that precedence among the heads of special missions should be governed by the provisions of the Vienna Convention, which are based on the presentation of credentials or on the date of arrival and on classes of heads of permanent missions — institutions irrelevant to special missions.

(2) The question of rank does not arise when a special mission meets with a delegation or organ of the receiving State. In practice, the rules of courtesy apply. The organ or delegation of the receiving State pays its compliments to the foreign special mission and the mission pays its respects to its hosts, but there is no question of precedence, properly so-called. The Commission has not dealt with this situation in the text of the articles, since it considers the rules of courtesy sufficient.

(3) The Commission believes that it would be wrong to include a rule that the order of precedence of heads of special missions should be determined by the diplomatic rank to which their titles would assign them under the general rules on classes of heads of permanent missions.

(4) Of particular significance is the fact that many heads of special missions have no diplomatic rank, and that heads of special missions are often personalities standing above all diplomatic rank. Some States make provision for such cases in their domestic law and in their practice, and give precedence to ministers who are members of the cabinet and to certain other high officials.

(5) The Commission wishes to stress that the rules of article 9 are not valid with respect to special missions having ceremonial or formal functions. This question is dealt with in article 10.

(6) The Commission considers that the rank of heads of special missions should be determined on the basis of the following considerations. Although in the case of *ad hoc* ceremonial diplomacy the heads of special missions are still divided into diplomatic classes (e.g., special ambassador, special envoy), the current practice is not to assign them any special diplomatic title. All heads of special missions represent their States and are equal among themselves in accordance with the principle of the equality of States.

(7) The International Law Commission did not take up this question in 1960. During the Commission's debates in 1960, however, Mr. Jiménez de Aréchaga expressed the view that the rules on classes of heads of missions

applied equally to special missions, and he did not restrict that conclusion to ceremonial missions.¹⁷³

(8) The practice developed in relations between States since the formation of the United Nations ignores the division of heads of special missions into classes according to their ranks, except in the case of ceremonial missions.

(9) There are two views concerning precedence among heads of special missions. According to the first, the question of rank does not arise with special missions. This follows from the legal rule laid down by article 3 of the Regulation of Vienna of 19 March 1815. This provides that diplomatic agents on special mission shall not by this fact be entitled to any superiority of rank. Genet¹⁷⁴ deduces from this rule that they have no special rank by virtue of their mission, although they do have diplomatic status. However, Satow¹⁷⁵ takes a different view. Although the heads of special missions are not ranked in the same order as the heads of the permanent diplomatic missions, there does exist an order by which their precedence can be established. This, says Satow, is an order *inter se*. It is based on their actual diplomatic rank; and where they perform identical functions, precedence among them is determined on the basis of the order of presentation of their credentials or full powers.

(10) In his 1960 proposal,¹⁷⁶ Mr. A. E. F. Sandström, Special Rapporteur of the International Law Commission, took the view that although, under the Regulation of Vienna, a special mission enjoys no superiority of rank, the heads of special missions, at least ceremonial missions, nevertheless rank among themselves according to the order of the presentation of their credentials. Yet while advancing this opinion in the preliminary part of his report, he limited himself in his operative proposal (alternative I, article 10, and alternative II, article 3) to inserting the negative provision that the head of a special mission should not, by such position only, be entitled to any superiority of rank.

(11) Mr. Sandström took as his starting point the idea that rank was defined by membership in the diplomatic service or by diplomatic category. He therefore made a distinction between diplomatic missions, missions regarded as being diplomatic, and technical missions, which were not of a diplomatic character.

(12) In the first place, the Commission, at its sixteenth session, held that it is not true that the person heading a special diplomatic mission of a political character will necessarily be a member of the diplomatic service and have diplomatic rank. Such missions may be headed by other persons, so that diplomatic rank is a very unreliable criterion. Why should a high official of the State (for example, a member of the Government) necessarily be ranked lower than a person bearing the title of ambassador? This would be incompatible with the current

¹⁷³ *Yearbook of the International Law Commission, 1960, vol. II, p. 116.*

¹⁷⁴ Raoul Genet, *Traité de diplomatie et de droit diplomatique*, Paris, 1931, vol. I, p. 86.

¹⁷⁵ Sir Ernest Satow, *A Guide to Diplomatic Practice*, fourth edition, London, 1957, p. 41.

¹⁷⁶ *Yearbook of the International Law Commission, 1960, vol. II, p. 109.*

functional conception of diplomacy. On the other hand, it is considered that it would be erroneous to classify heads of mission having diplomatic rank according to their titles (for example, ambassador and minister plenipotentiary). They are all heads of diplomatic missions and have the same authority to represent their sovereign States, which, under Article 2 of the United Nations Charter, enjoy the right to sovereign equality. It follows that precedence *inter se* cannot be determined on the basis of diplomatic rank, at least in so far as juridical treatment is concerned (this does not affect the matter of courtesy towards the head of the special mission).

(13) Secondly, the Commission discarded the idea that different principles apply to so-called technical missions. Such missions are today usually headed by a career diplomat, and the task of every technical mission includes some political and representative elements.

(14) Again, precedence can hardly be established according to the order of the presentation of credentials by the heads of special missions. At most meetings of special missions the presumption, consistent with the facts, is that they arrive simultaneously,¹⁷⁷ and the individual and ceremonial presentation of credentials is a distinct rarity. For this reason, the date of presentation is without significance in practice.

(15) Precedence among heads of special missions, limited as it is in its effect to their relations *inter se*, is important only in the case of a multilateral meeting or of contacts among two or three States, not counting the receiving State. In contacts between the special mission and the representatives of the receiving State alone, the question of precedence does not arise: as a matter of courtesy the host treats its guest with high consideration, and the latter is obliged to act in the same manner towards its host.

(16) The Commission considers that as a result, first, of the change which has taken place in the conception of the character of diplomacy, especially the abandonment of the theory of the exclusively representative character of diplomacy and the adoption of the functional theory,¹⁷⁸ and secondly, of the acceptance of the principle of the sovereign equality of States, the legal rules relating to precedence among heads of special missions have undergone a complete transformation. The principles of the Regulation of Vienna (1815) are no longer applicable. No general principle can be inferred, on the basis of analogy, from the rules of precedence governing permanent missions. For this reason, more and more use is being made of an automatic method of determining the precedence of heads of special missions, namely, the classification of delegates and delegations according to the alphabetical order of the names of the participating States. In view of the linguistic differences in the names of States, the custom is also to state the language in

which the classification will be made.¹⁷⁹ This is the only procedure which offers an order capable of replacing that based on rank, while at the same time ensuring the application of the rules on the sovereign equality of States.¹⁸⁰

(17) The International Law Commission did not go into the question of precedence within a special mission. It believes that each State must itself determine the internal order of precedence among the members of the special mission and that this is a matter of protocol only, the order of precedence being sent to the receiving State by the head of the special mission either direct or through the permanent diplomatic mission. This rule forms the subject of article 9, paragraph 2.

(18) The Commission also believes that there are no universal legal rules determining the order of precedence as between members of different special missions, or as between them and members of permanent diplomatic missions, or as between them and the administrative officials of the receiving State.

(19) It frequently happens that special missions meet in the territory of a third State which is not involved in their work. In this case it is important to the receiving State that the precedence of the heads of the special missions, or rather of the missions themselves, should be fixed, so that it does not, as host, run the risk of favouring one of them or of being guided by subjective considerations in determining their precedence.

(20) A brief comment must be made on the question of the use of the alphabetical order of names of States as a basis for determining the order of precedence of special missions. At the present time, the rule in the United Nations and in all the specialized agencies, in accordance with the principle of the sovereign equality of States, is to follow this method. While considering it to be the most correct one, the Commission concedes that the rule need not be strictly interpreted as requiring the use of the alphabetical order of the names of States in a specified language — English, for example. Some experts have drawn attention to the possibility of applying the same method but on the basis of the alphabetical order of names of States used in the official diplomatic list of the receiving State. The important thing is that the system applied should be objective and consistent with the principle of the sovereign equality of States. For this reason, the Commission adopted the principle of the alphabetical order of the names of States. The members of the Commission were divided on the question whether the order adopted should be that used by the United Nations or that used in the official diplomatic list of the receiving State.

¹⁷⁹ Mr. Sandström, too, used this method in dealing with the question of the participation of *ad hoc* diplomats in congresses and conferences (chap. II, art. 6).

¹⁸⁰ In order to bring the practice further into line with the principle of equality, it is now customary for lots to be drawn, the initial letter of the name of the State thus chosen indicating the beginning of the *ad hoc* alphabetical order. At United Nations meetings and meetings organized by the United Nations, lots are drawn at the opening of the session, to assign seats to the participating States for the duration of the session and whenever a roll-call vote is taken.

¹⁷⁷ See Mr. Jiménez de Aréchaga in *Yearbook of the International Law Commission*, 1960, vol. II, p. 116, para. 13.

¹⁷⁸ This cumulation of the functional and the representative character is confirmed by the fourth paragraph of the Preamble and by article 3 of the Vienna Convention on Diplomatic Relations.

(21) The Commission considers that everything stated in this article with regard to heads of special missions is also applicable to single representatives.

New suggestions by Governments

(22) 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".¹⁸¹

(23) 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.

(24) 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".¹⁸²

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

(26) 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".¹⁸³

(27) 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.

(28) 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.¹⁸⁴

(29) 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 a choice between 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.

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

Ad. 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.¹⁸⁵

(31) In principle, the Special Rapporteur endorses the proposal of the Austrian Government and suggests to the Commission that it should be co-ordinated with the proposals of the Belgian and Yugoslav Governments, set forth in paragraphs (22) and (28) of this commentary.

(32) The Netherlands Government made the following comment on articles 9 and 10:

The Netherlands Government believes that the whole matter of precedence had better be left to the protocol in force in the receiving State, as is done in article 10 for ceremonial missions. There is no need for an internationally applicable precedence regulation, except for multilateral conferences that are not convened by a receiving State. In fact, such conferences are outside the scope of the present articles. Therefore it is suggested that articles 9 and 10 be combined, leaving out paragraph 1 of article 9 and making article 10 applicable to all special missions.¹⁸⁶

(33) The Special Rapporteur cannot recommend that the Commission should adopt the Netherlands Government's idea, for it offers no assurance that there will be an international rule on the treatment of special missions; the Commission, moreover, has clearly decided that the modern special missions of today should not be confused with special missions of a ceremonial and formal character.

(34) Accordingly, the Special Rapporteur considers that:

(a) The only amendment that might be made in the text of paragraph 1 would be to determine more precisely the language or the use of the alphabetical order. (The Special Rapporteur thinks well of both the Belgian and the Yugoslav proposals and leaves it to the Commission to decide whether the adoption of these proposals is necessary and which is the most useful.) On the other hand, the Special Rapporteur does not recommend that articles 9 and 10 should be combined, as the Netherlands Government has suggested. The Special Rapporteur repeats that he is not convinced of the usefulness of the Belgian Government's proposal for the addition of a new paragraph in article 9;

(b) A more detailed explanation of the Belgian and Yugoslav proposals for a more precise determination of the language of the alphabetical order should be included in the commentary, regardless of whether or not these proposals are adopted;

(c) The commentary should mention the idea that modern special missions having substantive tasks should

¹⁸¹ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

not be associated with the traditional institution of special ceremonial and formal missions, and should note the suggestion of certain States that this idea should be taken into consideration;

(d) It is not necessary to amend the text of article 9 for drafting reasons;

(e) Whereas the provision contained in paragraph 1 of this article is of an optional nature, the provision in paragraph 2 represents an international usage which has become custom and is of a generally compulsory nature.

Article 10.¹⁸⁷ — Precedence among special ceremonial and formal missions

Precedence among two or more special missions which meet on a ceremonial or formal occasion shall be governed by the protocol in force in the receiving State.

Commentary

(1) The Vienna Convention on Diplomatic Relations confines itself to provisions concerning permanent diplomatic missions and does not take into account either special missions or diplomatic ceremonial and formal missions, which have continued to exist in practice even after the establishment of permanent resident diplomacy, and continue to exist to this day.

(2) The Commission observed that the rules governing special ceremonial and formal missions vary from State to State. The question arises whether a selection should be made among the different customs, or whether the rule universally observed in practice should be adopted, namely, that the receiving State is competent to settle the order of precedence among special missions meeting on its territory on the occasion of a ceremony or a formal manifestation. The Commission favoured the second proposal.

(3) The different customs practised include the following:

(a) On such occasions the representatives of States customarily bear the title of special ambassadors extraordinary. Even a regular accredited ambassador, when assigned to represent his country on a ceremonial occasion, is given the title of *ad hoc* ambassador. This is regarded as a point of international courtesy.

(b) In accordance with the established interpretation of article 3 of the Regulation of Vienna of 1815, the *prior tempore* rule is held to apply even to these ambassadors, who should take precedence in the order of the time of presentation of the letters of credence issued for the *ad hoc* occasion. In practice, however, it has proved almost impossible to implement this rule. The funeral of King George VI of Great Britain was a case in point. A number of special missions were unable, for lack of time, to present their letters of credence, or even copies of them, to the new Queen before the funeral ceremony. Moreover, several missions arrived in London simultaneously, so that the rule providing for the deter-

mination of precedence according to the order of arrival was also inapplicable. For this reason, it was maintained that it would be preferable to select another criterion, more objective and closer to the principle of the sovereign equality of States, while retaining the division of heads of special missions into classes.

(c) It is becoming an increasingly frequent practice to send special delegates of higher rank than ambassador to be present on ceremonial occasions. Some countries consider that to give them the title of *ad hoc* ambassador would be to lower their status, for it is increasingly recognized that Heads of Government and ministers rank above all officials, including ambassadors. In practice, the domestic laws of a number of countries give such persons absolute precedence over diplomats.

(d) However, persons who do not belong to the groups mentioned in sub-paragraph (a) above are also sent as special *ad hoc* ambassadors, but are not given diplomatic titles because they do not want them. Very often these are distinguished persons in their own right. In practice there has been some uncertainty as to the rules applicable to their situation. One school of thought opposes the idea that such persons also take precedence over *ad hoc* ambassadors; and there are some who agree with the arguments in favour of this viewpoint, which are based on the fact that, if the State sending an emissary of this kind wishes to ensure that both the head of the special mission and itself are given preference, it should appoint him *ad hoc* ambassador. Any loss of precedence is the fault of the sending State.

(e) In such cases, the diplomatic status of the head of the special mission is determined *ad hoc*, irrespective of what is called (in the French texts) the *rang diplomatique réel*. The title of *ad hoc* ambassador is very often given, for a particular occasion, either to persons who do not belong to the diplomatic career service or to heads of permanent missions who belong to the second class. This fact should be explicitly mentioned in the special letters of credence for ceremonial or formal occasions.

(f) The issuance of special letters of credence covering a specific function of this kind is a customary practice. They should be in good and due form, like those of permanent ambassadors, but they differ from the latter in their terms, since the mission's task is strictly limited to a particular ceremonial or formal function. The issuance of such letters of credence is regarded as an international courtesy, and that is why heads of permanent diplomatic missions are expected to have such special letters of credence.

(g) Great difficulties are caused by the uncertainty of the rules of law concerning the relative rank of the head of a special mission for a ceremonial and formal function and the head of the mission regularly accredited to the Government of the country in which the ceremonial occasion takes place. Under the protocol instructions of the Court of St. James's the heads of special missions have precedence, the heads of regularly accredited diplomatic missions occupying the rank immediately below them, unless they are themselves acting in both capacities on the specific occasion in question. This solution is manifestly correct and is dictated by the

¹⁸⁷ Introduced as article 9 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

very nature of the function, since otherwise it would be utterly pointless to send a special mission.

(h) The situation of the members of a special mission of a ceremonial or formal nature in cases where the members are designated as equals and are given collective letters of credence for the performance of the ceremonial or formal function in question is not precisely known. As stated in paragraph (4) of the commentary on article 7, practice in this matter is not uniform.

(4) Some members of the Commission requested that, despite the Commission's unanimous decision to accept the rule incorporated in article 10, the Special Rapporteur's original text should also be included in the present report for purposes of information.¹⁸⁸ This text is as follows:

1. Where two or more special missions meet on a formal or ceremonial occasion (for example, a marriage, christening, coronation, installation of Head of State, funeral, etc.), precedence among the heads of missions shall be determined in accordance with the class to which each head of mission belongs by virtue of his diplomatic title, and within each class in accordance with the alphabetical order of the names of the States.

2. Heads of State, members of ruling families, chairmen of councils and ministers who are members of the Government represent special classes having precedence over the class of ambassadors.

3. Heads of special missions who do not possess the diplomatic rank of ambassador or minister plenipotentiary and who do not belong to the groups specified in paragraph 2 of this article shall constitute, irrespective of the functions they perform, a special group next following that of heads of special missions having the rank of minister plenipotentiary.

4. The diplomatic title used in determining precedence for the purposes of this article, except in the case of persons mentioned in paragraph 2, shall be that indicated in the credentials issued for the performance of the ceremonial or protocol function.

5. Heads of regular diplomatic missions shall not be considered to be heads of special missions for ceremonial or formal functions unless they have presented credentials issued specially for this particular purpose.

6. The rank of the staff of special ceremonial and formal missions shall be determined in accordance with the rank of the heads of mission.

7. When they appear at the ceremony to which their formal or ceremonial function relates, heads of special missions shall take precedence over the heads of regular diplomatic missions.

This text was communicated to the Commission, but the Commission did not consider it in detail because it had decided in principle to regulate the matter by reference rather than by substantive provisions.

New suggestions by Governments

(5) 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.¹⁸⁹

(6) 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.

(7) 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.

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

(9) The Netherlands Government's suggestion concerning the combining of articles 9 and 10 has already been set out above in the discussion of article 9.

(10) The Special Rapporteur holds the view that the proposals by the Governments of Israel and the Netherlands for the combining of articles 9 and 10 are unacceptable because of the fundamental and essential difference between modern special missions and ceremonial and formal missions, which has been discussed at greater length in connexion with article 9.

(11) Accordingly, the Special Rapporteur considers that:

(a) There is no need to amend the text of article 10;

(b) The difference between substantive special missions and special ceremonial and formal missions should be pointed out again in a special paragraph in the commentary;

(c) There is no need to amend the text of this article for drafting reasons;

(d) The provision contained in article 10 is of a generally compulsory character, inasmuch as it obliges the receiving State to apply to all special ceremonial and formal missions without distinction the protocol in force in the receiving State, but it is not concerned with the internal substance of that protocol.

Article 11.¹⁹⁰ — Commencement of the functions of a special mission

The functions of a special mission shall commence as soon as that mission enters into official contact with the appropriate organs of the receiving State. The commencement of its functions shall not depend upon presentation by the regular diplomatic mission or upon the submission of letters of credence or full powers.

Commentary

(1) The Vienna Convention on Diplomatic Relations contains no express provisions on the commencement of the functions of permanent diplomatic missions.

¹⁸⁹ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹⁹⁰ Introduced as article 10 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 774th meeting.

¹⁸⁸ Document A/CN.4/166, article 9.

(2) The International Law Commission takes the view that, where the commencement of the functions of a special mission is concerned, the rules applicable to permanent diplomatic missions do not apply.¹⁹¹

(3) In practice, this matter is governed by a special usage. The functions of the special mission which have been the subject of prior notice and acknowledgement begin when the special mission arrives in the territory of the receiving State, unless it arrives prematurely — a situation which depends on the circumstances and on the notion of what constitutes a reasonable interval of time. If there has been no prior notice, the functions are deemed to begin when contact is made with the organs of the receiving State. A further point is that, in the case of special missions, the commencement of the function need not be deemed to take place only when copies of the letters of credence or full powers are presented, although this is taken into account in the case of *ad hoc* ambassadors. Heads of special missions in general, even in cases where they must have full powers, do not now present either the original or a copy in advance, but only when the time comes to prove their authority to assume obligations on behalf of the sending State. Thus there is a legal difference with respect to determining when the function commences, as compared with the case of the heads of permanent missions.

(4) Almost all the instructions by States concerning the exercise of functions related to diplomatic protocol are found to contain more rules on the procedure for welcoming a ceremonial *ad hoc* mission when it arrives and escorting it when it leaves than on its reception, which consists of an audience with the Minister for Foreign Affairs to introduce the mission, or the presentation of letters of introduction or copies of credentials. There are even fewer rules on audiences by Heads of State for the presentation of letters of credence. Even if the head of a special mission arrives with special letters of credence addressed to the Head of State, the practice is to present them more expeditiously — i.e., through the Chief of Protocol — and the functions of the mission commence immediately. An example of this custom is the case of an *ad hoc* mission sent to present the condolences of its own Head of State to the Head of State of another country upon the death of his predecessor or of a member of the royal family. In such a case, formal receptions are hardly in order; besides, there is usually little time. Nevertheless, missions of special importance are treated according to the general rules of protocol, both on arrival and when they leave.

(5) Contacts between special missions appointed to conduct political negotiations also generally take place immediately following the so-called protocol visit to the competent official with whom the negotiations are to be held.

(6) In the case of special missions appointed to conduct technical negotiations, it is not the practice to have either a ceremonial reception or a ceremonial presentation of credentials. It is customary, however, to make an

introductory visit or, if the parties already know each other, a visit for the purpose of establishing contact. There is a growing tendency to abandon the custom whereby the head of the special mission is accompanied on his first visit by the head of the diplomatic mission permanently accredited to the receiving State, or by some member of that mission, if the head of the special mission or his opposite number who is to receive him is of lower rank than the head of the permanent mission. In practice, however, this formality of introduction is becoming obsolete, and the Commission does not deem it essential.

(7) It should be noted that there is an essential difference between the reception of the head of a special mission and the presentation of his letters of credence or full powers on the one hand and the reception of the heads of permanent missions and the presentation of their credentials on the other. This difference relates, first of all, to the person from whom the full powers emanate, in cases other than that of a special ambassador or an *ad hoc* ceremonial mission. A special ambassador and the head of an *ad hoc* ceremonial mission receive their letters of credence from the Head of State, as do the regular heads of diplomatic missions of the first and second classes, and they are addressed to the Head of the State to which the persons concerned are being sent. This procedure is not necessarily followed in the case of other special missions. In accordance with a recently established custom, and by analogy to the rules concerning the regularity of credentials in the United Nations, full powers are issued either by the Head of State or of Government or by the Minister of Foreign Affairs, regardless of the rank of the delegate or of the head of the special mission.

(8) Again, this difference is seen in the fact that the letters of credence of the head of a permanent diplomatic mission are always in his name, while this is not so in the case of special missions, where even for a ceremonial mission, the letters of credence may be collective, in the sense that not only the head of the mission, but the other members also are appointed to exercise certain functions (a situation which could not occur in the case of regular missions, where there is no collective accreditation). Full powers may be either individual or collective, or possibly supplementary (granting authority only to the head of the mission, or stipulating that declarations on behalf of the State will be made by the head of the mission and by certain members or by one or more persons named in the full powers, irrespective of their position in the mission). It has recently become increasingly common to provide special missions with supplementary collective full powers for the head of the mission or a particular member. This is a practical solution (in case the head of the mission should be unable to be present throughout the negotiations).

(9) In practice, the members and staff of a special mission are deemed to commence their function at the same time as the head of the mission, provided that they arrived together when the mission began its activities. If they arrived later, their function is deemed to commence on the day of their arrival, duly notified to the receiving State.

¹⁹¹ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 116 and 180.

(10) It is becoming increasingly rare to accord a formal welcome to special missions when they arrive at their destination, i.e. at the place where the negotiations are to be held. In the case of important political missions, however, the rules concerning reception are strictly observed but this is of significance only from the standpoint of formal courtesy and has no legal effect.

(11) Members of permanent diplomatic missions who become members of a special mission are considered, despite their work with the special mission, to retain their capacity as permanent diplomats; consequently, the question of the commencement of their functions in the special mission is of secondary importance.

(12) In practice States complain of discrimination by the receiving State in the reception of special missions and the way in which they are permitted to begin to function even among special missions of the same character. The Commission believes that any such discrimination is contrary to the general principles governing international relations. It believes that the principle of non-discrimination should operate in this case too; and it requests Governments to advise it whether an appropriate rule should be included in the article. The reason why the Commission has refrained from drafting a provision on this subject is that very often differences in treatment are due to the varying degree of cordiality of relations between States.

New suggestions by Governments

(13) 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.¹⁹²

(14) 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.

(15) 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".¹⁹³

(16) 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 against 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, is as follows:

Article 11. The United Kingdom Government considers, 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.¹⁹⁴

(17) 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 (page 38).

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

¹⁹² See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

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.¹⁹⁵

(18) 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.

(19) In its written comments, the Netherlands Government expressed the following opinion:

With reference to the question in paragraph (12) of the Commission's commentary: it is doubtful whether there is any need for a clause on non-discrimination between special missions.¹⁹⁸

(20) While summarizing all these opinions, the Special Rapporteur considers that the text of paragraph (12) of the commentary should be retained in its present form and that a formal clause on non-discrimination in the reception of special missions should not be included; he leaves it to the Commission to take a decision on the Belgian Government's proposal, although he personally considers that any provision of this kind would complicate the Commission's idea that the commencement of the functions of special missions should be as simple as possible.

(21) Accordingly, the Special Rapporteur considers that:

- (a) The text of this article should not be amended;
- (b) The provisions relating to complaints on grounds of discrimination in paragraph (12) of the commentary might be expanded;
- (c) There is no need to amend the text for drafting reasons;
- (d) This provision should be considered as generally compulsory.

Article 12.¹⁹⁷ — End of the functions of a special mission

The functions of a special mission shall come to an end, *inter alia*, upon:

- (a) The expiry of the duration assigned for the special mission;
- (b) The completion of the task of the special mission;
- (c) Notification of the recall of the special mission by the sending State;
- (d) Notification by the receiving State that it considers the mission terminated.

Commentary

(1) The Vienna Convention on Diplomatic Relations contains no rules dealing directly with the end of the

functions of permanent diplomatic missions. Its treatment of the subject is limited to one provision on the end of the function of a diplomatic agent (article 43) and the provision concerning the case of the breaking off of diplomatic relations or the recall of the mission (article 45).

(2) In its deliberations in 1960,¹⁹⁸ the International Law Commission accepted the view that a special mission came to an end for the same reasons as those terminating the functions of diplomatic agents belonging to permanent missions. However, the accomplishment of a special mission's task was added, as a special reason for the termination of its functions.¹⁹⁹

(3) The Commission accepted the view of the majority of authors that the task of a special mission sent for a ceremony or for a formal occasion should be regarded as accomplished when the ceremony or occasion is over.

(4) In the first proposal he submitted in 1960 as the Commission's Special Rapporteur, Mr. Sandström expressed the opinion that it was desirable also to consider the functions of the special mission ended when the transactions which had been its aim were interrupted. A resumption of negotiations would then be regarded as the commencement of the functions of another special mission. Some authors adopt the same view and consider that in such cases it is unnecessary for the special mission to be formally recalled. The Commission regarded as well-founded the argument that the functions of a special mission are ended, to all practical purposes, by the interruption or suspension *sine die* of negotiations or other deliberations. It considered it preferable, however, to leave it to the sending and receiving States to decide whether they deemed it necessary in such cases to bring the mission to an end by application of the provisions of article 12 (c) and (d).

New suggestions by Governments

(5) 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.²⁰⁰ 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.

(6) 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.²⁰¹ The Special Rapporteur

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ Introduced as article 11 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 769th meeting. Commentary adopted at the 774th meeting.

¹⁹⁸ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 179-180.

¹⁹⁹ This addition was proposed by Mr. Jiménez de Aréchaga; *ibid.*, p. 115.

²⁰⁰ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁰¹ *Ibid.*

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.

(7) The Belgian Government considers that the provision in article 44, paragraph 2, of the Commission's draft should also be included in article 12.²⁰² 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.

(8) 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 on 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.²⁰³

(9) 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.

(10) 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 44.²⁰⁴ The Special Rapporteur considers that article 12 is appropriately placed and should stay where it is.

(11) Accordingly, the Special Rapporteur considers that:

(a) An amendment to the text of article 12 does not seem to be necessary; however, the Special Rapporteur leaves open the question whether in the French text it is preferable to use the term "*rappel*" in place of the term "*révocation*". After mature reflection, the Commission decided that "*révocation*" was a more appropriate word than "*rappel*" to designate the cessation of the existence

of special missions, since the latter term often denoted only a provisional recall.

The Special Rapporteur also considers that the severance of diplomatic relations should not be included in this article, since this question has been dealt with in article 44, paragraph 2, but that it might be useful to refer to that provision in the commentary on article 12.

The Special Rapporteur reiterates his view that a provision on the *de facto* interruption of negotiations without notification should not be included in paragraphs (c) and (d) of the article, since this question has been dealt with in paragraph (4) of the commentary.

(b) An addition to the commentary should relate the provisions of this article to those of draft article 44, paragraph 2;

(c) It is not necessary to amend the text for drafting reasons;

(d) This provision is of a general character and is generally compulsory, but in paragraphs (c) and (d) the parties are given ample freedom.

Article 13.²⁰⁵ — *Seat of the special mission*

1. In the absence of prior agreement, a special mission shall have its seat at the place proposed by the receiving State and approved by the sending State.

2. If the special mission's tasks involve travel or are performed by different sections or groups, the special mission may have more than one seat.

Commentary

(1) The provision of article 13 is not identical to that contained in the Vienna Convention on Diplomatic Relations (article 12). In the first place, permanent missions must have their seats in the same locality as the seat of the Government. The permanent mission is attached to the capital of the State to which it is accredited, whereas the special mission is usually sent to the locality in which it is to carry out its task. Only in exceptional cases does a permanent mission set up offices in another locality, whereas it frequently occurs that, for the performance of its task, a special mission has to move from place to place and its functions have to be carried out simultaneously by a number of groups or sections. Each group or section must have its own seat.

(2) Very little has been written on this question, and in 1960 the Commission did not consider it necessary to deal with it at length. Its basic thought was that the rules applicable to permanent missions in this connexion were not relevant to special missions and that no special rules on the subject were needed. Some members of the Commission did not entirely agree, however, because the absence of rules on the subject might encourage special missions to claim the right to

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ Introduced as article 12 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text discussed and adopted at the 770th meeting. Commentary adopted at the 774th meeting.

choose their seat at will and to "open offices in any part of the territory of the receiving State".²⁰⁶

(3) In practice, special missions normally remain at the place designated by mutual agreement, which, in most cases, is not formally established by the sending State and the receiving State. Under that agreement the special mission generally establishes its offices near the locality where its functions are to be performed. If the place in question is the capital city of the receiving State and there are regular diplomatic relations between the two States, the official offices of the special mission are usually on the premises of the sending State's regular diplomatic mission, which (unless otherwise indicated) is its official address for communication purposes. Even in this case, however, the special mission may have a seat other than the embassy premises.

(4) It is very rare, in practice, for the seat of a special mission not to be chosen by prior agreement. In the exceptional case where the special mission's seat is not established in advance by agreement between the States concerned, the practice is that the receiving State proposes a suitable locality for the special mission's seat, chosen in the light of all the circumstances affecting the mission's efficient functioning. Opinion is divided on whether the sending State is required to accept the place chosen by the receiving State. It has been held that such a requirement would conflict with the principle of the United Nations Charter concerning the sovereign equality of States if the receiving State were to impose the choice of the seat. The Commission has suggested a compromise, namely, that the receiving State should have the right to propose the locality, but that in order to become effective, that choice should be accepted by the sending State. That solution would have certain shortcomings in cases where the proposal was not accepted. The Commission has left the question open.

(5) The Commission did not go into the details of rules to determine the difference between the main seat and other seats where the special mission's task makes it necessary for it to have more than one seat. Usage varies in practice. One solution proposed to the Commission was that the main seat should be in the locality in which the seat of the Ministry of Foreign Affairs of the receiving State is situated, or in some other locality chosen by mutual agreement, and that the other seats should be established with a view to facilitating the work of the sections or teams. However, the Commission preferred to leave this question to be settled by agreement of the parties.

New suggestions by Governments

(6) 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.²⁰⁷

²⁰⁶ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 116 and 179-180.

²⁰⁷ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

(7) 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.

(8) 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.²⁰⁸

(9) The Special Rapporteur proposes that this point, being a matter of drafting, should be considered by the Drafting Committee, though he considers that the expression "in the absence of prior agreement" is here correctly used.

In paragraph (4) of the commentary on article 13, the Commission suggested a compromise, namely, that the receiving State should have the right to propose the locality, but that, in order to become effective, that choice should be accepted by the sending State. 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.²⁰⁹

(10) 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.

(11) The comments of the Netherlands Government are as follows:

The Netherlands Government believes that cases in which no prior agreement is sought and reached as to the location of a special mission's seat are less rare in practice than the International Law Commission states in paragraph (4) of its commentary. It is not at all customary to consult the receiving State in advance on the matter of the location of a special mission's seat, nor for the receiving State to make or await suggestions on the subject, particularly when the special mission has duties primarily of a political nature that can be discharged within a relatively short period (varying from a few hours to a few days), which is very often the case. It is more customary for this kind of special mission to be housed by the permanent mission of the sending State or to find accommodation themselves, in or in the immediate vicinity of the locality of the seat of Government of the receiving

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

State. In such cases the special mission's address is either care of the permanent mission or an address given beforehand by or on behalf of the sending State to the receiving State, whichever the sending State opts for. As a rule the receiving State will raise no objections against the choice of seat, although it is entitled to do so in exceptional cases.

Even in countries where in these days the movement of foreigners in general and of foreign diplomats in particular is still severely restricted, the receiving State need not necessarily interfere in matters concerning the location of the seat, provided a locality is chosen near that of the Government.

The Netherlands Government proposes that article 13, paragraph 1, be amended to read:

"1. In the absence of prior agreement, a special mission shall have its seat at the place chosen by the sending State, provided the receiving State does not object."²¹⁰

(12) The Special Rapporteur considers the text proposed by the Netherlands Government reads more smoothly than the Commission's paragraph 1. Nevertheless, the Commission, considering that such a text would not offer sufficient security to the Government of the receiving State, did not adopt that wording when it prepared the draft articles. The Commission might reconsider this question.

(13) Accordingly, the Special Rapporteur considers that:

(a) The question of the wording of article 13, paragraph 1, has been raised; the Commission must decide to adopt one of two solutions — the existing text or the wording proposed by the Netherlands Government;

(b) The amendment of the commentary will depend on whether or not the Netherlands Government's proposal is adopted; if it is adopted, a new paragraph 6 would be added to the commentary;

(c) It is not necessary to amend the text for drafting reasons;

(d) The very delicate question dealt with in this provision should be governed by a generally compulsory rule which is flexible only to the extent that it permits a prior agreement between the receiving State and the sending State.

Article 14.²¹¹ — Nationality of the head and the members of the special mission and of members of its staff

1. The head and members of a special mission and the members of its staff should in principle be of the nationality of the sending State.

2. Nationals of the receiving State may not be appointed to a special mission except with the consent of that State, which may be withdrawn at any time.

3. The receiving State may reserve the right provided for in paragraph 2 with regard to the nationals of a third State who are not also nationals of the sending State.

²¹⁰ *Ibid.*

²¹¹ Introduced as article 13 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text discussed and adopted at the 770th meeting. Commentary adopted at the 774th meeting.

Commentary

(1) Article 14 corresponds to article 8 of the Vienna Convention on Diplomatic Relations.

(2) In 1960 the International Law Commission did not consider it necessary to express an opinion on the question whether the rules concerning the nationality of diplomatic agents of permanent missions should also apply to special missions. It even formulated the rule that the relevant article of its 1958 draft — article 7 — did not apply directly to special missions.²¹²

(3) The relevant literature, on the other hand, does not consider it impossible for nationals of a country to be admitted by that country as members of special missions, but stresses that the problem has been dealt with differently by various countries at various times.²¹³

(4) In the Commission's view, there is no reason why nationals of the receiving State should not be employed as *ad hoc* diplomats of another State, but for that purpose, the consent of the receiving State has to be obtained.

(5) Apart from the question whether a national of the receiving State can perform the functions of *ad hoc* diplomat of another State, the problem arises whether an *ad hoc* diplomat must possess the nationality of the State on whose behalf he carries out his mission. Here again, the International Law Commission expressed no opinion in 1960. Recent practice shows that nationals of third States, and even stateless persons, may act as *ad hoc* diplomats of a State, although some members of the Commission held it to be undesirable that they should do so. Practical reasons sometimes make it necessary to adopt this expedient, and in practice it is for the receiving State alone to decide whether or not such persons should be recognized as *ad hoc* diplomats.

(6) The Commission has not specifically referred in the text to the possibility that the head of a special mission or one of its members or staff might have dual nationality. It believes that, in the case of a person who also possesses the nationality of the receiving State, that State has the right, in accordance with the existing rules on nationality in international law and with the practice of some countries, to consider such a person on the basis of the characterization theory, exclusively as one of its own nationals. In most States, the idea still prevails that nationality of the receiving State excludes any other nationality, and the argument that effective nationality excludes nominal nationality is not accepted in this case. The case of a person possessing more than one foreign nationality is juridically irrelevant, since it would be covered by paragraph 3 of this article.

(7) The Commission has also not considered whether persons possessing refugee status who are not natives of the receiving State can be employed, without the special approval of the receiving State, as heads or members of special missions or of their staffs.

(8) As regards nationals of the receiving State engaged locally by the special mission as auxiliary staff, and persons

²¹² *Yearbook of the International Law Commission, 1960, vol. II, pp. 179-180.*

²¹³ Sir Ernest Satow, *A Guide to Diplomatic Practice*, 4th edition, London, 1957, pp. 138-141.

having a permanent domicile in its territory, the Special Rapporteur believes that they should not be subject to the provisions of this article, but rather to the régime applicable in this respect under the domestic law of the receiving State. The Commission did not deem it necessary to adopt a special rule on the subject.

(9) Nor did the Commission express any views on the question whether, in this respect, aliens and stateless persons having a permanent domicile in the territory of the receiving State should be treated in the same way as nationals of that State.

New suggestions by Governments

(10) 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.²¹⁴

(11) 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.

(12) 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.²¹⁵

(13) 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.

(14) Accordingly, the Special Rapporteur considers that:

(a) The present text should be adhered to, and the Swedish Government's proposal for the deletion of this article and for the elimination of the restrictions concerning the nationality of the members and staff of special missions should not be adopted. This article is very flexibly worded and does not include any categorical rule; it only ensures the receiving State that the special mission sent to it will not include its own nationals or nationals of third States against its wish;

(b) The opinion of the Swedish Government should be clearly stated in the commentary for the information of other Member States;

(c) To improve the drafting, in paragraph 1 the words "The head and members of a special mission and the

members of its staff" should be replaced, in accordance with the spirit of the introductory article, by the words "The members and staff of the special mission";

(d) This provision should be a generally compulsory rule, but in substance it gives the receiving State wide discretion.

Article 15.²¹⁶ — Right of special missions to use the flag and emblem of the sending State

A special mission shall have the right to display the flag and emblem of the sending State on the premises of the mission, on the residence of the head of the mission and on the means of transport of the mission.

Commentary

(1) Article 15 is modelled on article 20 of the Vienna Convention on Diplomatic Relations.

(2) The Commission reserves the right to decide at a later stage whether article 15 should be placed in the section of the draft dealing with general matters or in the special section concerning facilities, privileges and immunities.

(3) In 1960, the International Law Commission recognized the right of special missions to use the national flag of the sending State upon the same conditions as permanent diplomatic missions.²¹⁷ In practice, the conditions are not identical, but nevertheless there are some instances where this is possible. The Commission's Special Rapporteur, Mr. Sandström, cited the case of the flying of the flag on the motor vehicle of the head of a ceremonial mission. During the discussion which took place in the Commission in 1960, Mr. Jiménez de Aréchaga expressed the view that all special missions (and not only ceremonial missions) have the right to use such flags on the ceremonial occasions where their use would be particularly appropriate.²¹⁸

(4) Current practice should be based on both a wider and a narrower approach: wider, because this right is not restricted to ceremonial missions but depends on the general circumstances (e.g., special missions of a technical nature moving in a frontier zone and all special missions on certain formal occasions); and narrower, because this usage is now limited in fact to the most formal occasions or to circumstances which warrant it, in the judgement of the mission. In practice, however, such cases are held within reasonable limits, and the tendency is towards restriction.

(5) All the rules applicable to the use of the national flag apply equally to the use of the national emblem, both in practice and in the opinion of the International Law Commission.

²¹⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²¹⁵ *Ibid.*

²¹⁶ Introduced as article 15 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text, numbered 14, discussed and adopted at the 770th meeting. Commentary adopted at the 774th meeting.

²¹⁷ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 108 and 180.

²¹⁸ *Ibid.*, p. 116.

(6) In practice, some receiving States assert that they have the right to require that the flag of the sending State should be flown on all means of transport used by the special mission when it is travelling in a particular area. It is claimed in support of this requirement that measures to protect the special mission itself will be easier to carry out if the attention of the authorities of the receiving State is drawn by an external distinguishing mark, particularly in frontier security zones and military zones and in special circumstances. Some States, however, object to this practice on the grounds that it very often causes difficulties and exposes the special mission to discrimination. The Commission holds that this practice is not universally recognized and it has therefore not included a rule regarding it in the text of article 15.

New suggestions by Governments

(7) 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".²¹⁹

(8) 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.

(9) 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.²²⁰

(10) 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, the exercise of that right cannot be left entirely to the discretion of 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.

(11) The Netherlands Government's comments on article 15 are as follows:

Although in general there need not be any objection to using the flag in the manner laid down in this article, this article does not seem acceptable as a *jus cogens* rule in view of the diversity of the activities included under the term "special mission". The two

²¹⁹ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

²²⁰ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 843rd meeting, para. 39.*

States concerned should be free in each case to deviate from this article by mutual agreement. Therefore it is suggested that the article open with the words: "*Except as otherwise agreed*".

The words "*when used on official business*" should be added to the phrase "and on the means of transport of the mission", in conformity with article 29, paragraph 2, of the 1963 Vienna Convention on Consular Relations. If it appears desirable in a certain contingency to display flag and emblem on vehicles even when the vehicles are not in official use, some agreement can always be reached on the matter.²²¹

(12) The Special Rapporteur considers that both proposals of the Netherlands Government are very reasonable and should be adopted, but the adoption of these proposals would in a way be a disavowal of the rule that the special mission has *ex jure* the right to use the flag and emblems of its State if the sending State and the receiving State do not reach agreement on this matter. The Special Rapporteur points out these possible consequences to the Commission and asks it to take them into consideration.

(13) Accordingly, the Special Rapporteur considers that:

(a) The question of the amendment of the text by the adoption of the Netherlands Government's proposal is left open;

(b) If the proposal is adopted, a corresponding statement should be added to the commentary;

(c) It is not necessary to amend the text for drafting reasons;

(d) Even if the Netherlands Government's amendment permitting the question to be regulated by mutual agreement is adopted, the provision should be of a generally compulsory nature. It will be so *a fortiori* if this amendment is not adopted;

(e) As to whether this article should be included in part I or part II of the draft articles, there are arguments on both sides. The argument for retaining this article in part I is that it concerns a condition relating to the functioning of special missions, and the argument for its transfer to part II is that it concerns a privilege of special missions. The Special Rapporteur is rather inclined to adopt the first view.

Article 16.²²² — Activities of special missions in the territory of a third State

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

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

Commentary

(1) There is no corresponding rule in the Vienna Convention on Diplomatic Relations, but article 7 of the Vienna

²²¹ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

²²² Introduced as article 14 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text, numbered 15, discussed and adopted at the 770th meeting. Commentary adopted at the 774th meeting.

Convention on Consular Relations of 1963 provides that a consular post established in a particular State may not exercise consular functions in another State if the latter objects.

(2) Very often, special missions from different States meet and carry on their activities in the territory of a third State. This is a very ancient practice, particularly in the case of meetings between *ad hoc* missions or diplomats belonging to States which are in armed conflict. The International Law Commission did not take note of this circumstance in 1960; nor have writers paid much attention to it, but some of them do mention it, particularly where the contact takes place through the third State. Whether or not the third State engages in mediation or extends its good offices, courtesy undoubtedly requires that it should be informed, and it is entitled to object to such meetings in its territory.

(3) Thus, the States concerned are not entitled to make arbitrary use of the territory of a third State for meetings of their special missions, if this is contrary to the wishes of that State. However, if the third State has been duly informed and does not express any objection (its formal consent is not necessary), it has a duty to treat special missions sent in these circumstances with every consideration, to assure them the necessary conditions to carry on their activities, and to offer them every facility, while the parties concerned, for their part, must refrain from any action which might harm the interests of the third State in whose territory they carry on their activities.

(4) In practice, the prior approval of the third State is often simply a matter of taking note of the intention to send a special mission to its territory (such intention may even be notified orally). If the third State makes no objection to the notification and allows the special mission to arrive in its territory, approval is considered to have been given.

(5) The Commission regards as correct the practice of some States—for example, Switzerland during the war—in imposing certain conditions which must be observed by parties sending special missions. The duty to comply with these conditions is without prejudice to the question whether, objectively, the mission's activities are considered to be prejudicial to the interests of the third State in whose territory they are carried on.

(6) A question which arises in practice is whether the third State must not only behave correctly and impartially towards the States whose missions meet in its territory by according them equal treatment, but must also respect any declarations it may itself have made in giving its prior approval. Since such approval can be given implicitly, it must be considered that a third State which goes even further by taking note, without objection, of a request for permission to use its territory is, in accordance with the theory of unilateral juridical acts in international law, bound by the request of the parties concerned, unless it has made certain reservations.

(7) Intercourse between a special mission of one State and the permanent diplomatic mission of another State accredited to the receiving State must be accorded the same treatment as the intercourse and activities of special missions in the territory of the third State. Such contacts

are frequent, and they are referred to by legal writers as irregular means of diplomatic communication. They make direct intercourse possible between States which do not maintain mutual diplomatic relations, even when the States concerned are in armed conflict.

(8) The right of the third State, at any time and without being obliged to give any reason, to withdraw its hospitality from special missions in its territory and to prohibit them from engaging in any activity is recognized. In such cases, the sending States are obliged to recall their special missions immediately, and the missions themselves are required to cease their activities as soon as they learn that hospitality has been withdrawn. The exercise of this right by the third State does not mean that diplomatic relations with the States in question are broken off or that the head of the mission or its members are declared *persona non grata*. It merely means that the third State's consent to the activities of special missions in its territory has been revoked. The Commission held that article 16, paragraph 1, was sufficient and that the word "consent" means that the consent of the third State continues to be required throughout the period during which the activities of the special missions of the other States are taking place.

New suggestions by Governments

(9) 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 on 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."²²³

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

(11) 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".²²⁴

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

(13) The Belgian Government made a comment on this article and also proposes a new draft. Its comment reads:

²²³ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²²⁴ *Ibid.*

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 State.

"3. The third State may at any time and without having to explain its decision, withdraw its consent."²²⁵

(14) The Special Rapporteur's view is that the draft proposed by the Belgian Government is an oversimplification. He prefers the wording proposed by the Government of Israel and reproduced above.

(15) 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 in the text of the article itself.²²⁶ As he has already explained when discussing these proposals, the Special Rapporteur is in favour of this idea.

(16) Accordingly, the Special Rapporteur considers that:

(a) A new paragraph 3 in the terms proposed by the Government of Israel should be added to the text of article 16;

(b) If the proposal of the Government of Israel is adopted, the text of paragraph (8) of the commentary should be amended;

(c) It is not necessary to amend the text for drafting reasons. This applies also to the text of paragraph 3 proposed by the Government of Israel;

(d) The provisions of this article contain certain legal rules which should be compulsory in the practice of international relations.

PART II. FACILITIES, PRIVILEGES AND IMMUNITIES²²⁷

General considerations

314. In the literature, in practice, and in the drafting of texts *de lege ferenda* on the law relating to *ad hoc* diplomacy, apart from matters of rank and etiquette, special attention has been given to the question what facilities, privileges and immunities are enjoyed by *ad hoc* diplomacy. Even on this fundamental question, however, opinions are not unanimous. While the drafts of

proposed rules (Institute of International Law, London, 1895; International Law Association, Vienna, 1924; Sixth International Conference of American States, Havana, 1928; International Law Commission of the United Nations, Geneva, 1960) all agree that *ad hoc* diplomacy has in the past been entitled to privileges by legal custom, and should in the future be entitled to them under a law-making treaty, the literature and the practice are still uncertain about the question whether such privileges attach to *ad hoc* diplomacy as of right or by virtue either of the comity of nations or of mere courtesy. One school of thought goes so far as to assert that the recognition of this legal status in the case of *ad hoc* diplomacy rests entirely on the goodwill of the receiving State or even, perhaps, on mere tolerance.

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

316. If mere tolerance is taken as the basis, the whole structure becomes precarious. In this case, the *ad hoc* diplomat has no right to the enjoyment of facilities, privileges and immunities. Indeed, the receiving State may at any time declare or avow that no such tolerance exists (although some authorities maintain that it must be presumed to exist until such time as the receiving State expresses a contrary intention) or, if it has been practised in the past, whether in general or in a specific instance, that it may be discontinued. According to this view, in other words, the receiving State has no obligation in this respect towards an *ad hoc* diplomat, and the latter has no ground for asserting his rights against the receiving State. In these circumstances, the sending State can clearly have no legal authority either to demand the enjoyment of such privileges or to protest against their denial. All it can do in such a case is to make political representations or objections, according to the benefit or the harm which might accrue to good and smooth international relations through such action.

317. As will be indicated below, the Special Rapporteur has no hesitation in rejecting this theory summarily, since it is not in conformity with the principles essential to the maintenance of international relations—respect for State sovereignty and the establishment of conditions ensuring the normal functioning of the special mission assigned to the *ad hoc* diplomat and the latter's freedom and security.

²²⁵ *Ibid.*

²²⁶ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 843rd meeting, para. 40.*

²²⁷ Title adopted at the 819th meeting.

318. The case is similar, though by no means identical, if the enjoyment of these privileges by an *ad hoc* diplomat is based on the goodwill of the receiving State. In this event the goodwill displayed—provided that the other party has been notified of it—at least constitutes an autonomous source of public international law which may be invoked by foreigners and by foreign States. This is an action by the receiving State falling within the category of unilateral juridical acts under public international law.²²⁸ Consequently, a State is obliged to keep such unilateral promises, at least for so long as the *ad hoc* diplomats with respect to whom the sending State has been notified that such goodwill exists, in the form of a unilateral act, remain in its territory. This does not mean that a unilateral promise of this kind could not have been revoked, but such revocation would have no effect on situations already created and established; at the very most, it could be binding only for future cases.

319. Thus an *ad hoc* diplomat may invoke a promise made by unilateral act, whether or not he or his State has been notified of the act. Similarly, the sending State has the legal right to demand the fulfilment of the unilateral promise.

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

321. The theory of courtesy does not differ in any respect from the foregoing. In this case also, it depends on the goodwill of the State whether the rules of courtesy should be applied, and to what extent. There is, however, a shade of difference in the way this goodwill is formed. Convenience is not the sole criterion, as in the preceding case (para. 318). Here again, the receiving State acts in accordance with its own notions of courtesy, which usually tell it that courtesy is obligatory, at least between States maintaining good relations with each other. In this case, however, there is a presumption of reciprocal observance of the rules of the comity of nations, and a presumption of the right of the receiving State not to apply those rules if its expectations of reciprocity are not fulfilled.

322. The Special Rapporteur believes that in this instance both the *ad hoc* diplomat and the sending State may demand the enjoyment of facilities and privileges, and if they are denied, may challenge this breach of the rules

of courtesy by protesting in moderate terms. In the view of the Special Rapporteur, such demands and protests would be of a purely diplomatic nature. Considerations of law may enter in two cases, namely:

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

(b) If the receiving State does not give identical treatment, from the standpoint of courtesy, to all the *ad hoc* diplomats of various States. In this case, the legal ground for complaint and protest is not a breach of the rules of courtesy, but a violation of the general principle of non-discrimination.²²⁹ In this case, however, the sending State must offer the same facilities (principle of reciprocity) since, according to the general principle, there is no discrimination if the State does not grant to other States the privileges which it claims for itself.

323. The Special Rapporteur believes that this system also is unacceptable in principle. One can speak of courtesy only if the range of facilities is to be extended, whereas the basic facilities are granted *ex jure*, and not by the comity of nations.

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

(a) What is meant by the right of *ad hoc* diplomacy to the enjoyment of diplomatic facilities, privileges and immunities? Does it mean the right to a status identical with, or similar to, that of permanent missions? In the view of the Special Rapporteur, it simply implies the application to *ad hoc* diplomacy by the States concerned of the general treatment given in principle to resident diplomacy. The whole matter, however, even in a case

²²⁸ Eric Suy, *Les actes juridiques unilatéraux en droit international public*, Paris, 1962.

²²⁹ This principle was adopted as applying to diplomatic law in the Vienna Convention on Diplomatic Relations, 1961, and its applicability to *ad hoc* diplomacy was envisaged by the International Law Commission in its draft rules on special missions.

explicitly provided for in a treaty, depends on the nature of the special mission's functions.

(b) Where the treaty grants specific exceptional rights to the special missions without mentioning the general code of treatment, does this mean that the special missions enjoy only the rights provided in the treaty, and not other rights also? The Special Rapporteur's view is that in this case the special missions, in addition to being covered by the normal rules relating to the status of diplomats, enjoy facilities which are not the customary rule but are essential to the performance of their assignment.

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

326. There still remains the fundamental question—what is the general legal custom (since codified rules are as yet lacking) with regard to the legal status of *ad hoc* diplomacy as regards the enjoyment of facilities, privileges and immunities? On this point theory, practice and the authors of the draft for the future regulation of this question agree. The International Law Commission took as its starting-point the assumption that *ad hoc* missions, being composed of State representatives, are entitled to diplomatic privileges and immunities.²³⁰ This, however, does not answer the question; for it has not yet been determined, either by the Commission or in practice, precisely to what extent *ad hoc* diplomacy enjoys these diplomatic facilities. The Commission itself wavered between the application of the *mutatis mutandis* principle and the direct (or analogous) application of the rules relating to permanent diplomatic missions. In any event, before a decision can be reached further studies will be needed, in order either to codify the undetermined and imprecise cases of application in practice (e.g., topics which are not yet ripe for codification) or to apply, by means of rational solutions, the method of the progressive development of international law.

327. Whichever course is adopted, however, the method of approach must be decided upon. What notion should be followed—the theory of representation or the functional theory?

328. The representative nature of diplomacy in general, which was recognized in the Vienna Regulation (1815)²³¹ in the case of ambassadors, has lost all significance with the passage of time. The Head of State is no longer the absolute repository of the diplomatic capacity of his

State. Democratic methods of State administration, irrespective of the forms of democracy, link the process of representation of the State in international relations to the constitutional order of the sending State. Diplomats represent the State, not the Head of State. The Vienna Convention on Diplomatic Relations (1961) therefore rejected any idea of the representative nature of resident diplomacy. It would be logical to assume that, if this is so in the case of permanent missions, it must be even more so in the case of *ad hoc* missions. The Special Rapporteur considers that this is correct in principle, but here again the notion of relativity in legal matters re-emerges, for there is no rule without an exception. Special ambassadors appointed for certain ceremonial or formal missions would be the exception. Although, even in these cases, it is increasingly clear that all acts are performed on behalf of the State, and not on behalf of the Head of State, there still remain vestiges of the former representative nature of such special ambassadors, and this is reflected, in the law, in certain norms of custom and protocol. As an increasing number of *ad hoc* missions have come to perform essentially political or technical tasks, however, the approach based on representation can no longer serve to determine the extent of the diplomatic facilities granted to *ad hoc* diplomats.

329. On the other hand, the functional theory of privileges and immunities adopted at the Vienna Conference (1961) as the starting-point for understanding and determining the status of resident diplomacy, together with the similar notion applied in the Convention on the Privileges and Immunities of the United Nations (1946) and the Convention on the Privileges and Immunities of the Specialized Agencies, indicate the correct approach to determining the extent of the facilities which the receiving State is legally obliged to grant to special missions and itinerant envoys. These represent the sovereign State, its dignity and its interests. They perform certain specific tasks on behalf of that State, and they should enjoy all the guarantees they need in order to carry out, freely and without hindrance, the mission entrusted to them. For this reason, the receiving State is required to give them all the facilities appropriate to their mission and to grant them all the privileges which are conferred on such representatives of the sending State and all the guarantees and immunities without which a mission of this kind could not be accomplished in a free and normal manner. All these privileges and facilities, however, are not granted by the receiving State to *ad hoc* diplomats in their personal capacity; they are enjoyed by them only because this assists them in the discharge of their duties and is necessary to their State. Thus according to the functional theory there is a direct juridical relation between the receiving State and the sending State. It is only by reflection that *ad hoc* diplomats enjoy such rights and privileges, their status depending on the rights which belong to their State and on the latter's willingness to ensure their enjoyment of them (the State is entitled to waive the immunity enjoyed by the *ad hoc* diplomat, since such immunity attaches to the State and not to the diplomat in question).

330. Thus, there is a general legal rule concerning the duty to grant facilities, privileges and immunities to

²³⁰ See the working paper on special missions prepared by the United Nations Secretariat, document A/CN.4/155, para. 11, in *Yearbook of the International Law Commission, 1963*, vol. II.

²³¹ The text of the Regulation of Vienna is quoted in the *Yearbook of the International Law Commission, 1957*, vol. II, p. 135, foot-note 6.

ad hoc diplomacy; but in view of the functional basis on which this legal custom is applied, there is a need to draft legal rules specifying to what extent and in what circumstances the enjoyment of such rights is necessary to *ad hoc* diplomacy, for the rules at present in existence are imprecise and the criteria are vague.

331. In presenting this argument, the Special Rapporteur believes that he has provided guidelines for a substantially correct solution. The juridical nature of these privileges, the legal relationship between States in matters affecting their mutual respect, is the linking of these privileges to function in international relations, and the effect of these rules *ex lege* and *ipso facto*, are the criteria on which the study and determination of the particular forms of facilities, privileges and immunities applicable to *ad hoc* diplomacy should be founded.

New suggestions by Governments

332. 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.²³²

333. 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.²³³

334. 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.

335. 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."²³⁴

336. 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.

Article 17.²³⁵ — General facilities

The receiving State shall accord to the special mission full facilities for the performance of its functions,

²³² *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 846th meeting, para. 5.*

²³³ *Ibid.*, 847th meeting, para. 17.

²³⁴ 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.

²³⁵ Introduced as article 17 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 804th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 820th meeting.

having regard to the nature and task of the special mission.

Commentary

(1) This article is based on article 25 of the Vienna Convention on Diplomatic Relations.

(2) Proceeding from the fundamental idea that the facilities due to special missions depend on the nature, task and level of the special mission in question, the Commission considers that what must be ensured is the regular functioning of special missions with due regard to their nature and task. The Commission has not adopted the view expressed in 1960 that, in this respect, all the provisions applicable to permanent diplomatic missions should be applied to special missions. It was inclined to follow the fundamental idea underlying the resolution adopted by the Vienna Conference on Diplomatic Intercourse and Immunities,²³⁶ namely, that the problem of the application of the rules governing permanent missions to special missions deserves detailed study. This means that the application of these rules cannot be uniform and that each case must be considered separately.

(3) It is undeniable that the receiving State has a legal obligation to provide a special mission with all facilities necessary for the performance of its functions. In the literature, this rule is generally criticized on the ground that it is vague. The Commission is convinced that its content changes according to the task of the mission in question, and that the facilities to be provided by the receiving State vary. Consequently, the assessment of the extent and content of the above-mentioned obligation is not a question of fact; the obligation is an *ex jure* obligation, whose extent must be determined in the light of the special mission's needs, which depend on the circumstances, nature, level and task of the specific special mission. There remains the legal question whether the extent is determined fairly by the receiving State and thus matches what is due.

(4) The Commission is of the opinion that the difficulties which arise in practice are due to the fact that some special missions consider the receiving State obliged to provide them with all the facilities normally accorded to permanent diplomatic missions. The right approach is that of the States which offer to special missions only such facilities as are necessary, or at least useful, according to some objective criterion, for the performance of their task, whether or not they correspond to the list of facilities granted to permanent diplomatic missions as set forth in the Vienna Convention on Diplomatic Relations. Special missions may, however, in some exceptional cases, enjoy more facilities than permanent diplomatic missions, when this is necessary for the performance of their particular tasks, for example in the case of high-level special missions or frontier-demarcation special missions. This approach is consistent with the resolution on special missions adopted by the Vienna Conference on Diplomatic Intercourse and Immunities.

²³⁶ *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vol. II, document A/CONF. 20/10/Add.1, resolution I, p. 89.

New suggestions by Governments

(5) The Netherlands Government made a specific comment with a view to amending the text of article 17. This comment is as follows:

The last phrase "having regard to the nature and task of the special mission" has little or no effect on the general obligations of the receiving State described in the main clause of this article. In point of fact, the receiving State is also obliged "to have regard to the nature and task" of the permanent diplomatic or consular mission under the terms of article 25 of the 1961 Vienna Convention on Diplomatic Relations or under the terms of article 28 of the 1963 Vienna Convention on Consular Relations, even though the aforesaid phrase is not included in these two articles.

The fact that the functions discharged by special missions as distinct from those discharged by permanent diplomatic and consular missions are not necessarily in the interests of both the sending State and the receiving State prompts the placing in the present draft article of a somewhat different obligation on the receiving State with respect to special missions. Although maximum obligations, i.e. to provide full facilities, devolve upon the receiving State as regards permanent missions, the receiving State need only give a special mission the minimum of aid it requires to enable it to discharge its mission. The States concerned can always come to some agreement for each special case.

The Netherlands Government suggests that article 17 be amended to read:

"The receiving State shall accord to the special mission *such facilities as may be necessary* for the performance of its functions."²³⁷

(6) The Special Rapporteur considers that the phrase "having regard to the nature and task" is much more specific and more nearly satisfies the requirements of this kind of provision than the Netherlands Government supposes. The Special Rapporteur is particularly reluctant to endorse a wording which accords the receiving State the right to judge what may be necessary for the exercise of the functions of the special mission, without referring to the criteria by which it should decide that question.

(7) Accordingly, the Special Rapporteur considers that:

(a) The present text of article 17 should not be changed;

(b) There is no need to change the commentary, but the Netherlands Government's opinion should be noted in it;

(c) It is not necessary to amend the text for drafting reasons;

(d) The provision contained in this article embodies a fundamental idea and should be generally compulsory.

Article 17 bis. — Derogation by mutual agreement from the provisions of Part II

(1) The Government of Pakistan also made an observation concerning the general attitude towards special missions with regard to their facilities, privileges and immunities. It thinks that it would be advantageous to insert in article 17 a paragraph reading as follows:

The facilities, privileges and immunities provided for in Part II of these Articles, shall be granted to the extent required by these

²³⁷ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

Articles, unless the receiving State and the sending State agree otherwise.²³⁸

(2) The Special Rapporteur is of the opinion that it would be preferable to add to the draft articles a new article 17 *bis* which would contain the provision proposed by the Pakistan Government.

(3) This article should, of course, be construed as generally compulsory, since it contains a rule permitting States to make exceptions to the provisions laid down in the draft articles, if they so agree. At the same time, however, such exceptions will exist only if Governments have so agreed, and in the absence of agreement among themselves, they must adhere to the provisions laid down in these articles as the general rule.

Article 17 ter (new). — Difference between categories of special missions

Distinctions may be introduced, by mutual agreement, in the extent of the facilities, privileges and immunities granted to special missions, having regard to the different categories of special missions and to the conditions needed to ensure the regular functioning of these particular categories, so that all special missions between the same States need not necessarily be treated in the same manner, but may be treated according to their nature and within the limits laid down by agreement between the sending State and the receiving State.

Comments by the Special Rapporteur

(1) The Special Rapporteur proposes the above text in pursuance of the task entrusted to him by the Commission in the decision recorded in paragraph 61 of its report on the work of its eighteenth session. This decision is as follows:

The Commission gave attention to the comments by Governments on this point and in particular to the possibility of distinguishing between special missions of a political character and those which were of a purely technical character. The question thus arose whether it was not desirable to distinguish between special missions in respect of the privileges and immunities of members of missions of a technical character. The Commission reaffirmed its view that it was impossible to make a distinction between special missions of a political nature and those of a technical nature; every special mission represented a sovereign State in its relations with another State. On the other hand, the Commission concluded that there was some justification for the proposal by Governments that the extent of certain privileges and immunities should be limited in the case of particular categories of special missions. The Commission requested the Special Rapporteur to re-examine the problem, more particularly the question of applying the functional theory and the question of limiting the extent of certain privileges and immunities in the case of particular categories of special missions. The Commission instructed the Special Rapporteur to submit to it a draft provision on the subject which would provide *inter alia* that any limitation of that nature should be regulated by agreement between the States concerned.²³⁹

(2) The Special Rapporteur has also adopted the view that it would be incorrect to divide special missions into abstract categories, since special missions of the same

kind may need to be treated differently in the relations between different countries, such treatment depending on the mutual confidence of States rather than on abstract legal rules. The only abstract legal rule should be the requirement that regard should be had for the nature and task of the special mission and for the establishment of the conditions necessary for the performance of its functions.

Article 17 quater (new). — Status of the Head of State

1. The Head of State who leads a special mission of the sending State enjoys in the receiving State all the facilities, privileges and immunities which are accorded, under the rules of international law and international custom, to a Head of State on an official visit to the receiving State.

2. All persons forming part of a special mission which is led by a Head of State and the members of his suite shall enjoy all the facilities, privileges and immunities which are enjoyed in the receiving State by the diplomatic staff of permanent diplomatic missions accredited to that State and all the facilities, privileges and immunities which may be necessary for the performance of the tasks incumbent on the members of special missions.

Comments by the Special Rapporteur

(1) The status of the Head of State as an organ of international communication is based on legal customs which had their origin, in the past, in the fiction of extraterritoriality; today it is based on the full recognition of his personal immunity from the jurisdiction of the territorial State, and he is also accorded all the facilities and privileges, including the special honours, which are due, in international relations, to the Heads of foreign States. It should be noted that, in practice, the arrival of a foreign Head of State is generally preceded by a special informal agreement which determines more particularly the status of the Head of State during the time that he performs the functions of head of the special mission. Even in the absence of such an agreement, however, his status is determined, from the juridical point of view, by customary law.

(2) According to unanimous and universal practice, the suite of the Head of State and the members and staff of the special mission which he leads enjoy, by way of exception, all the facilities, privileges and immunities accorded to diplomatic representatives in the receiving country or to the diplomatic staff of permanent diplomatic missions. Nevertheless, where necessary, these persons may also invoke the provisions relating to special missions if these provisions are, in some situations, more favourable to them than the regular treatment accorded to members of the diplomatic corps.

(3) This provision was introduced into the draft articles because of the Commission's decision to limit the idea of draft articles on so-called high-level special missions to a provision concerning the status of the Head of State as head of the special mission. This decision, which is recorded in paragraph 69 of the Commission's report on its eighteenth session, is as follows:

²³⁸ *Ibid.*

²³⁹ *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, p. 276.

At its sixteenth session, the International Law Commission decided to ask the Special Rapporteur to submit at its next 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. In his second report (A/CN.4/179), the Special Rapporteur submitted to the seventeenth session of the Commission a set of draft provisions concerning so-called high-level special missions. The Commission did not discuss this draft at its seventeenth session, but considered whether special rules of law should or should not be drafted for so-called high-level special missions, whose heads hold high office in their States. It said that it would appreciate the opinion of Governments on this matter, and hoped that their suggestions would be as specific as possible. After noting the opinions of Governments, the Commission recommended the Special Rapporteur not to prepare draft provisions concerning so-called high-level special missions, to include in part II of the draft articles a provision concerning the status of the Head of State as head of a special mission, and to consider whether it was desirable to mention the particular situation of this category of special missions in the provisions dealing with certain immunities. The Special Rapporteur was, accordingly, instructed to undertake the necessary studies on this subject and to submit appropriate conclusions to the Commission.²⁴⁰

(4) The Special Rapporteur is opposed to the introduction of special provisions on high-level special missions which are not led by a Head of State. See his comments on this subject in chapter II, section 13, of this report.

*Article 18.*²⁴¹ — *Accommodation of the special mission and its members*

The receiving State shall assist the special mission in obtaining appropriate premises and suitable accommodation for its members and staff and, if necessary, ensure that such premises and accommodation are at their disposal.

Commentary

(1) This article is based on article 21 of the Vienna Convention on Diplomatic Relations.

(2) However, article 18 is not identical with the said article 21. The Commission is of the opinion that it is not necessary to provide that the State sending a special mission has in all cases the right to acquire land for the construction of accommodation for the special mission or to acquire the premises required for accommodating it, as is provided for by the corresponding provisions of the Vienna Convention in regard to regular, permanent diplomatic missions. The Commission considers that in this connexion it is sufficient to ensure the provision of accommodation for special missions, which are temporary in character.

(3) Special missions should, however, have their accommodation guaranteed and the accommodation should be adequate for the special mission in question. On this point, the same rules should in principle apply as in the case of permanent diplomatic missions. But it is

held that there is no obligation upon the receiving State to permit the acquisition of the necessary premises in its territory, a proposition which does not rule out the possibility—though this is an exceptional case—of some States purchasing or leasing the premises necessary for the accommodation of successive special missions which they send to the same country.

(4) The task of special missions may be such that they need more than one seat. This is clear from paragraph (5) of the commentary to article 13. In particular, cases occur in practice where either the special mission as a whole or a section or group of the mission has to travel frequently in the territory of the receiving State. Such travel often involves a swift change in the seat of the special mission or the arrival of groups of the special mission at specific places, and the mission's or group's stay in a particular locality is often very brief. These circumstances sometimes make it impossible for the sending State itself to arrange accommodation for its special mission or a section thereof. In this case, it is the authorities of the receiving State which arrange accommodation.

New suggestions by Governments

(5) The only comment on this article comes from the Netherlands Government. It is as follows:

When comparing the present article with article 21 of the 1961 Vienna Convention, we see that no mention is made in the present article of aid in the acquisition of land or buildings, an omission of which the Netherlands Government approves. On the other hand the present article is more categorical: assistance in obtaining accommodation for members of the staff is made obligatory under all circumstances, whereas in the second paragraph of article 21 of the Vienna Convention only "where necessary". The Netherlands Government sees no reason for this extension. The term "special mission" covers so many different situations that no general rule can be laid down to the effect that the receiving State should help any and every kind of special mission. The various diplomatic missions all have comparable functions, all of which are in the interests of both the sending State and the receiving State, but the functions of the special missions vary considerably and occasionally a special mission will fulfil a mission that is only in the interest of the sending State. Therefore it is suggested that paragraph 18 open with the words:

"Where necessary, . . ."²⁴²

(6) The Special Rapporteur considers the Netherlands Government's suggestion pertinent and a useful drafting amendment.

(7) Accordingly, the Special Rapporteur considers that:

(a) The amendment suggested by the Netherlands Government should be adopted;

(b) There should be some minor changes in the commentary to stress the idea of necessity brought out by the Netherlands Government's amendment;

(c) The text of this article, with the amendment suggested by the Netherlands Government, does not require any drafting changes;

(d) The provisions contained in this article should be compulsory unless Governments agree otherwise (see the discussion of article 17 *bis* above).

²⁴⁰ *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, p. 277.

²⁴¹ Introduced as article 18 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 804th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 820th meeting.

²⁴² See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex II.

Article 19.²⁴³ — Inviolability of the premises

1. The premises of a special mission shall be inviolable. The agents of the receiving State may not enter the premises of the special mission, except with the consent of the head of the special mission or of the head of the permanent diplomatic mission of the sending State accredited to the receiving State.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the special mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the special mission, their furnishings, other property used in the operation of the special mission and its means of transport shall be immune from search, requisition, attachment or execution by the organs of the receiving State.

Commentary

(1) This article is based on article 22 of the Vienna Convention on Diplomatic Relations. However, the text has had to be adapted to the requirements imposed by the nature and practice of special missions.

(2) In 1960 the Commission considered that in this matter the rules applicable to permanent diplomatic missions should also apply to special missions. The previous Special Rapporteur, in his first draft, had held that "the official premises of... a special mission... shall enjoy... inviolability...".²⁴⁴

(3) In 1965 the Commission took the view that the provisions of the Vienna Convention on Diplomatic Relations concerning accommodation should be applied to special missions, with due regard for the circumstances of such missions. It should also be noted that the premises of a special mission are often combined with the living quarters of the members and staff of the special mission.

(4) The offices of special missions are often located in premises which already enjoy the privilege of inviolability. That is so if they are located in the premises of the permanent diplomatic mission of the sending State, if there is one at the place. If, however, the special mission occupies private premises, it must equally enjoy the inviolability of its premises, in order that it may perform its functions without hindrance and in privacy.

(5) The Commission discussed the situation which may arise in certain exceptional cases where the head of a special mission refuses to allow representatives of the authorities of the receiving State to enter the premises of the special mission. It has provided that in such cases the Ministry of Foreign Affairs of the receiving State

may appeal to the head of the permanent diplomatic mission of the sending State, asking for permission to enter the premises occupied by the special mission.

(6) As regards the property used by the special mission, the Commission considers that special protection should be accorded to such property, and accordingly it has drafted paragraph 3 of this article in terms granting such protection to all property, by whomsoever owned, which is used by the special mission.

New suggestions by Governments

(7) 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: "Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action".²⁴⁵

(8) 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.

(9) 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.²⁴⁶

(10) 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.

(11) 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".²⁴⁷

(12) 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

²⁴³ Paragraphs 1 and 2 introduced as article 19 of the Special Rapporteur's second report (A/CN.4/179). Discussed at the 804th and 805th meetings of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Paragraph 3 introduced as article 24 of the Special Rapporteur's second report. Discussed at the 806th meeting of the Commission. Drafting Committee's text discussed and referred back to Drafting Committee at the 817th meeting. Re-submitted and adopted at the 820th meeting. Commentary adopted at the 820th meeting.

²⁴⁴ *Yearbook of the International Law Commission, 1960*, vol. II, p. 112.

²⁴⁵ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

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.

(13) 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.²⁴⁸

(14) The Special Rapporteur wishes to point out that the question raised in this comment was discussed by 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.

(15) 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 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.²⁴⁹

(16) 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.

(17) In its written comments, the Netherlands Government stated:

Paragraph 1, first sentence. It was not without some hesitation that the Netherlands Government concluded that this provision should be accepted. It assumes that the term "premises" does not as a matter of course include the residence of the mission's head or the dwellings occupied by the members of the staff. (Cf. the comment on the fourth example in section 2 of the present document and the end of paragraph 3 of the commission's commentary.)

Here again the difficulty lies in the great diversity of special missions. Some of them require a certain degree of inviolability for their office premises to enable them to discharge their duties without let or hindrance; other missions only need the personal inviolability of their members (article 24) and the inviolability of their documents (article 20). The matter is complicated by the fact that, as the Netherlands Government sees it, the minimum of inviolability cannot be determined by rules of *jus dispositivum*, to be settled by the States concerned in each particular case.

Therefore the Netherlands Government approves of the first sentence, but with the specifications and restrictions given below.

Paragraph 1. By analogy with article 31, paragraph 2 of the 1963 Vienna Convention on Consular Relations the following clause should be added to this paragraph:

"The consent of the head of the special mission may, however, be assumed in case of fire or other disaster requiring prompt protective action."

This addition would seem to be required in view of the frequency with which special missions find accommodation in buildings, such as hotels, where other people live and work.

New paragraph. Also for the reason given above it would seem advisable to have a new paragraph after paragraph 1, viz. the second sentence of article 19, paragraph 1 of the second report by Mr. Bartoš:

"2. Paragraph 1 shall apply even if the special mission is accommodated in a hotel or other public building, provided that the premises used by the special mission are identifiable."

Paragraph 2. No comment.

Paragraph 3. The immunity from search of the mission's means of transport is taken from article 22, paragraph 3 of the Vienna Convention on Diplomatic Relations, but because of its unspecific wording it might also be interpreted so widely in that context as to give far greater immunity than was ever intended. It would be hazardous to give a more detailed description in the draft article of the circumstances under which a means of transport should be "immune from search", since it would foster the placing of a wide interpretation on the corresponding article 22, paragraph 3 of the Vienna Convention. Therefore it is proposed that the word "search" be deleted from paragraph 3 of the draft article. In so far as this word refers to the premises, the furnishings and other objects on the premises such immunity is already given by paragraph 1. In so far as "search" refers to other objects used for the work of the special mission, but located outside the premises (and this is an amplification that goes beyond article 22 of the Vienna Convention), such immunity would seem of no practical importance in view of the immunity of persons (article 24) and of documents (article 20).²⁵⁰

(18) The Special Rapporteur requests the Commission to look more closely at the suggestions which have been made concerning this article and to consider, in particular:

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

(a) Whether it should adopt the idea that the consent of the head of the mission is assumed in case of fire or other disaster, as proposed by the Israel and Netherlands Governments;

(b) Whether it should include the new paragraph 1 (a) proposed by the Netherlands Government;

(c) Whether it should delete the word "search" in paragraph 3, as proposed by the Netherlands Government;

(d) Whether it should establish special protection for property used in the operation of the special mission as protection peculiar to such a mission.

(19) The decisions which the Commission takes on these matters will determine the proposals which the Special Rapporteur ultimately submits.

Article 20.²⁵¹ — Inviolability of archives and documents

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

Commentary

(1) This article reproduces *mutatis mutandis* article 24 of the Vienna Convention on Diplomatic Relations and article 33 of the Vienna Convention on Consular Relations.

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

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

(4) There have been no new suggestions since the seventeenth session of the Commission.

(5) The Special Rapporteur considers that the proposed text should not be changed, that the provision contained in it should be generally compulsory, and that no drafting amendments are necessary.

Article 21.²⁵² — Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the special mission such freedom of move-

ment and travel on its territory as is necessary for the performance of its functions, unless otherwise agreed.

Commentary

(1) This article is based on article 26 of the Vienna Convention on Diplomatic Relations and article 34 of the Vienna Convention on Consular Relations. However, changes have been made in the text to take account of the special circumstances in which the task of special missions is performed. The article thus includes certain provisions which apply neither to permanent diplomatic missions nor to consulates.

(2) Special missions have limited tasks. It follows that they should be guaranteed freedom of movement only to the extent necessary for the performance of these tasks (this does not mean that they cannot go also to other parts of the territory of the receiving State, subject to the normal conditions applicable to other aliens).

(3) Guaranteed freedom for special missions to proceed to the seat of the sending State's permanent diplomatic mission to the receiving State or to a consular post of the sending State and to return to the place where the special mission performs its task is in practice not only a daily occurrence but also a necessity. That is because the special mission generally receives its instructions through the permanent diplomatic mission, because the latter is moreover the protector of the special mission and is directly interested in being kept up to date with respect to the performance of the special mission's task.

(4) One of the peculiarities of special missions is that they may operate through persons or teams situated in different places or responsible for specific tasks in the field. Because of the need for constant liaison between the different sections of a special mission there should be wide freedom of movement.

New suggestions by Governments

(5) In the Sixth Committee of the General Assembly during the twentieth session, 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.²⁵³ 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 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

²⁵¹ Introduced as article 20 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 805th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁵² Introduced as article 21 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 805th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁵³ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 847th meeting, para. 24.*

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.

(6) 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 re-worded 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.²⁵⁴

(7) 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.

(8) The Special Rapporteur believes that it is not necessary to change the text and does not suggest any amendments. The text itself shows that this article is of an optional nature.

Article 22.²⁵⁵ — Freedom of communication

1. The receiving State shall permit and protect free communication on the part of the special mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the special mission may employ all appropriate means, including couriers and messages in code or cipher. However, the special mission may install and use a wireless transmitter only with the consent of the receiving State.

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

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

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

5. The courier of the special mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall

be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the special mission may designate couriers *ad hoc* of the special mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the special mission's bag in his charge.

7. The bag of the special mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the special mission. By arrangement with the appropriate authorities, the special mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

Commentary

(1) This article is based on article 27 of the Vienna Convention on Diplomatic Relations.

(2) In 1960 the Commission took the position that special missions enjoy the same rights as permanent diplomatic missions in this respect.

(3) It should be noted, however, that in practice special missions are not always granted the right to use messages in code or cipher. The Commission considered that special missions should be granted this right, since the use of messages in code or cipher is often necessary for the proper functioning of such missions.

(4) The Commission did not think that it should depart from the practice whereby special missions are not allowed to use wireless transmitters, unless there is a special agreement or a permit is given by the receiving State.

(5) The Vienna Convention on Diplomatic Relations (article 27, paragraph 3) lays down the principle of the absolute inviolability of the diplomatic bag. Under that provision, the diplomatic bag may not be opened or detained by the receiving State. The Vienna Convention on Consular Relations, on the other hand, confers limited protection on the consular bag (article 35, paragraph 3). It allows the consular bag to be detained if there are serious reasons for doing so and provides for a procedure for the opening of the bag. The question arises whether absolute inviolability of the special mission's bag should be guaranteed for all categories of special missions. The Commission considered this question and decided to recognize the absolute inviolability of the special mission's bag.

(6) The Commission adopted the rule that the special mission's bag may be entrusted to the captain of a commercial aircraft (article 27, paragraph 7, of the Vienna Convention on Diplomatic Relations; article 35, paragraph 7, of the Vienna Convention on Consular Relations) or to the captain of a ship (article 35, paragraph 7, of the Vienna Convention on Consular Relations). It has been observed recently that in exceptional cases special missions use the services of such persons for

²⁵⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁵⁵ Introduced as article 22 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 805th and 806th meetings of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

the transport of the bag. The Commission considers that the captains of commercial inland waterway vessels may also be used for this purpose.

New suggestions by Governments

(7) 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.²⁵⁶

(8) 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.

(9) In its comments, the Belgian Government deals with several aspects of the text of article 22. In the first place, it emphasizes 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. It gives the following reminder:

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 should not apply to Government telegrams.”

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.

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.²⁵⁷

(10) 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.

(11) 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:

“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.²⁵⁸

(12) 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.

(13) 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.²⁵⁹

(14) 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

²⁵⁶ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

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.

(15) 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.²⁶⁰

(16) 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.

(17) In its written comments, the Netherlands Government made the following proposal:

The following introductory clause should be inserted in article 22 and subsequent paragraphs renumbered:

"1. Unless otherwise agreed, special missions shall have freedom of communication to the extent provided in this article."²⁶¹

(18) Accordingly, the Special Rapporteur considers that:

(a) A new paragraph 1, worded as the Netherlands Government has proposed, should be included in article 22, and the present paragraphs 1 to 7 should become paragraphs 2 to 8;

(b) It should be stressed in the commentary that the more detailed provisions on freedom of communications are dependent upon agreement between the Governments concerned, and that this article differs in that respect from

article 27 of the Vienna Convention on Diplomatic Relations of 1961, justifiably since it is not always necessary for all special missions to enjoy identical guarantees, as it is for permanent diplomatic missions. The Commission expressed the contrary view on this question in 1960;

(c) It is not necessary to amend the text for drafting reasons;

(d) Unless otherwise agreed by the parties, the provision contained in this article should be construed as generally compulsory.

Article 23.²⁶² — Exemption of the mission from taxation

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

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

Commentary

(1) This article reproduces *mutatis mutandis* article 23 of the Vienna Convention on Diplomatic Relations.

(2) In 1960 the Commission expressed the view that in this respect the legal rules applicable to permanent diplomatic missions should be applied to special missions. At its seventeenth session, the Commission reaffirmed that view.

(3) On the other hand, the Commission is of the opinion that article 28 of the Vienna Convention on Diplomatic Relations cannot be applied to special missions. It is the rule that special missions have no authority to levy any fees, dues or charges in foreign territory except in the cases specially provided for by international agreements. This does not, however, rule out the possibility that in certain exceptional cases provided for in international agreements special missions may be authorized to charge such dues. The Commission therefore decided not to include in the article any rule of law concerning the levying by special missions of fees, dues or charges in the territory of the receiving State, and to refer to the matter only in the commentary.

New suggestions by Governments

(4) 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.

²⁶² Introduced as article 23 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 806th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

Accordingly, the words "in his capacity as such" should be inserted after "head of the special mission".²⁶³

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

(6) Although the proposal of the Government of Israel concerning questions of terminology²⁶⁴ 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.

(7) 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".²⁶⁵

(8) 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.

(9) The Netherlands Government made the following suggestions:

It is not clear from the first paragraph why, in addition to the sending State and the head of the special mission, the members of its staff should also be mentioned here; this phrase does not appear in article 23 of the Vienna Convention on Diplomatic Relations. No explanation of this seemingly superfluous addition is given in either the Commission's report or in the reports by Mr. Bartoš.

In the opinion of the Netherlands Government there is virtually no need for the exemption from taxation mentioned in article 23 for any of the special missions in view of their temporary character. This exemption, which to the diplomatic missions is a traditional privilege rather than a necessity, is not required for the due performance of the functions of temporary missions. The granting and registering of the exemption causes the receiving State more trouble than it is worth. Therefore it is suggested that article 23 be deleted.²⁶⁶

(10) The Special Rapporteur puts before the Commission the general question raised by the proposal of the United Kingdom Government; for his part, he considers it

inadvisable to enter into the details contained in this proposal.

(11) The Special Rapporteur also asks the Commission if it is prepared to adopt the Belgian Government's amendment inserting after the words "head of the special mission" the words "in his capacity as such". He considers that the adoption of this amendment would be useful.

(12) Lastly, the Special Rapporteur sees no virtue in the Netherlands Government's proposal for the deletion of article 23 and does not agree with the assertion that the cost to the receiving State is disproportionate in relation to the amount of the taxes. He therefore considers that this proposal should be rejected.

(13) In his opinion, the text of this article should remain as it is.

(14) The discrepancy between the French and English texts of paragraph 1 mentioned by the Netherlands Government is inexplicable. As the French text is the original prepared by the Special Rapporteur, the English text should be brought into line with it.

Article 24.²⁶⁷ — Personal inviolability

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

Commentary

(1) This article reproduces *mutatis mutandis* article 29 of the Vienna Convention on Diplomatic Relations.

(2) The Commission discussed the advisability of a provision granting to the members of special missions only a personal inviolability limited to the performance of their functions. The majority of the Commission did not consider such a provision acceptable.

New suggestions by Governments

(3) 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.²⁶⁸

(4) 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

²⁶³ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ Introduced as article 25 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 806th and 807th meetings of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁶⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

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.

(5) In connexion with this article, the question also arises whether, in keeping with the spirit of the general comment by the Government of Israel,²⁶⁹ 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.

(6) In its written comments on articles 24, 25 and 26, 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.

(7) The Special Rapporteur believes that this remark by the United Kingdom Government is similar in substance to the comments made in chapter II, section 2, of his third report: "Distinction between the different kinds of special missions"²⁷⁰ and in the section on article 17 in chapter III of that report²⁷¹

(8) 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 immunity and inviolability to official documents and official acts.²⁷²

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

(10) In its general remarks on articles 24, 25 and 26—cited above—the United Kingdom Government would prefer a restriction of immunity and inviolability to official documents and official acts.

(11) 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 in preference to those of the 1963 Vienna Convention on Consular Relations.

(12) Bound as he is by the Commission's decision, the Special Rapporteur cannot recommend the adoption of the text proposed by the United Kingdom Government.

(13) In its written comments, the Netherlands Government made the following suggestion:

This article extends to the members of special missions (and to the members of their diplomatic staffs) the envoy's personal inviolability that has typified diplomatic relations from time immemorial. It is undeniable that personal inviolability is essential if a mission is to perform its functions without let or hindrance, and it should outweigh any interests involving the legal order within the receiving State, at least as regards permanent missions and some special missions. However, these considerations do not apply to all special missions.

Accordingly, the Netherlands Government would join the minority referred to in paragraph (2) of the Commission's commentary and propose that personal inviolability be restricted to acts performed in the fulfilment of the mission's duties. A second paragraph stipulating that "*at the request of the sending State, and provided the receiving State does not object, personal inviolability shall be extended to include all deeds*" might be added to article 24 modified in the manner described.

If this proposal is accepted, a new article should be inserted after article 24 governing, for cases for which extended personal inviolability has not been agreed upon, arrest and detention for deeds falling outside the scope of the performance of functions proper, in the same way as is done in articles 40, 41 and 42 of the 1963 Vienna Convention for consular officers.²⁷³

(14) Accordingly, the Special Rapporteur considers that:

(a) The present text of article 24 should not be changed. Nevertheless, the Commission must take a definite decision on the Netherlands Government's proposal that personal inviolability should be restricted to functional immunity (to acts performed in the fulfilment of the mission's duties). If the Commission adopts the Netherlands Government's proposal, a second paragraph would have to be included in the text; however, the Special Rapporteur does not recommend it.

(b) In any event, special note must be taken, in the commentary, of the opinions of the United Kingdom and Netherlands Governments.

(c) In the light of the definitions proposed in the introductory article, it would be necessary to substitute the words "of the members of the special mission" for the words "of the head and members of the special mission".

(d) Even if the Netherlands and United Kingdom Governments' proposals are adopted, this article should be a generally compulsory rule, subject to the general limitation set out in article 17 *bis*.

²⁶⁹ *Ibid.*

²⁷⁰ *Yearbook of the International Law Commission, 1966*, vol. II, document A/CN.4/189 and Add.1 and 2, pp. 129 and 130.

²⁷¹ *Ibid.*, pp. 143 and 144.

²⁷² See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁷³ *Ibid.*

Article 25.²⁷⁴ — Inviolability of the private accommodation

1. The private accommodation of the head and members of the special mission and of the members of its diplomatic staff shall enjoy the same inviolability and protection as the premises of the special mission.
2. The papers, correspondence and property of the persons referred to in paragraph 1 shall likewise enjoy inviolability.

Commentary

- (1) This article reproduces *mutatis mutandis* article 30 of the Vienna Convention on Diplomatic Relations.
- (2) The word "residence" used in the Vienna Convention on Diplomatic Relations has been replaced by the word "accommodation" because of the temporary nature of special missions.
- (3) The inviolability of the accommodation of the members of special missions should be guaranteed, regardless of whether they live in a separate building or in parts of another building, or even in a hotel. It was considered necessary to add this paragraph of the commentary because some States do not recognize this protection in cases where the mission is accommodated in a building accessible to the public.

New suggestions by Governments

- (4) 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. . ." ²⁷⁵
- (5) 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.
- (6) In examining this article, account should also be taken of the comment by the Government of Israel concerning terminology. ²⁷⁶ 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.
- (7) It will be recalled that this article is also referred to in the United Kingdom Government's general remarks

²⁷⁴ Introduced as article 26 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 807th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁷⁵ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁷⁶ *Ibid.*

on articles 24, 25 and 26, which are reproduced above in the discussion of article 24.

(8) 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. He is, therefore, unable to recommend that the Commission should adopt this proposal.

(9) In its written comments, the Netherlands Government makes the following proposals:

The *first* paragraph of this article should be deleted. The States concerned can enter upon additional agreements to cover any special cases of private residences or accommodation needing protection.

The *second* paragraph is superfluous in view of the provisions of articles 20 and 22. Therefore this paragraph can be deleted, too. ²⁷⁷

(10) The Special Rapporteur cannot endorse the Netherlands Government's proposal for the abolition of a guarantee as important as inviolability of the residence unless that should be done by virtue of the agreement provided for in article 17 *bis*. On the basis of his personal experience, he considers that inviolability of the residence, papers and correspondence is necessary for the regular and free performance of the special mission's functions.

(11) Accordingly, the Special Rapporteur considers that:

- (a) This article should not be amended;
- (b) The commentary should include the opinions of the Governments that supported the deletion of this article and the reasons that led the Commission not to endorse those opinions;
- (c) In paragraph 1, the words "head and" should be deleted for drafting reasons, in accordance with the definition in the introductory article;
- (d) The provision contained in this article should be generally compulsory, unless otherwise agreed in accordance with article 17 *bis*.

Article 26.²⁷⁸ — Immunity from jurisdiction

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

2. Unless otherwise agreed, they shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State, except in the case of:

- (a) A real action relating to private immovable property situated in the territory of the receiving State, unless the head or member of the special mission or the member of its diplomatic staff holds it on behalf of the sending State for the purposes of the mission;

²⁷⁷ *Ibid.*

²⁷⁸ Introduced as article 27 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 807th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

(b) An action relating to succession in which the person referred to in sub-paragraph (a) is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the person referred to in sub-paragraph (a) in the receiving State outside his official functions.

3. The head and members of the special mission and the members of its diplomatic staff are not obliged to give evidence as witnesses.

4. No measures of execution may be taken in respect of the head or of a member of the special mission or of a member of its diplomatic staff except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 2 of this article, and provided that the measures concerned can be taken without infringing the inviolability of this person or of his residence.

5. The immunity of the head and members of the special mission and of the members of its diplomatic staff from the jurisdiction of the receiving State does not exempt them from the jurisdiction of the sending State.

Commentary

(1) This article is based on article 31 of the Vienna Convention on Diplomatic Relations.

(2) The Commission discussed the question whether members of special missions should or should not be granted complete and unlimited immunity from criminal, civil and administrative jurisdiction. Some members of the Commission took the view that, in principle, only functional immunity should be granted to all special missions. There should be no deviation from this rule, except in the matter of immunity from criminal jurisdiction; for any limitation of the liberty of the person prevents the free accomplishment of the special mission's tasks. Disagreeing with that opinion, the majority of the Commission decided that full immunity from the jurisdiction of the receiving State in all matters (criminal, civil and administrative) should be granted to the members of special missions.

(3) However, the Commission added in paragraph 2 the phrase "Unless otherwise agreed" to indicate that it is open to the States concerned to limit the immunity from *civil and administrative* jurisdiction. In short, the ordinary rule proposed by the Commission is complete immunity from civil and administrative jurisdiction, the States concerned being at liberty to agree on a limited form of immunity in this respect.

New suggestions by Governments

(4) 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.

(5) 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.

(6) 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 idea 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.

(7) 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.

(8) 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.²⁷⁹

(9) 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 draft articles. 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.

(10) 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:

²⁷⁹ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

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.²⁸⁰

(11) 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 (6) 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.

(12) In its comments, the Netherlands Government also considered this article and stated:

Paragraphs 1 and 4. If the proposal put forward in section 26 is accepted, paragraphs 1 and 4 of article 26 will have to be restricted in the same way as article 24 in so far as immunity from criminal jurisdiction is concerned.

Paragraph 2. Apart from the question whether complete or limited immunity from criminal jurisdiction should be granted, it might be considered to what extent members of special missions should be withdrawn from the civil and administrative jurisdiction of the receiving State. The Netherlands Government believes that the legal order, particularly the legal protection of third persons who come into contact with members of the special mission demands that the liability under civil law of members of a special mission be affected as little as possible by immunity. The opposing interest, viz. the undisturbed performance of the mission's functions, is hardly affected by civil and administrative jurisdiction. It is unnecessary to allow intrusion upon the legal order of the receiving State to the same extent as is required when ensuring personal immunity from criminal jurisdiction. The Netherlands Government subscribes to the view held by the minority and described in paragraph 2 of the Commission's commentary, and therefore suggests replacing paragraph 2 by a rule analogous to the one in article 43 of the 1963 Vienna Convention on Consular Relations.²⁸¹

(13) The Special Rapporteur considers that the arguments put forward by the Netherlands Government are not new to the Commission, which has decided against them and in favour of the present text. He believes, therefore, that there is no new reason for adopting the Netherlands proposals.

(14) Accordingly, the Special Rapporteur considers that:

(a) The text should not be changed;

(b) The opinions of the United Kingdom and Netherlands Governments should be mentioned in the commentary, and it should be made clear that they do not conform to the ideas of the Commission, which considers the question of immunity from jurisdiction one of the fundamental guarantees of the regular and free performance of the special mission's functions;

(c) For drafting reasons, the words "The head and" at the beginning of paragraphs 1 and 3, the words "of the head or" in paragraph 4, and the words "the head and" in paragraph 5 should be deleted, since they are redundant in the light of the definitions contained in the proposed introductory article;

(d) The provisions contained in this article are substantive rules and should be considered as generally

compulsory, subject to the agreements provided for in article 17 *bis*.

Article 27.²⁸² — Waiver of immunity

1. The immunity from jurisdiction of the head and members of the special mission, of the members of its staff and of the members of their families, may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by one of the persons referred to in paragraph 1 of this article shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.

Commentary

(1) This article reproduces *mutatis mutandis* article 32 of the Vienna Convention on Diplomatic Relations.

(2) The Commission considers that the purpose of immunity is to protect the interests of the sending State, not those of the person enjoying the immunity.

New suggestions by Governments

(3) 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.

(4) Accordingly, the Special Rapporteur considers that:

(a) It is not necessary to make any changes in the text;

(b) The commentary should include an explanation that this is a general rule which refers to all categories of staff, not only to the diplomatic staff;

(c) To improve the drafting of paragraph 1, the words "of the members and staff of the special mission" should be substituted for the words "of the head and members of the special mission, of the members of its staff", in accordance with the definition proposed in the introductory article;

(d) The provisions contained in this article should be obligatory and a necessary guarantee of the free exercise of the functions of the members and staff of special missions, and consequently they should be generally compulsory rules, subject to the agreements provided for in article 17 *bis*.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² Introduced by the Drafting Committee as article 27 *bis*. Discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

*Article 28.*²⁸³ — *Exemption from social security legislation*

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

2. The provisions of paragraph 1 of this article shall not apply:

(a) To nationals or permanent residents of the receiving State regardless of the position they may hold in the special mission;

(b) To locally recruited temporary staff of the special mission, irrespective of nationality.

3. The head and members of the special mission and the members of its staff who employ persons to whom the exemption provided for in paragraph 1 of this article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

Commentary

(1) This article is based on article 33 of the Vienna Convention on Diplomatic Relations.

(2) In practice, it is found necessary not to exempt from the social security system of the receiving State persons locally employed for the work of the special mission, for a number of reasons: the short duration of the special mission; the risk to life and health presented by the difficulty of the special mission's tasks in certain cases, especially in the case of special missions working in the field; and the still unsettled question of insurance after the termination of the special mission's task, if the employee was not engaged through and on the responsibility of the permanent diplomatic mission.

New suggestions by Governments

(3) 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.

(4) 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.²⁸⁴

(5) 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.

(6) In its written comments, the Netherlands Government also proposed the deletion of this article, on the ground that it was not required for the exercise of the functions of temporary missions.²⁸⁵ In view of the restriction laid down in paragraph 2, the Special Rapporteur believes that the exemptions guaranteed to the members of the special mission do not impose any limitation on the receiving State, but are necessary to the special mission itself and to the sending State.

(7) Accordingly, the Special Rapporteur considers that:

(a) The text of the article should not be changed;

(b) The opinion of the Netherlands Government should be noted in the commentary, which should also show the reasons why the persons referred to in paragraph 2, sub-paragraphs (a) and (b), are mentioned in this article, although their exemption may be presumed under the terms of article 36. The Special Rapporteur has indicated the reasons why he believes that there is no unnecessary duplication;

(c) From the point of view of drafting, and in accordance with the definition proposed in the introductory article, the words "The members and staff of the special mission" should be substituted for the words "The head and members of the special mission and the members of its staff" in paragraphs 1 and 3;

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

*Article 29.*²⁸⁶ — *Exemption from dues and taxes*

The head and members of the special mission and the members of its diplomatic staff shall be exempt from all dues and taxes, national, regional or municipal, in the receiving State on all income attaching to their functions with the special mission and in respect of all acts performed for the purposes of the special mission.

Commentary

(1) This article is based on article 34 of the Vienna Convention on Diplomatic Relations.

(2) The Commission was of the opinion that the exemption of the members of special missions from dues and taxes should apply only to income attaching to their functions with the mission and in respect of all acts performed for the purposes of the mission. Accordingly, the Commission decided to omit from article 29 all the exceptions enumerated in the said article 34.

²⁸³ Introduced as article 28 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁸⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I (comment on article 32).

²⁸⁵ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁸⁶ The proposal to introduce this article was made by the Special Rapporteur at the 808th meeting. Drafting Committee's text, numbered 28 *bis*, submitted and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

New suggestions by Governments

(3) 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 unnecessary 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.

(4) 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 organise 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.²⁸⁷

(5) The Special Rapporteur recognizes that all the arguments put forward in 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.

(6) 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.

(7) 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.

(8) 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.

(9) 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.

(10) Accordingly, the Special Rapporteur considers that:

(a) It is not necessary to change to text of this article;

(b) It is not necessary to change the commentary on this article in any way or to add any new ideas;

(c) For drafting reasons, the words "The members and diplomatic staff of the special mission" should be substituted for the words "The head and members of the special mission and the members of its diplomatic staff", in accordance with the definitions proposed in the introductory article;

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

Article 30.²⁸⁸ — Exemption from personal services and contributions

The receiving State shall exempt the head and members of the special mission and the members of its diplomatic staff from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Commentary

(1) This article reproduces *mutatis mutandis* article 35 of the Vienna Convention on Diplomatic Relations.

²⁸⁸ Introduced as article 29 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁸⁷ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

(2) In drafting article 30 the Special Rapporteur had started with the ideas underlying the said article 35, but had expanded the article in the following way:

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

(b) It was also his view that exemption from personal services and contributions ought to be accorded to locally recruited staff regardless of nationality and domicile. Otherwise, the special mission would be placed in a difficult position and would not be able to carry out its task until it succeeded in finding other staff exempt from such services and contributions. Calling on such locally recruited staff to render such services or contributions could be used as a powerful weapon by the receiving State to harass the special mission. On the other hand, the receiving State would not be imperilled by these exemptions, special missions generally being of very short duration and their staff very small.

(3) The Commission considered that the rules of law corresponding to these needs of the special mission would involve an excessive derogation from the sovereign rights of the receiving State, but it decided to mention in the commentary the arguments put forward by the Special Rapporteur.

New suggestions by Governments

(4) 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.

(5) 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.

(6) 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.

(7) In its written comments, the Netherlands Government stated the following opinion:

With reference to paragraphs 2 and 3 of the Commission's commentary the Netherlands Government states that it endorses the view that there is no need to supplement this article as proposed by the Special Rapporteur.²⁸⁹

(8) The Special Rapporteur considers it sufficient that the opinion expressed by the Netherlands Government should be included in the commentary, and does not think it necessary to insert it in the text. He would like to have it mentioned in the Commission's report so that it may be taken into consideration at the conference of plenipotentiaries.

(9) Accordingly, the Special Rapporteur considers that:

(a) It is not necessary to change the proposed text;

(b) There is no need to change the commentary;

(c) For drafting reasons, the words "the members and diplomatic staff of the special mission" should be substituted for the words "the head and members of the special mission and the members of its diplomatic staff";

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

Article 31.²⁹⁰ — Exemption from customs duties and inspection

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

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

(b) Articles for the personal use of the head and members of the special mission, of the members of its diplomatic staff, or of the members of their family who accompany them.

2. The personal baggage of the head and members of the special mission and of the members of its diplomatic staff shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the person concerned, of his authorized representative, or of a representative of the permanent diplomatic mission of the sending State.

Commentary

(1) This article is based on article 36 of the Vienna Convention on Diplomatic Relations.

(2) The question of applying to special missions the rules exempting permanent diplomatic missions and their members from the payment of customs duties on articles imported for the establishment of the mission, its members or its staff seldom arises, although it may do so. In view of the rarity of such cases, the Commission considers that a special provision on this point should not be included in the text but that this eventuality should be mentioned in the commentary, in order to inform Governments that such situations occur and that they ought to settle them by specific decisions in individual cases.

(3) The claims of certain special missions, for themselves or for their members, to exemption from the payment of customs duties on the importation of consumer goods, have been challenged in practice. The Commission has refrained from proposing a solution for this case.

²⁸⁹ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

²⁹⁰ Introduced as article 30 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

New suggestions by Governments

(4) 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 baggages.²⁹¹

(5) 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.

(6) 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.

(7) 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.

(8) 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 1.²⁹²

(9) 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.

(10) 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 36, 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.²⁹³

(11) 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 expresses his views in the section on article 32, he does not think that there is any need here to express his opinion on the subject.

(12) Accordingly, the Special Rapporteur considers that:

(a) The text of article 31 should not be changed;

(b) The comments of the Austrian, Belgian, Swedish, and United Kingdom Governments which have been cited should be included in the commentary;

(c) For drafting reasons, paragraph 2 should begin with the words "The personal baggage of the members and diplomatic staff of the special mission shall be";

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

Article 32.²⁹⁴ — Administrative and technical staff

Members of the administrative and technical staff of the special mission shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in articles 24 to 31, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 2 of article 26 shall not extend to acts performed outside the course of their duties.

Commentary

(1) This article is based on article 37, paragraph 2, of the Vienna Convention on Diplomatic Relations.

(2) The two texts differ in that article 32 omits two clauses which appear in the said article 37, paragraph 2:

(a) It omits any mention of members of the family, for these are dealt with in a separate article (article 35);

(b) It does not provide for customs exemption in respect of articles imported at the time of first installation,

²⁹³ *Ibid.*

²⁹⁴ Introduced as article 32 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 31, discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁹¹ See *Yearbook of the International Law Commission, 1967*, vol. II, document 6709/Rev.1, annex I.

²⁹² *Ibid.*

as the Commission considered that this privilege should not be granted to the members of special missions (see article 31, paragraph (2) of the commentary).

New suggestions by Governments

(3) 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 36.²⁹⁵ 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.

(4) 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.

(5) The Swedish Government's comment on article 31 (see above, article 31, paragraph (8) of the commentary) also refers to this article. The Special Rapporteur has already accepted this comment in connexion with article 31.

(6) 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.²⁹⁶

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

(8) 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.

(9) In the section on article 32, 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.²⁹⁷

(10) 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.

(11) The 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.

(12) The Netherlands Government has also submitted written comments concerning the text of this article:

No comments, except for the necessity of formal adaptation to article 26 if the proposal to change this article is adopted. If the proposal to change article 26, paragraph 2 is not adopted, article 32 should be amended in such a manner that liability for damage resulting from road accidents falls outside the scope of the immunity.²⁹⁸

(13) Reference should also be made to the general comment of the Austrian Government on articles 31 and 32, which is reproduced in the discussion of article 31.

(14) The Special Rapporteur believes that the Commission should not go into the question of responsibility for damages resulting from automobile accidents, but he is prepared to propose to the Commission that accidents of this kind should not be considered as covered by the "minor" immunities, which include acts committed by members of this staff in the course of their duties.

(15) Accordingly, the Special Rapporteur considers that:

(a) It is not necessary to change the text of article 32;

(b) The idea set forth in the Netherlands Government's proposal should be included in the commentary;

(c) It is not necessary to revise the text of this article for drafting reasons;

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

Article 33.²⁹⁹ — Members of the service staff

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

Commentary

(1) This article is based on article 37, paragraph 3, of the Vienna Convention on Diplomatic Relations.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ Introduced as article 32 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 32, discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁹⁵ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁹⁶ *Ibid.*

(2) The Commission considers that the text adopted is sufficient to provide the guarantees necessary for the members of the service staff of special missions.

(3) The Special Rapporteur suggested that the Commission should provide for the grant of the following additional privileges to members of the service staff:

(a) Exemption from personal services and contributions, for he is convinced that, unless members of the service staff are guaranteed this exemption, the authorities of the receiving State could paralyse the proper functioning of the special mission;

(b) Full immunity from the criminal jurisdiction of the receiving State, for the exercise of that jurisdiction in respect of members of the service staff could paralyse the functioning of the special mission entirely — a possibility which does not arise in the case of permanent diplomatic missions.

(4) The Commission did not accept the Special Rapporteur's suggestions, and it decided not to go further than the Vienna Convention on Diplomatic Relations in the matter. It decided to draw attention in the commentary to the Special Rapporteur's suggestions set out in paragraph (3) above.

New suggestions by Governments

(5) 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."³⁰⁰

(6) 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.

(7) 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.

(8) 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.³⁰¹

(9) 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 it is not necessary to include these remarks in the commentary.

(10) In its written comments, the Netherlands Government proposes the following:

Liability for damage resulting from road accidents should be excluded from the immunity.³⁰²

(11) Accordingly, the Special Rapporteur considers that:

(a) The Belgian Government's two suggestions for amendment of the text should be adopted;

(b) The commentary should be extended to include the Belgian amendments and the idea contained in the Netherlands Government's proposal;

(c) There is no need to amend the text for drafting reasons;

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

Article 34.³⁰³ — Private staff

Private staff of the head and members of the special mission and of members of its staff who are authorized by the receiving State to accompany them in the territory of the receiving State shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In all other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the special mission.

Commentary

(1) This article is based on article 37, paragraph 4, of the Vienna Convention on Diplomatic Relations.

(2) In 1960 the Commission took as the premise the proposition that the head, members and members of the staff of the special mission should be allowed to bring private staff with them, for such staff might be essential to their health or personal comfort.

(3) However, it is a moot point whether there is a right *de jure* to bring such staff. This matter is thought to lie within the discretionary power of the receiving State, which may therefore impose restrictions. However, where there are no restrictions or where the receiving State grants permission, the question arises in practice whether the privileges and immunities extend to private staff.

(4) The Special Rapporteur is of the opinion that this staff should be guaranteed functional immunity from criminal jurisdiction in respect of acts performed in the course of the duties they normally carry out on the orders of their employers. The Commission did not

³⁰² *Ibid.*

³⁰³ Introduced as article 32 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 33, discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

³⁰⁰ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³⁰¹ *Ibid.*

wish to go further than the Vienna Convention on this point.

New suggestions by Governments

(5) 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 36.³⁰⁴ The Belgian Government's observation is fully justified.

(6) 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 oppose 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.³⁰⁵

(7) 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.

(8) With reference to this point, the Netherlands Government states that it is opposed to the use of the expression "private staff" and prefers the expression "private servants".³⁰⁶ However, the Commission rejected the term "servant", which had previously been discarded during the preparation of the Vienna Convention on Consular Relations of 1963. The Special Rapporteur thinks that the Commission should not revert to an expression previously rejected in international law.

(9) Accordingly, the Special Rapporteur considers that:

(a) The text of article 34 should not be changed;

(b) There should be an explanation in the commentary of why the expression "private servant" has not been used;

(c) For drafting reasons and in the light of the definitions proposed in the new article, the words "of the members of staff of the special mission" should be substituted for the words "of the head and members of the special mission and of members of its staff";

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

Article 35.³⁰⁷ — Members of the family

1. The members of the families of the head and members of the special mission and of its diplomatic staff who are authorized by the receiving State to accompany them shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 24 to 31.

2. Members of the families of the administrative and technical staff of the special mission who are authorized by the receiving State to accompany them shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in article 32.

Commentary

(1) This article is based on article 37 of the Vienna Convention on Diplomatic Relations, but some major changes were necessary to make it applicable to special missions.

(2) In practice, the question arises whether privileges and immunities also attach to family members accompanying the head and members of the special mission or members of its staff. One school of thought maintains that there can be no grounds for limiting privileges exclusively to the head and members of the special mission and members of its staff unless, owing to the nature of the work to be performed or by prior arrangement, the presence of family members in the territory of the receiving State is ruled out in advance.

(3) The Commission realized that the attempt to specify what persons are covered by the expression "members of the family" had at both the Vienna Conferences (in 1961 and 1963) ended in failure, but it believes that in the case of special missions the number of such persons should be limited. However, in the case of temporary residence it is a matter of no great consequence whether the relative concerned is a regular member of the household of the person whom he or she is accompanying.

(4) In practice, restrictions are sometimes general, sometimes limited in the sense that they except a specified number of family members, or else they may apply to certain periods of the special mission's visit or to access to certain parts of the territory. The Commission merely recognized, without going into details, that

³⁰⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ Introduced as article 31 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 34, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

it is within the receiving State's power to impose restrictions in this respect.

New suggestions by Governments

(5) 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.³⁰⁸

(6) 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.

(7) 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.³⁰⁹

(8) 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.

(9) The Swedish Government's comment on article 31 (see above, article 31, paragraph (8) of the commentary) also refers to this article. The Special Rapporteur has already answered this comment by the Swedish Government in the section dealing with article 31.

(10) 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 its 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.³¹⁰

(11) 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 text of the article. He will, nevertheless, take these comments into account in preparing the final text of the commentary.

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

Article 35, paragraph 2:

This paragraph should, in the manner already explained in connexion with article 32, and in the light 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.³¹¹

(13) The Special Rapporteur thanks the Austrian Government for giving him this warning and points out that he has already expressed his views on this question in the present section on article 35, in reply to a similar remark by the United Kingdom Government.

(14) The Netherlands Government, in its written comments, has also given its opinion on the text of article 35. Its comments are as follows:

This article is worded in such a manner that the permission of the receiving State would seem to be required whenever the head or members of the special mission or its diplomatic staff wish to bring members of their families with them. Even though circumstances are conceivable in which the receiving State would advise against bringing members of families or would even feel obliged to forbid it, it does not seem right to make it a general rule that the bringing of members of one's family shall be subject to the granting of permission. It is proposed that, by and large, matters concerning the presence and the status of members of families be omitted from the rules governing special missions. Only if the sending State desired that special status be accorded to the members of the families would the receiving State's permission be required. Therefore the words: "who are authorized by the receiving State to accompany them" should be deleted from article 35, paragraph 1; instead, the following words should be added at the end of the clause:

" . . . in articles 24 to 31, in so far as these privileges and immunities are granted to them by the receiving State".

Paragraph 2 should be amended accordingly.

If the proposal to amend article 26, paragraph 2 is rejected, article 35 should be amended in such a way that damage resulting from road accidents is not included in the immunity.³¹²

(15) The Special Rapporteur considers that the idea put forward by the Netherlands Government concerning

³⁰⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² *Ibid.*

paragraph 1 is not in accord with the fundamental idea which guided the Commission. According to the Commission's conception, the members of the family should enjoy privileges and immunities to the same extent as the persons from whom they derive these privileges. On the other hand, according to the conception of the Netherlands Government, the extent of these privileges and immunities is determined by the receiving State. Since this is a substantive question, the Special Rapporteur considers that the Commission should take a definite decision on it; personally, he does not advise the adoption of this idea. As to the suggestion that the members of the family should not enjoy immunities in respect of damages resulting from automobile accidents, he is of the opinion that it might be adopted.

(16) Accordingly, the Special Rapporteur considers that:

(a) A decision should be taken on the Netherlands Government's proposed amendment to paragraph 1;

(b) In any event, the Netherlands Government's idea should be noted in the commentary;

(c) The words "of the members and diplomatic staff of the special mission" should be substituted for the words "of the head and members of the special mission and of its diplomatic staff" for drafting reasons and in accordance with the definition proposed in the introductory article;

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

*Article 36.*³¹³ — *Nationals of the receiving State and persons permanently resident in the territory of the receiving State*

1. Except in so far as additional privileges and immunities may be recognized by special agreement or by decision of the receiving State, the head and members of the special mission and the members of its diplomatic staff who are nationals of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of their functions.

2. Other members of the staff of the special mission and private staff who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the special mission.

Commentary

(1) This article is based on article 38 of the Vienna Convention on Diplomatic Relations, but the two texts are not identical. The starting-point is the idea that

³¹³ Introduced as article 33 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 35, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

the receiving State is not obliged to admit, as head, member or member of the staff of the special mission, its own nationals or persons permanently resident in its own territory. This idea is set forth in article 14 concerning the nationality of the head and members of the special mission and of members of its staff.

(2) The difference between the aforesaid article 14 and the present article is that, in the latter, persons permanently resident in the territory of the receiving State are treated in the same manner as nationals of the receiving State.

(3) During the discussion of article 14, the Commission did not adopt the view that nationals of the receiving State and persons permanently resident in its territory should be treated in identical fashion. In adopting that decision, the Commission took account of the fact that article 8 of the Vienna Convention on Diplomatic Relations does not treat these persons in identical fashion. However, in regard to the enjoyment of privileges and immunities, the Vienna Convention on Diplomatic Relations accepts identical treatment of these two groups in article 38. The Commission considers that the same course should be adopted in the present article. It accepts the argument that the rules on special missions should not reduce the staff of special missions to a status lower than that resulting from the provisions of the Vienna Convention on Diplomatic Relations. However, it was also argued in the Commission that in settling the status of special missions the Commission should take care not to establish any further limitations on the sovereignty of receiving States. It is held that it would not be logical for certain members of special missions or of their staff to be favoured to the detriment of the interests of the receiving State.

(4) The Commission stresses that, in its view, it is better that this question should be settled by mutual agreement rather than that general international rules should be laid down on the subject.

New suggestions by Governments

(5) 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.³¹⁴

(6) 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.

(7) 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

³¹⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

forth in article 14 etc." is not exact. As appears from paragraph (3) only part of the idea was incorporated in article 14.³¹⁵

(8) 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.

(9) In its written comments on article 32, the United Kingdom Government draws attention to the fundamental nature of 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.

(10) The Special Rapporteur agrees with this comment by the United Kingdom Government.

(11) In its written comments, the Netherlands Government opposed the retention of article 36.³¹⁶

(12) The Special Rapporteur cannot endorse the proposal of the Netherlands Government, since, perhaps through his fault, paragraph (4) of the commentary has been clumsily drafted. The Commission did not oppose this provision. It only expressed the opinion that it would be better in the first place to settle the status of members of the staff of the special mission who were nationals of the receiving State or who were permanently resident in its territory by mutual agreement rather than by general rules of international law. The Netherlands Government's proposal therefore goes beyond the Commission's wishes, and the Special Rapporteur cannot adopt it.

(13) Accordingly, the Special Rapporteur considers that:

(a) The Commission should first decide on the Netherlands Government's proposal for the deletion of this article. The Special Rapporteur does not recommend that the Commission should adopt this proposal. He also considers that the Drafting Committee should be requested to study the Belgian Government's proposal concerning what it considers to be "a drafting error";

(b) The reference to article 14 in paragraph (2) of the commentary should be revised in accordance with the observation made by the Swedish Government; moreover, the commentary should include a more detailed explanation of the meaning of paragraph (4), in accordance with the decision which the Commission takes on the Netherlands Government's proposal;

(c) For drafting reasons, the words "the members and diplomatic staff of the special mission" should be substituted for the words "the head and members of the special mission and the members of its diplomatic staff", in accordance with the definition in the introductory article;

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

Article 43.³¹⁷ — Right to leave the territory of the receiving State

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Commentary

(1) This article reproduces *mutatis mutandis* article 44 of the Vienna Convention on Diplomatic Relations.

(2) The Commission considered that persons who had entered the receiving State's territory in order to form part of a special mission (other than nationals of the receiving State) had the right to leave that territory. The receiving State would be contravening the principle of personal inviolability if it prevented them from leaving.

New suggestions by Governments

(3) 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.

(4) 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.³¹⁸

(5) 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 is 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.

(6) 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.³¹⁹

(7) 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 of article 44, which concerns the situation in case of the cessation of the special mission's functions cannot be considered

³¹⁷ Text, numbered 42, submitted by Drafting Committee and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

³¹⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³¹⁹ *Ibid.*

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

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.

(8) Accordingly, the Special Rapporteur considers that:

(a) The Commission should adopt the Israel Government's second proposal;

(b) It is not necessary to change the commentary, but it would be useful to add a new paragraph which would relate the provisions of article 43 to those of article 44 (cross-reference);

(c) There is no need to make any drafting changes in the text of this article;

(d) The provision contained in this article should be generally compulsory, and States may not, even by agreement, waive the right of the members of a special mission and its staff to leave the territory of the receiving State.

Article 37.³²⁰ — Duration of privileges and immunities

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State for the purpose of performing his functions in a special mission, or, if already in its territory, from the moment when his appointment is notified to the competent organ of that State.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in the case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the special mission, immunity shall continue to subsist.

Commentary

(1) This article reproduces *mutatis mutandis* article 39, paragraphs 1 and 2, of the Vienna Convention on Diplomatic Relations. In the present draft the subject-matter of the other two paragraphs (3 and 4) of the said article 39 is dealt with in a separate article (article 38).

(2) In adopting article 37 the Commission based itself on the same reasons as determined the adoption of article 39 of the Vienna Convention on Diplomatic Relations.

New suggestions by Governments

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

³²⁰ Introduced as article 34 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 36, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

The word "organ" in the seventh line should be replaced by some more neutral word such as "authority".³²¹

(4) 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*.

(5) 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*".

(6) The Special Rapporteur leaves the decision on this point to the Drafting Committee.

(7) Accordingly, the Special Rapporteur considers that:

(a) It is not necessary to change the text, unless the Drafting Committee adopts the amendment to paragraph 2 proposed by the Belgian Government;

(b) It is not necessary to change the commentary;

(c) There is no need to amend the text for drafting reasons;

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

Article 38.³²² — Case of death

1. In the event of the death of the head or of a member of the special mission or of a member of its staff, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

2. In the event of the death of the head or of a member of the special mission or of a member of its staff, or of a member of their families, if those persons are not nationals of or permanently resident in the receiving State, the receiving State shall facilitate the collection and permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death.

3. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as the head or member of the special mission or member of its staff, or as a member of their families.

Commentary

(1) This article is based on paragraphs 3 and 4 of article 39 of the Vienna Convention on Diplomatic Relations. It contains no more than is needed in the case of special

³²¹ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³²² Introduced as article 35 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 37, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

missions, which are not of the same nature as permanent diplomatic missions.

(2) The Commission takes the view that in addition to the provisions applicable to permanent diplomatic missions an obligation should be placed on the receiving State to take whatever measures of protection are necessary with regard to the movable property of members of special missions. It may be that members of special missions and their families are far from the seat of the sending State's permanent mission when death occurs, and the assistance of the local authorities is then necessary for the purpose of collecting and protecting the deceased's movable property. This situation does not arise in the case of the staff of diplomatic and consular missions.

New suggestions by Governments

(3) This article was not referred to in the discussions in the Sixth Committee.

(4) The United Kingdom Government has 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.³²³

(5) 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.

(6) Accordingly, the Special Rapporteur considers that:

(a) The text of this article should not be changed;

(b) With reference to the United Kingdom Government's observation, a commentary which would be in harmony with the Special Rapporteur's position and which would be worded to take account of the United Kingdom Government's comment should perhaps be included;

(c) For drafting reasons, the words "of a member of the special mission or of its staff" should be substituted for the words "of the head or of a member of the special mission or of a member of its staff" in paragraphs 1 and 2, since it is impossible to use the shorter form contained in the definition in the proposed introductory article;

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

³²³ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

Article 39.³²⁴ — Transit through the territory of a third State

1. Subject to the provisions of paragraph 4, if the head or a member of the special mission or a member of its diplomatic staff passes through or is in the territory of a third State, while proceeding to take up his functions in a special mission performing its task in a foreign State, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the person referred to in this paragraph, or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the transit of members of the administrative and technical or service staff of the special mission, and of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. Subject to the provisions of paragraph 4, they shall accord to the couriers and bags of the special mission in transit the same inviolability and protection as the receiving State is bound to accord.

4. The third State shall be bound to comply with the obligations mentioned in the foregoing three paragraphs only if it has been informed in advance, either in the visa application or by notification, of the transit of the special mission, and has raised no objection to it.

5. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in these paragraphs, and to the official communications and bags of the special mission, whose presence in the territory of the third State is due to *force majeure*.

Commentary

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

(2) The Commission considers that a third State is not bound to accord to its nationals who form part of a foreign special mission passing through its territory the privileges and immunities which the receiving State is not bound to guarantee to its nationals who are members of a foreign special mission (see article 36 of the draft).

³²⁴ Introduced as article 36 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Draft Committee's text, numbered 38, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

New suggestions by Governments

(3) In its written comments, the Government of Israel proposes to change 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).³²⁵

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

(5) 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.³²⁶

(6) The Special Rapporteur recalls that the phrase which the Government of Israel suggests should be deleted corresponded in its essential features to the position taken by the Commission, which was 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.

(7) The Belgian Government also proposes a change in article 39, paragraph 4, as follows:

It would be better to say "*soit dans le demande de visa*", as that wording would bring out better the obligation to inform at the time that the visa application is made.³²⁷

(8) 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 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.

(9) 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.³²⁸

(10) 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.

(11) Article 39 was mentioned in the written comments of the Netherlands Government. Its observation is as follows:

The last few words of paragraph 4, viz. "and has raised no objection to it", make paragraphs 1, 2 and 3 meaningless. The Netherlands Government is of the opinion that the third State is only entitled to object to the transit of special missions in exceptional cases and after stating its reasons for doing so. There would have to be an objective criterion by which to judge the justifiability of refusals to allow special missions to pass, and that criterion would have to be set down in the present article. Since it is impossible to establish such a criterion, it would be better to dispense with the article altogether.³²⁹

(12) The Special Rapporteur does not regard the Netherlands Government's proposal as a contribution to the development of international law, for any provision, however incomplete, concerning the duty of the third State to permit transit is better than the deletion of the provision regulating this point. If the third State has, in principle, an obligation to permit transit, this obligation should be expressly stated.

(13) Accordingly, the Special Rapporteur considers that:

I (a) It is not necessary to adopt the United Kingdom Government's amendment;

(b) Consideration should be given to the Israel Government's suggestion, and a decision should be taken as to which expression is more correct: transit through the territory of a *third* State or transit through the territory of a *foreign* State. The Drafting Committee should take a decision on this amendment;

(c) The Commission should take a decision again as to whether the sending State has a duty to furnish an explanation in the note in which it applies for the visa. The Special Rapporteur considers that it would be advisable for the Commission to approve the reasons put forward by the Belgian and Israel Governments on this point;

II (a) If the Netherlands amendment is adopted—and the Special Rapporteur is opposed to its adoption—the question of an addition to the commentary will arise;

(b) If the United Kingdom amendment is adopted, it will be necessary to change paragraph 1 of the commentary;

(c) If either the Belgian or the Israel amendment is adopted, it will be necessary to add a new paragraph to the commentary;

III For drafting reasons, in the light of the definitions contained in the introductory article, the words "the head or" in paragraph 1 should be deleted.

³²⁵ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³²⁶ *Ibid.*

³²⁷ *Ibid.*

³²⁸ *Ibid.*

³²⁹ *Ibid.*

IV In principle, the provision contained in this article should be generally compulsory in the absence of a special agreement between the sending State and the third State concerned.

*Article 40 bis.*³³⁰ — *Non-discrimination*

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

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

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

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

(c) Where States agree among themselves to reduce reciprocally the extent of the facilities, privileges and immunities for their special missions in general or for particular categories of their special missions, although such a limitation does not exist with regard to other States.

3. Discrimination also shall not be regarded as taking place where there is inequality in the treatment of special missions which belong to different categories or are received in different circumstances.

Commentary and comments by the Special Rapporteur

(1) Paragraph 1 and the first two sub-paragraphs of paragraph 2 correspond entirely to article 47 of the Vienna Convention on Diplomatic Relations and to article 72 of the Vienna Convention on Consular Relations, which two articles are identical. In the Special Rapporteur's opinion, these rules now represent the standard provisions concerning the application of international law.

(2) The third sub-paragraph of paragraph 2 is new. It was introduced because of the Commission's position that the extent of the facilities, privileges and immunities normally accorded where there are no agreements concerning limitations between the sending State and the receiving State may be changed and limited by mutual agreement. In this case, the States to which such agreements apply cannot be considered to be suffering discrimination.

³³⁰ In his second report on special missions (A/CN.4/179), submitted to the International Law Commission at its seventeenth session, the Special Rapporteur included an article 39, entitled "Non-discrimination",* the text of which was identical with that of paragraph 1 and paragraphs 2 (a) and 2 (b) of article 40 bis. At that session the Commission did not accept the Special Rapporteur's suggestion that a provision on non-discrimination should be included among the draft articles.** At its eighteenth session, however, the Commission reconsidered its previous decision on the point and requested the Special Rapporteur to submit a draft article prohibiting discrimination, concerning which it gave him instructions.***

* Yearbook of the International Law Commission, 1965, vol. II, p. 141.

** *Ibid.*, p. 191, para. 49.

*** Yearbook of the International Law Commission, 1966, vol. II, p. 276, para. 62.

(3) Paragraph 3 was included in the draft articles by the Special Rapporteur in accordance with the instructions given by the Commission. The tasks of the various categories of special missions are so diverse that they have to be treated differently, but the treatment accorded to them should always include the conditions necessary to ensure their functioning and the minimum required by international courtesy. In practice, different treatment is applied to different kinds of special missions, and a sending State may not consider that its special mission belonging to a certain category is being discriminated against if this special mission is not accorded all the facilities, immunities and privileges accorded to another State's special mission which belongs to another category. For example, a special mission for hydrotechnical works cannot claim the treatment accorded to another State's special mission which is responsible for political negotiations, but it has the right not to be subjected to any discrimination in respect of the treatment ordinarily accorded to a special mission of the other State entrusted with similar tasks in the hydrotechnical field.

PART III. MISCELLANEOUS CLAUSES

*Article 40.*³³¹ — *Obligation to respect the laws and regulations of the receiving State*

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

2. The premises of the special mission must not be used in any manner incompatible with the functions of the special mission as laid down in these articles or by other rules of general international law or by any special agreements in force between the sending and the receiving State.

Commentary and comments by the Special Rapporteur

(1) Paragraph 1 of this article reproduces *mutatis mutandis* paragraph 1 of article 41 of the Vienna Convention on Diplomatic Relations and of article 55 of the Vienna Convention on Consular Relations. The rule in question is at present a general rule of international law. The Special Rapporteur considered, furthermore, that this rule should be amplified by a proviso stating that the laws and regulations of the receiving State are not mandatory for the organs of the sending State if they are contrary to the general rules of international law or to the contractual rules which exist between the States. Such a proviso was discussed at both the Vienna Conferences (1961 and 1963) but was not inserted in the relevant articles, for it was presumed that as a general rule the receiving State would observe its general international

³³¹ Introduced as article 38, paragraphs 1 and 4 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 39, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

obligations and its duties arising out of international agreements. In addition, it was pointed out that it would be undesirable to refer the diplomatic or consular organs to the general rules of international law and that in each specific case they had the right to enter into discussions with the Government of the receiving State about the conformity of its internal law with the rules of international law. Accordingly, the Commission adopted the rule in question for special missions, but omitted the proviso mentioned above.

(2) Paragraph 2 of this article reproduces *mutatis mutandis* paragraph 3 of article 41 of the Vienna Convention on Diplomatic Relations.

(3) There have been no further suggestions.

(4) The Special Rapporteur considers that neither the text of the article nor the commentary should be changed.

Article 42.³³² — Professional activity

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

Commentary

(1) This article reproduces *mutatis mutandis* article 42 of the Vienna Convention on Diplomatic Relations.

(2) With regard to the possibility of including in the article a clause stating that the right of the persons concerned to carry on a professional or commercial activity in the receiving State on behalf of the sending State is subject to the prior consent of the receiving State, some members contested the validity of the argument that prior consent should not be required in the case of special missions because it is not required in the case of permanent diplomatic missions. The other members took the view that such activity was permitted if in conformity with the law of the receiving State and that the question was settled by article 40, paragraph 1, of the draft (Obligation to respect the laws and regulations of the receiving State). The Commission decided not to include a clause on this question in the text, but to mention this difference of opinion in the commentary.

New suggestions by Governments

(3) The Belgian Government has stated its views on the question whether the provision forbidding members of special missions and their diplomatic staff to practise a professional or commercial activity should be on the lines of article 42 of the 1961 Vienna Convention on Diplomatic Relations, or 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

³³² Introduced as article 37 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 41, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

"shall not carry on", as in article 57 of the Vienna Convention on Consular Relations of 24 April 1963.³³³

(4) 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.³³⁴ At the close of the discussion, the prevailing view was that the provisions of the Convention on Diplomatic Relations should be followed.

(5) 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 57.³³⁵

(6) The Special Rapporteur considers that the explanation given by him with respect to the preceding proposal also replies to this second proposal by the Belgian Government.

(7) 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".³³⁶

(8) 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 that a number of different attitudes can be taken towards it. He personally considers that the adopted text should be adhered to, but at the same time he recalls that this text was not adopted unanimously at 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.

(9) During the discussion which took place in the Sixth Committee of the General Assembly, the Turkish delegation stated that it 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.³³⁷ The Special Rapporteur has been unable, by reference to the official record of the meeting, to form a clear idea of the meaning of the observation of the Turkish represen-

³³³ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³³⁴ See *Yearbook of the International Law Commission, 1965*, vol. I, 809th meeting, paras. 10-51.

³³⁵ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³³⁶ *Ibid.*

³³⁷ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 847th meeting, para. 24.*

tative, Mr. Bilge, whom he has asked for a more detailed explanation of his ideas. Unfortunately he has received no reply to the letter he has sent Mr. Bilge on this subject.

(10) The Netherlands Government also made the following comments on the text of article 42:

Although the Netherlands Government has no objection to this article in its present form, it wishes to endorse the original proposal of the Special Rapporteur that the provision be amplified with the words: "*and they may not do so for the profit of the sending State unless the receiving State has given its prior consent*". (Cf. commentary on article 37 in the second report by Mr. Bartoš.)

This amplification will become superfluous if the Netherlands proposal to amend article 24 is adopted by the Commission.³³⁸

(11) Accordingly, the Special Rapporteur considers that:

(a) In view of the doubts which had been expressed in the Commission, the Israel and Netherlands suggestions should be reconsidered and one of them should be adopted;

(b) The Commission's decision on this point will determine whether it is necessary to change and amplify the commentary;

(c) For drafting reasons, the words "The members and diplomatic staff of the special mission" should, in accordance with the definition contained in the proposed new introductory article, be substituted for the words "The head and members of the special mission and the members of its diplomatic staff";

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

*Article 41.*³³⁹ — *Organ of the receiving State with which official business is conducted*

All official business with the receiving State entrusted to the special mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other organ, delegation or representative as may be agreed.

Commentary

(1) This article is based on paragraph 2 of article 41 of the Vienna Convention on Diplomatic Relations. No such provision appears in the Vienna Convention on Consular Relations for the simple reason that consuls are allowed in principle to communicate direct with all the organs of the receiving State with which they have dealings in the performance of their tasks. Special missions are in a special position. As a general rule, they communicate with the Ministry of Foreign Affairs of the receiving State, but frequently the nature of their

tasks makes it necessary for them to communicate direct with the competent special organs of the receiving State in regard to the business entrusted to them. These organs are often but not always local technical organs. It is also the practice for the receiving State to designate a special delegation or representative who establishes contact with the special mission of the sending State. The question is generally settled by mutual agreement between the States concerned, or else the Ministry of Foreign Affairs of the receiving State informs the organs of the sending State with which organ or organs the special mission should get in touch. A partial solution to this problem has already been provided in the commentary on article 11 of the draft. Consequently, the article as adopted is merely an adaptation of article 41, paragraph 2, of the Vienna Convention on Diplomatic Relations.

(2) Although the range of organs of the receiving State with which the special mission may establish contact in the conduct of its business has been widened in the article as adopted, special missions are not being placed in a position analogous to that of consuls. The relations of special missions are confined to those with the organs which have been specified by agreement or to which they are referred by the Ministry of Foreign Affairs of the receiving State. It should be noted that the term "organ" also applies to liaison officers.

New suggestions by Governments

(3) 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 on".³⁴⁰

(4) 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.

(5) In its observations, the Belgian Government also makes another proposal in case the Commission fails to 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".³⁴¹

(6) 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.

(7) The Special Rapporteur considers that, notwithstanding these observations of the Belgian Government, neither the text nor the commentary on this article should

³³⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³³⁹ Introduced as article 38, paragraphs 2 and 3 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 40, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

³⁴⁰ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³⁴¹ *Ibid.*

be changed and that it is not necessary to amend the text for drafting reasons.

*Article 44.*³⁴² — *Cessation of the functions of the special mission*

1. When a special mission ceases to function, the receiving State must respect and protect its property and archives, and must allow the permanent diplomatic mission or the competent consular post of the sending State to take possession thereof.

2. The severance of diplomatic relations between the sending State and the receiving State shall not automatically have the effect of terminating special missions existing at the time of the severance of relations, but each of the two States may terminate the special mission.

3. In case of absence or breach of diplomatic or consular relations between the sending State and the receiving State and if the special mission has ceased to function,

(a) The receiving State must, even in case of armed conflict, respect and protect the property and archives of the special mission;

(b) The sending State may entrust the custody of the property and archives of the mission to a third State acceptable to the receiving State.

Commentary

(1) This article is based on article 45 of the Vienna Convention on Diplomatic Relations, but it was necessary to take into account the fact that the cessation of a special mission's functions does not always coincide with the severance of diplomatic or consular relations between the sending State and the receiving State.

(2) Paragraph 1 covers the case in which the functions of a special mission cease while diplomatic or consular relations exist between the States concerned. In this case, the diplomatic mission or consular posts of the sending State are authorized to take possession of the property and archives of the special mission; they are responsible for the protection of the property of the sending State, including that of the special mission.

(3) Paragraph 2 provides, first, that the severance of diplomatic relations between the sending State and the receiving State does not automatically have the effect of terminating special missions existing at the time of severance. This is consequential on the rule in article 1, paragraph 2, of the draft that the existence of diplomatic or consular relations between the States is not necessary for the sending and reception of special missions (see also paragraph (5) of the commentary on article 1). If the existence of diplomatic or consular relations is not necessary for the sending or reception of special missions, then, *a fortiori*, the severance of such relations does not automatically have the effect of terminating special missions.

(4) Secondly, in conformity with practice, the Commission has recognized in paragraph 2 the right of each of the States concerned to terminate by unilateral act special missions existing at the time when diplomatic relations are severed.

(5) Where diplomatic or consular relations between the two States concerned are non-existent or are severed, the property and archives of the special mission which has ceased its functions are governed, in conformity with practice, by the rules of diplomatic law relating to the severance of diplomatic relations (article 45 of the Vienna Convention on Diplomatic Relations).

New suggestions by Governments

(6) In its observations the Belgian Government discussed the substance of article 44 and particularly of 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 the two States may terminate the special mission" would become superfluous.³⁴³

(7) 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 does not automatically have the effect of terminating 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.

(8) 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 word "automatically", since it is a question of the effective consequence of a fact rather than of a juridical effect.

(9) 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 missions 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 44.³⁴⁴

³⁴² Text, numbered 43, submitted by Drafting Committee and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

³⁴³ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

³⁴⁴ *Ibid.*

(10) The Special Rapporteur thanks the Government of Israel for having drawn attention to the special situations connected with the breaking off 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.

(11) 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.³⁴⁵

(12) 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; it would therefore be better to take a middle course.

(13) Accordingly, the Special Rapporteur considers that:

I. (a) The Commission should study the United Kingdom amendment and, if it adopts that amendment in principle, should direct the Special Rapporteur to propose a wording;

(b) The amendment proposed by the Government of Israel is a useful suggestion which the Commission should adopt. Should the Commission adopt this suggestion, the Special Rapporteur will ask Mr. Rosenne, a member of the Commission, to help him draft correctly the addition to the text of article 44;

(c) The Belgian amendment should be sent to the Drafting Committee for preliminary consideration, and the decision on it should be left to that committee;

II. If any of the amendments referred to in subparagraphs (a), (b) and (c) is adopted, the appropriate additions will be made to the commentary;

III. It is not necessary to amend the text of this article for drafting reasons;

IV. The provision contained in this article should be construed as generally compulsory.

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;

(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 task 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

³⁴⁵ *Ibid.*

of the special mission, including the residence of accommodation of the members and staff of the special mission.

Commentary

The reasons which led to the preparation of this article are set out more particularly in chapter I, section 15, of this report. The comments on this text by Mr. Castrén, a member of the Commission, and by the Governments of some Member States will also be found there.

Article "X". — Legal status of the provisions

The provisions contained in these articles shall be compulsory for the States that have acceded to them, unless the provisions contained in particular articles provide expressly that they may be modified by the States concerned in their reciprocal relations by mutual agreement.

Comments by the Special Rapporteur

(1) The Special Rapporteur proposes the above provision in accordance with the Commission's decision recorded in paragraph 60 of its report on its eighteenth session, which reads as follows:

After examining the comments by Governments on this point, the Commission decided to ask the Special Rapporteur to base his draft on the view that the provisions of the draft articles on special missions could not in principle constitute rules from which the parties would be unable to derogate by mutual agreement. The Special Rapporteur was asked to submit to the Commission a draft article which would convey that view and indicate specifically which of the provisions, if any, should in his opinion be excepted from this principle.³⁴⁶

(2) The Special Rapporteur did not consider it advisable, in a provision of this kind, to list the articles which should be considered generally compulsory, from which the parties would be unable to derogate, and certain other articles which could be considered rules left to the discretion of the parties and of a purely optional nature. He considers it preferable to make a general statement, as he has done in the above text. If the Commission thinks that this provision should indicate specifically the rules which may be modified by States and the other rules which should be considered compulsory, the necessary amendment of the proposed provision cannot be made until after the Commission, in its revision of the draft articles, has taken a decision on the compulsory or optional character of each provision.

(3) The problem of the nature and legal status of the draft articles relating to special missions has been fully set out in chapter II, section 8, of this report, which should be considered as a detailed commentary on this provision.

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

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

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

Commentary and comments by the Special Rapporteur

(1) This article had been proposed as article 40 by the Special Rapporteur in his second report,³⁴⁷ but the Commission did not adopt it at its seventeenth session.

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

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

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

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

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

(a) derogating therefrom, in cases where the rules themselves provide that they are applicable unless the

³⁴⁶ Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, p. 276, para. 60.

³⁴⁷ See Yearbook of the International Law Commission, 1965, vol. II, document A/CN.4/179, pp. 141 and 142.

States settle the particular question differently by treaty (e.g., article 3; article 6, paragraph 3; article 9; article 13, paragraph 1, of the articles on special missions as already adopted). In such a case, the rules in the articles are residual rules.

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

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

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

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

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

(8) The Commission did not adopt the Special Rapporteur's proposal during its seventeenth session, and it included in its report on that session the following decision:

Nor did the Commission accept for the time being the Special Rapporteur's proposal that the draft should contain a provision on the relationship between the articles on special missions and other international agreements (article 73 of the Vienna Convention on Consular Relations).³⁴⁸

(9) When it reverted to this question during its eighteenth session, the Commission changed its mind and took a new decision, which was recorded in paragraph 64 of its report. This decision is as follows:

In paragraph 50 of its report on the work of the first part of its seventeenth session (1965), the Commission referred to the question whether the draft articles on special missions should include a provision on the relationship between the articles and other international agreements, corresponding to article 73 of the Vienna Convention on Consular Relations. After considering

the comments by Governments and the Special Rapporteur's views on the point, the Commission asked the Special Rapporteur to submit a draft article on the subject based on the Convention on the Privileges and Immunities of the United Nations, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.³⁴⁹

(10) This idea is discussed more particularly in chapter II, section 4, of this report, which should be considered as an integral part of this commentary.

Preamble

337. The Commission discussed, during its eighteenth session, the question of the preparation of a preamble to the instrument relating to special missions. The Commission's decision, which was recorded in paragraph 67 of its report on that session, is as follows:

Although it is not current practice for the Commission to prepare preambles to the drafts which it submits to the General Assembly, one Government, in its written comments, expressed the view that the preamble to the convention on special missions should give a definition of a special mission and emphasize the differences between special missions and permanent diplomatic missions. After discussing the matter, the Commission instructed the Special Rapporteur to draft a preamble and submit it to the Commission.³⁵⁰

338. The Special Rapporteur, proceeding in accordance with this decision, has prepared a draft preamble. A more detailed statement on this subject will be found in chapter II, section 16, of this report. That statement should also be considered as a commentary on the draft preamble itself.

339. The draft preamble is as follows:

The States parties to this Convention,

Recalling that the peoples of all States have recognized since time immemorial the special status of special missions,

Bearing in mind the Purposes and Principles of the United Nations Charter relating to the sovereign equality of States, the maintenance of international peace and security, and the development of friendly relations among nations,

Considering that international conventions on diplomatic and consular relations and on privileges and immunities contribute to the development of friendly relations among peoples irrespective of their different constitutional and social systems, and that the conclusion of such conventions at the 1961 and 1963 Vienna Conferences represents progress in the development of international law,

Endorsing the recommendations of the 1961 Vienna Convention on Diplomatic Relations relating to the importance of special missions and the idea that the rules on special missions represent a special branch of diplomatic law since special missions are essentially different in nature and functions from permanent diplomatic missions,

³⁴⁸ *Yearbook of the International Law Commission, 1965*, vol. II, p. 191, para. 50.

³⁴⁹ *Yearbook of the International Law Commission, 1966*, vol. II, p. 276, para. 64.

³⁵⁰ *Ibid.*, p. 277, para. 67.

Recognizing the need for special provisions of international law which would relate to special missions and which would govern them as an institution which is being increasingly used in international relations,

Noting that the conclusion of a special convention relating to special missions will complete the code of positive diplomatic law initiated by the conclusion of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations,

Mindful of the fact that the status, privileges and immunities to be conferred on special missions are not accorded for the benefit of persons but for the purpose of assuring the effective exercise of the functions of special missions in so far as they represent States,

Confirming that the rules of customary international law should continue to be valid for questions which are not expressly regulated by the provisions of this Convention,

Have adopted the following articles:

...

Arrangement of the articles

340. In his third report, the Special Rapporteur mentioned that several States had made suggestions concern-

ing the revision of the general arrangement of the articles in the draft.³⁵¹

341. The Commission considered this question during its eighteenth session and took a decision on the matter which is recorded in paragraph 68 of its report on that session. This decision is as follows:

The Commission had intended to rearrange the articles on special missions when they had been put into final form. Several Governments too, both in their written comments and in the discussions in the Sixth Committee of the General Assembly, suggested that the Commission should rearrange the articles when it finally adopted them. In accordance with the views of the Special Rapporteur, the Commission decided that it would be premature to undertake such a rearrangement at the present stage. However, it requested the Special Rapporteur to prepare a draft rearrangement of the articles and to submit it to the Drafting Committee of the Commission when the articles had been finally adopted.³⁵²

342. The Special Rapporteur thinks that this work should be done by the Drafting Committee after the Commission has taken a decision on all the draft articles, and that only thereafter should the Commission take a decision in plenary meeting on the rearrangement of the articles.

³⁵¹ *Ibid.*, document A/CN.4/189 and Add.1 and 2, p. 133, para. 69.

³⁵² *Ibid.*, document A/6309/Rev.1, Part II, p. 277, para. 68.

Written comments by Governments received after the stipulated time limit for their submission and prior to the opening of the nineteenth session of the International Law Commission with the Special Rapporteur's observations thereon (A/CN.4/194/Add.3 and 4)

CONTENTS

| | <i>Page</i> |
|--|-------------|
| PRELIMINARY NOTE | 112 |
| I. ADDITIONAL COMMENTS ON CHAPTER II OF THE FOURTH REPORT ON SPECIAL MISSIONS | 112 |
| A. General comments | 112 |
| B. Comments on specific points | 114 |
| II. ADDITIONAL COMMENTS ON CHAPTER III OF THE FOURTH REPORT ON SPECIAL MISSIONS. | 115 |
| <i>Part I of the draft articles: General rules</i> | |
| Article 1: The sending of special missions | 115 |
| Article 2: The task of a special mission | 115 |
| Article 3: Appointment of the head and members of the special mission or of members of its staff | 116 |
| Article 4: Persons declared <i>non grata</i> or not acceptable | 116 |
| Article 5: Sending the same special mission to more than one State | 116 |
| Article 6: Composition of the special mission | 116 |
| Article 7: Authority to act on behalf of the special mission | 117 |
| Article 8: Notification | 117 |
| Article 9: General rules concerning precedence. | 117 |
| Article 10: Precedence among special ceremonial and formal missions | 118 |

CONTENTS (continued)

| | <i>Page</i> |
|---|--|
| Article 11: | Commencement of the functions of a special mission. 118 |
| Article 12: | End of the functions of a special mission 118 |
| Article 13: | Seat of the special mission 118 |
| Article 14: | Nationality of the head and the members of the special mission and of members of its staff 118 |
| Article 15: | Right of special missions to use the flag and emblem of the sending State. 119 |
| Article 16: | Activities of special mission in the territory of a third State 119 |
| <i>Part II of the draft articles: Facilities, privileges and immunities</i> | |
| General considerations. | 119 |
| Article 17: | General facilities.. . . . 120 |
| Article 17 bis: | Derogation by mutual agreement from the provisions of part II 120 |
| Article 17 quater (new): | Status of the Head of State. 120 |
| Article 18: | Accommodation of the special mission and its members 120 |
| Article 19: | Inviolability of the premises. 120 |
| Article 20: | Inviolability of archives and documents. 121 |
| Article 22: | Freedom of communication 121 |
| Article 23: | Exemption of the mission from taxation 122 |
| Article 24: | Personal inviolability 122 |
| Article 25: | Inviolability of private accommodation 122 |
| Article 26: | Immunity from jurisdiction. 122 |
| Article 27: | Waiver of immunity. 122 |
| Article 28: | Exemption from social security legislation 123 |
| Article 29: | Exemption from dues and taxes 123 |
| Article 30: | Exemption from personal services and contributions 123 |
| Article 31: | Exemption from customs duties and inspection 123 |
| Article 32: | Administrative and technical staff 124 |
| Article 33: | Members of the service staff. 124 |
| Article 34: | Private staff 124 |
| Article 35: | Members of the family. 124 |
| Article 36: | Nationals of the receiving State and persons permanently resident in the territory of the receiving State. 124 |
| Article 37: | Duration of privileges and immunities. 124 |
| Article 39: | Transit through the territory of a third State. 125 |
| Article 40 bis: | Non-discrimination 125 |
| <i>Part III of the draft articles. Miscellaneous clauses</i> | |
| Article 41: | Organ of the receiving State with which official business is conducted. 125 |
| Article 42: | Professional activity. 125 |
| Article 44: | Cessation of the functions of the special mission 126 |
| Article "0" (pro- visional number) | Expressions used 126 |
| Article "X" (new): | Legal status of the provisions 126 |
| Article "Y" (new): | Relationship between the present articles and other international agreements . . . 127 |
| New article: | Proposal by the Greek Government 127 |

Preliminary note

1. Although the Special Rapporteur did not complete the draft of his fourth report on special missions until after the stipulated time limit for the submission of suggestions and comments by Governments of Member States, he nevertheless received the comments of six Governments, namely those of Canada, Chile, Gabon, Greece, Japan and the United States of America, after he had despatched the manuscript of the report to the United Nations Secretariat.

2. The Special Rapporteur has therefore decided to present the comments of the six Governments in question, together with his opinions on those comments, in this supplement to his fourth report. The comments are presented in accordance with the scheme adopted for the fourth report.

3. The Special Rapporteur wishes to point out that the number of comments submitted by Governments of Member States after the last two sessions of the General Assembly of the United Nations is fairly large and that this will enable the International Law Commission to decide with greater certainty on the final wording of the draft articles on special missions. The Commission's gratitude is due to the Governments which have contributed to its work by submitting comments on the draft articles on special missions.

I. Additional comments on chapter II of the fourth report on special missions

A. GENERAL COMMENTS

4. On the whole, the general observations of the six Governments whose comments are presented in this supplement show a positive attitude towards the draft articles prepared by the Commission. Each of the Governments had different comments to make. These are reproduced below.

(a) The Greek Government states:

The Greek Government wishes first of all to congratulate the International Law Commission on the valuable work it has done on the draft articles on special missions.

The Greek Government considers it desirable, as a matter of principle, for the question of special missions to be codified. It considers it necessary, however, to make reservations concerning, in particular, the excessive scope of the privileges and immunities granted to special missions and to their members and staff. It is of the opinion that such privileges and immunities should be granted only to the extent strictly necessary for the mission to carry out its task. It must oppose the extension to special missions, as provided in the draft articles, of procedures provided for in the Vienna Convention on Diplomatic Relations . . .

. . . On the whole, therefore, the Greek Government is of the opinion that there will be more chance of success in codifying the question of special missions if the articles are not given too wide an application and if the privileges and immunities granted are kept within the limits strictly necessary for the work of the mission.¹

(b) The comments of the Canadian Government are as follows:

While expressing general agreement with the principles and rules embodied in the present draft articles, the Canadian Government is of the view that the International Law Commission should not go too far in assimilating the status of special missions to that of permanent missions. It is opposed to the undue extension of privileges and immunities which certain of the draft articles now appear to confer. In its 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 following comments have consequently been set out in such a way as to emphasize a somewhat conservative approach to the status to be accorded to special missions. Suggestions have been made to that end under the articles which are considered to be too liberal, with the intention that they be brought closer to Canadian views. However, with regard to so-called High Level Special Missions, it is the view of the Canadian Government that such missions should receive a more generous treatment, in respect of both privileges and immunities, than those of a more routine character.²

(c) The Government of Gabon has made the following general comments on the draft articles:

Many African States repeatedly have recourse among themselves to special missions of a political character, in particular, to transmit written or verbal messages from the head of the sending State or its Government, as well as to missions of a technical character, which, because of the growing interdependence in technical matters, tend to increase rapidly in number.

The Gabonese Government accordingly has no doubt that the codification of that topic undertaken by the experts on the International Law Commission will be useful, regardless of the kind of international legal instrument which it produces, and even if that instrument in fact is merely a concise guide-book of procedures which the developing States may use.³

(d) The general observations of the Government of the United States of America are worded as follows:

The United States Government believes that a set of definitions is a useful addition to these articles. Most of the definitions proposed by the Special Rapporteur are from the 1961 Vienna Convention on Diplomatic Relations or the 1963 Vienna Convention on Consular Relations. The definition of "Special mission" is new. It is of paramount importance since it necessarily determines the scope of the draft articles.

The United States considers that the abstract nature of the definition of "special mission" presents serious problems. The only limitations expressed in the definition are that the mission be "temporary", between States, and "for the performance of a specific task". The definition can be considered to include almost any official mission in a foreign State except a permanent diplomatic or consular establishment. As a result, any visit of a representative of one State to another on any kind of official business can be, for the purposes of the proposed convention, a special mission which throws into operation the complicated machinery of the draft articles.

The United States considers that a convention so framed would not accord with modern developments in the conduct of foreign relations. The system proposed would look back toward nineteenth century practice rather than to the conduct of foreign relations in the present half of the twentieth century and to the

¹ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

² *Ibid.*

³ *Ibid.*

framing of a convention which should lay a basis for the conduct of foreign affairs in the twenty-first century.

The technological explosion of the past twenty years in the fields of communication and transportation has altered the world in many aspects, and the field of diplomacy has not remained untouched. The most striking development has been in the very area which is the subject of this convention. The carrying on of intercourse between States through meetings of specialists in all fields and at all levels has become a customary feature of international life. It is a most promising development from every aspect. This is an increasingly complicated world and the solution of problems on the international level requires increasingly higher levels of competence, training and experience in a broad spectrum of endeavour, and thus a continuing growth in the employment of experts.

Meetings of an expert character are generally marked by an absence of special arrangements, of concern with protocol, of fanfare and formality. The aims of the meetings are to clear away misconceptions or misunderstandings through face-to-face explanations, to work out joint areas of interest through joint discussions and to seek common goals through common endeavours. These aims have been achieved in innumerable meetings of experts and specialists in the past twenty years, and achieved without any special arrangements for privileges and immunities, for inviolability, for pouches, for servants and for deciding who sits at the head of the table.

It appears from the records of the International Law Commission that a good part of the Commission's work in this field has been devoted to modifying and adapting the provisions of the Vienna Diplomatic and Consular Conventions to Special Missions. The approach has been that there need be no basic difference made between permanent and special missions except to take into account the indefinite duration of the latter. The United States suggests that special missions, as they have developed since World War II, have substantially different work patterns, objectives, and procedures than permanent missions. Requirements developed for permanent missions could be a hindrance rather than a help to the efficient and productive conduct of foreign relations. Such requirements should be modified to take into account experiences of States with the operation of special missions and, in particular, the reasons which have led States to increasingly greater reliance upon special missions for the conduct of foreign affairs.

First and foremost is the need for expert knowledge. A glance at the current topics which are the subject of international agreements, beginning with aerospace disturbances, agricultural commodities, air services, air transport, atmospheric sampling, atomic energy, is an immediate illustration of the enormous requirements for technical knowledge which the modern practice of foreign relations calls for. For foreign relations now includes all sorts of efforts in which individual States co-operate to combat disease, to predict the weather, to increase food production, to harness hydroelectric powers, to turn salt water into fresh water. As a result, there is a constant and continuing exchange of specialist missions between co-operating States. The arrangements for these exchanges of experts and for their meetings are generally informal in character, and certainly have little in common with the elaborate procedures and requirements laid down in the draft convention.

The improvement in long-distance communication, especially by telephone, and the blanketing of the entire world with speedy and efficient air-transport systems, have changed special missions between States from elaborate expeditions into routine visits. The trend is more and more to sending the man dealing with an international problem in one State on a quick trip to talk to the man dealing with that problem in the other. The United States believes that this development is a valuable contribution to the conduct of foreign relations. Again it notes that arrangements for

missions of this nature are usually informal in character and that this method of diplomacy has flourished in the absence of any special arrangements for privileges and immunities.

Present-day experience does not demonstrate the need to make extraordinary arrangements for the ordinary flow of official visitors between one State and another. Experience does demonstrate, however, that there is a growing concern with and a mounting opposition to further extensions of privileges and immunities in most States in which there are sizable diplomatic communities. It would seem extremely likely that a convention extending privileges and immunities to another substantial class of individuals would not be warmly received. If such a convention were to come into general acceptance, its probable effects will be to undermine the valuable developments in the use of special missions discussed above. States will become less receptive to unqualified acceptance of official visits when every such visit must be treated as that of an envoy extraordinary.

The United States recognizes that there are special missions which should be treated specially. Missions which are sent for ceremonial or formal occasions are of a different nature than expert or technical missions, and this difference should be recognized.⁴

(e) The general observations of the Government of Chile are as follows:

1. For the reasons adduced in the International Law Commission it would appear that the draft articles should take the form of a separate convention, independent of the Vienna Conventions on Diplomatic and Consular Relations.

In order to emphasize this independence, specific references to the Vienna Conventions should be avoided. However, unity of form should be preserved through the use of the same terminology and of analogous definitions wherever possible.

2. The Commission was correct in preparing a draft which includes both missions carrying out political tasks and missions of a technical character.

3. The draft must be as flexible as possible. In view of the widely recognized importance of bilateral agreements on special missions, it should not be unduly rigid since this might make it difficult to adapt the provisions to specific circumstances. It should therefore not restrict too greatly the possibility of States entering into new bilateral agreements, even if the special mission in question might, under such agreements, be accorded juridical treatment in some respects less favourable than that provided for in the draft.

Hence the draft should include a minimum of rules of *jus cogens*, States being free to depart from the provisions which do not fall into that category and which would be regarded as residual. These latter would be applicable only in the absence of an express provision agreed to by the parties. The Commission's decision to delete article 40, paragraph 2, of the Rapporteur's preliminary draft⁵ is therefore correct.

Consequently, and in order to emphasize all of the foregoing, the draft should include among its final clauses a provision similar to that suggested by Mr. Rosenne at the 819th meeting on 7 July 1965 (art. 16 *bis*, paras. 1 and 2), with the stipulation that it would be applicable to the entire Convention and not just to Part II, on Facilities, Privileges and Immunities. It would thus be made clear that the draft regulates the activities of all missions, whether political or technical, and whatever their level, save as expressly provided to the contrary.⁶

⁴ *Ibid.*

⁵ *Yearbook of the International Law Commission, 1965*, vol. II, p. 141.

⁶ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

(f) The general comments submitted by the Government of Japan read as follows:

There is at present no established international practice with respect to special missions, and the matters concerning them are left to the solution on the "case-by-case" basis. The Government of Japan sees no need, at the present stage, to formulate a set of special rules governing them, but rather considers it more practical to allow the matter to be handled as each particular case arises. (Therefore, even in case codification be attempted, rules should remain as simple as possible.)

The following comments on the International Law Commission draft are submitted on the premise that the work of codification concerning the special mission will be carried out more or less on the line of the Commission's draft. They shall not in any way affect the basic position of the Japanese Government as set forth in the preceding paragraph . . .

...

Since the institutional and procedural aspects of the special missions covered in the present part still remain fluid today, it is premature to formulate detailed rules out of them. The codification at the present stage should therefore be carried out in a concise form in which only basic principles are enumerated, so as to allow room for natural development of customary law.⁷

B. COMMENTS ON SPECIFIC POINTS

5. Observations have also been submitted on some of the specific points examined in chapter II of the fourth report on special missions.

6. *Form of the instrument.* The Gabonese Government comments as follows on this point:

As to the form which the juridical instrument on special missions should take, it would follow from the solution adopted with respect to the peremptory character of the provisions of the text that it should remain, at least for the time being, independent of the Vienna Convention of 18 April 1961, which is based on a contrary principle and which will probably have different effects in international law.

The solution of an additional protocol to that Convention should therefore be ruled out.

In that connexion, the International Law Commission's careful avoidance of the slightest reference to that Convention in its draft articles seems very well advised. Such references are found only in the commentaries.

If the Vienna Convention should be referred to in a preamble placed at the beginning of the draft articles, that reference should be aimed primarily at stressing the wide divergence which exists, provisionally at least, between the two documents, so as not to weaken the effect and peremptory character of the text referred to.

If such a reference was made, it would be even more necessary to add a provision based on article 73 of the Vienna Convention on Consular Relations, explaining that the rules laid down shall not affect other international agreements in force as between States parties to them, including the Convention on the Privileges and Immunities of the United Nations, the Vienna Convention on Diplomatic Relations, and the Vienna Convention on Consular Relations.⁸

7. The Special Rapporteur has already given a detailed commentary on this subject in chapter II of the fourth report.

⁷ *Ibid.*

⁸ *Ibid.*

8. *Relationship with other international agreements.* See the opinion of the Japanese Government under article Y below.

9. *Body competent to adopt the instruments relating to special missions.* The Gabonese Government has expressed itself indirectly on this point. It comments as follows:

Concerning the *method of adoption* of the instrument on special missions, which will depend on its juridical content, the Gabonese Government wishes simply to indicate that if the instrument should include peremptory rules in respect of privileges and immunities, it would have to be in the form of an international treaty in order to take effect on Gabonese territory, since the accession of the Republic to the proposed instrument would have to be ratified by the head of the executive branch under authority of a law.⁹

10. In the view of the Special Rapporteur, the approach taken by the Gabonese Government corresponds to the normal procedure for international treaties.

11. *Legal status of the articles relating to special missions.* The opinion of the Gabonese Government on this point is given under article X below.

12. *So-called high-level special missions.* This point has been commented on by the Governments of Canada, Gabon, Japan and the United States of America.

13. The observations of the Canadian Government are of a general nature and have been reproduced above. The more detailed observations of the Gabonese Government are as follows:

The International Law Commission rightly decided that the annexing of special rules concerning *so-called high-level special missions*¹⁰ was not essential. If the other view was adopted, the proposed provisions would have to be exhaustive and would have to deal also with the case of Vice-Presidents, Deputy Prime Ministers and Ministers of State, which would make the text even longer.

At the most, the case of the head of State who leads a national or governmental mission might be mentioned in general terms with an indication that it was, of course, a special case which entailed adjustments in accordance with the protocol in force in the receiving State for the treatment of heads of State considered as such.¹¹

14. The Japanese Government's comments on this point are as follows:

Provisions concerning the so-called "high-level" special mission also had better be dispensed with for the same reason as that stated ... (above).¹²

15. The Government of the United States of America has also given its views on the level of the special mission as follows:

The level of the mission should also be taken into account. When the mission is headed by an official of ministerial rank or when the mission is received by an official of ministerial rank, this would evidence that the mission is conducting its activities

⁹ *Ibid.*

¹⁰ See the "Draft provisions concerning so-called high-level special missions," prepared by the Special Rapporteur, *Yearbook of the International Law Commission, 1965*, vol. II, document A/CN.4/179, pp. 143 and 144.

¹¹ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹² *Ibid.*

on a plane which demands special recognition. Finally, there are missions which, even though not headed by an official of ministerial rank, are dealing with matters of such gravity and importance to the States concerned, or which involve unusual considerations, that special protection should be afforded them. In such cases, however, the full range of privileges and immunities afforded by draft articles should become applicable only if the sending State requests the application specifically and the receiving State agrees.

16. The Special Rapporteur feels that this subject has been dealt with adequately in chapter II of the fourth report on special missions (see section 13).

17. *Prohibition of discrimination.* See below under article 40 *bis*.

18. *Introductory article.* See below under article 0.

19. *Question of the preamble.* The Gabonese Government comments as follows on the preamble:

The proposed text should also specify, in its preamble, that it is not intended to assimilate "special missions" to "permanent diplomatic missions", particularly in respect of privileges and immunities, the grant of which should be based entirely on functional needs.¹³

20. The Special Rapporteur has no further comments to offer on this point.

II. Additional comments on chapter III of the fourth report on special missions

PART I OF THE DRAFT ARTICLES: GENERAL RULES

Article 1. — The sending of special missions

21. With the exception of the Canadian and Greek Governments, all the Governments mentioned in the preliminary note have commented on article 1.

22. The Government of Chile submitted two comments on this article. The first is as follows:

The value of defining a special mission in terms of its specific task will appear to be doubtful, for two reasons. On the one hand, there are political missions whose tasks are general rather than "specific" and have not been defined in advance but are merely exploratory, and there are missions whose tasks are gradually broadened as negotiations proceed. On the other hand, there are missions which have a specific task but which are established permanently in the receiving State and which are therefore not covered by the rules set forth in this draft. For these reasons it would seem preferable to define the special mission solely in terms of the temporary nature of its functions. In other words, the task of a special mission may be more or less specific, general, or even undefined in advance, but in all cases the use of the term presupposes that the mission will remain in the receiving State temporarily.¹⁴

23. The Special Rapporteur considers that the criterion of the specific nature of the task should be adopted as an essential part of the concept of a special mission.

24. The second observation of the Chilean Government on article 1 is as follows:

Paragraph 2 should include a provision to the effect that special missions may be sent or received regardless of whether the Governments concerned recognize each other.¹⁵

25. The Special Rapporteur has already indicated his acceptance of this idea.

26. The observations of the United States of America on article 1 have been given above in the additional comments on chapter II of the fourth report. The Special Rapporteur regards these observations as well-founded and in the spirit of the underlying idea of article 1.

27. The United States Government has also proposed a new definition of the concept of special missions. This proposal is given under article 0. It should be considered in conjunction with article 1.

28. The observations of the Government of Gabon on article 1 are as follows:

It might be useful to specify that the sending or reception of a special mission does not imply recognition by one State of another.¹⁶

29. The Gabonese Government is also of the opinion that this article could be further condensed, but the Special Rapporteur finds nothing superfluous in it.

30. The Japanese Government has made an observation on article 1. It comments as follows:

... the International Law Commission seems to consider it possible to send and receive special missions even in the absence of recognition between the two States concerned. However, paragraph 2 of the present article might be construed to mean that at least the existence of recognition is a prerequisite to sending and reception of special missions. It seems necessary, therefore, to add complementary provisions in accord with the tenor of the Comment cited above.¹⁷

31. The Special Rapporteur has already accepted the idea expressed by the Japanese Government.

32. In conclusion, the Special Rapporteur considers, on the basis of the observations of the four Governments, that the text of article 1 as proposed in the fourth report does not require amendment, except as regards the proposal of the United States Government contained in article 0.

Article 2. — The task of a special mission

33. Note should be taken of the following observations by the Governments of Chile, Gabon, Greece, Japan and the United States of America.

34. The Government of Chile considers that:

It is of the greatest practical importance that a clear distinction should be drawn between the powers of the special mission and those of the permanent mission since this will affect the validity of the special mission's acts. It would not appear to be desirable that the draft should lay down a rigid rule, but there should be some criterion that would serve as a guideline in every case.

As permanent missions frequently co-operate in the discharge of the tasks assigned to special missions, the draft should not, as

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ The reference is to paragraph (3) of the Commentary on article 1. See *Yearbook of the International Law Commission, 1965, vol. II, document A/6009, p. 166.*

¹³ *Ibid.*

¹⁴ *Ibid.*

a general principle, exclude such participation. It could establish a flexible criterion drafted along the following lines: "The competence of the special mission, as distinct from that of the permanent mission, shall be determined by its credentials; if its credentials are silent on this point, the competence of the permanent mission shall not be understood to be excluded".¹⁸

35. The Special Rapporteur is of the opinion that the security of juridical relations between States requires that permanent missions should not be able to encroach on the powers of special missions. For the reasons stated, he does not recommend acceptance of the amendment submitted by the Government of Chile.

36. The Government of Gabon considers that article 2 could be further condensed. The Special Rapporteur finds the present wording satisfactory.

37. The Greek Government observes that article 2 should be more carefully worded in order to make it more precise. The Special Rapporteur would be glad to discuss this comment with the Commission and the Drafting Committee.

38. The Government of the United States of America gives the following opinion on article 2:

In answer to the question posed in paragraph 5 of the Commentary, the United States Government believes that a hard-and-fast rule concerning exclusion from the competence of permanent missions of the tasks entrusted to special missions would not be useful, but that a sending State should be free to specify such exclusive competence in those instances it deems such an arrangement necessary.¹⁹

39. The Special Rapporteur agrees with this view of the United States Government.

40. The Government of Japan has also commented in the following terms on the point raised by the United States:

With reference to the question raised in Comment (5),²⁰ concerning whether or not a rule on the relationship between special missions and permanent diplomatic missions with regard to their competence should be inserted in the final text of the articles, the Government of Japan is of the opinion that such a problem as concerns the division of authority and functions had better be left to a settlement between the parties concerned in each individual case, and that no such provisions are necessary.²¹

The Special Rapporteur agrees with this view.

41. In conclusion, the Special Rapporteur does not consider that the comments on article 2 call for revision of the proposed text.

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

42. Additional comments on the provisions of article 3 were submitted by the Governments of Gabon and the United States of America. Their observations are as follows:

¹⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹⁹ *Ibid.*

²⁰ Paragraph (5) of the commentary on article 2. See *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009, p. 167.

²¹ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

43. The Government of Gabon considers that this article could be further condensed. The Special Rapporteur refers the point to the Drafting Committee for decision.

44. The United States Government proposes the following amendment to article 3:

The United States agrees that the prior consent of the receiving State to the composition of a special mission should not be required. However, it is important and desirable that the sending State give advance notice of composition to the receiving State. This may be accomplished by adding the following to the end of the second sentence of article 3: "but prior notice of the composition of the mission shall be given to it".²²

45. The Special Rapporteur has no objection to the United States proposal.

Article 4. — Persons declared non grata or not acceptable

46. The Government of Canada raises the following point in connexion with article 4:

It would perhaps be desirable to establish at least some maximum duration to the period following which persons declared *personae non gratae* should have left the receiving country. It is noted that the separate question of what might happen if such a person were to stay on in the receiving country is not covered by article 4. Perhaps this should be dealt with as well.²³

47. The Special Rapporteur feels that the question raised by the Canadian Government deserves an answer in the commentary. His view is that a person declared *non grata* should leave the receiving country immediately after the notification, unless the receiving State has stipulated a time limit.

48. The Gabonese Government suggests that this article might be condensed. The Special Rapporteur is prepared to consider this suggestion with the Drafting Committee.

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

49. The Governments of Gabon and the United States of America have submitted comments on article 5.

50. The United States Government considers the article unnecessary. No reasons were advanced in support of the request for its deletion. The Special Rapporteur continues to regard the provision as necessary and useful.

51. The Gabonese Government believes that article 5 should be condensed. The Special Rapporteur feels that the question should be examined by the Drafting Committee.

Article 6. — Composition of the special mission

52. Of the additional comments, only those of the Governments of Gabon and Greece concern article 6.

53. The Gabonese Government requests further condensation of the article. The Special Rapporteur believes that the matter should be examined by the Drafting Committee.

²² *Ibid.*

²³ *Ibid.*

54. The Greek Government's comment also concerns drafting. It requests clarification of article 6. The Special Rapporteur hopes that the Drafting Committee will consider this point.

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

55. The Governments of Chile, Gabon and the United States of America have submitted additional comments on article 7.

56. The Government of Chile comments as follows:

The term "normally" suggests a practice, to which, as such, there may be exceptions, but it can hardly be understood to enunciate a rule of law. This same idea should be expressed as follows: "Save as otherwise provided in its credentials, only the head of the mission shall be . . .", or: "Save as otherwise determined by the sending State, only the head of the mission . . ."²⁴

57. The Special Rapporteur does not think that such wording would conflict with the underlying idea of the article, and he has no objection to the adoption of one of the two amendments submitted by the Government of Chile.

58. The United States Government proposes the following amendment to article 7.

Paragraph 2 implies that the sending State does not have full liberty to change the head of the special mission. It would appear desirable to provide merely that a member of the mission may be authorized by the sending State to replace the head of the special mission. In addition, a sentence should be added at the end of paragraph 2 as follows: "The receiving State shall be notified of a change of head of mission."²⁵

59. The Special Rapporteur considers that the sending State has full liberty to change the head of the special mission, provided there is prior notification of the change to the receiving State. Accordingly, the Special Rapporteur has no objection to the amendment proposed by the United States Government.

60. As in the case of other articles, the Government of Gabon requests that article 7 be condensed. It would be desirable for the Drafting Committee to examine this point *ex officio*.

Article 8. — Notification

61. The Governments of Chile, Gabon and Japan have submitted additional comments on article 8.

62. The comments of the Government of Chile read as follows:

Notification seems to be unnecessary in the case of paragraph 1 (d) (e.g. typists, chauffeurs), unless such persons are to enjoy diplomatic privileges and immunities, in which case they should be included among the administrative and technical staff of the mission. This is the criterion reflected in the Vienna Convention on Diplomatic Relations, which requires notification only in the case of persons "entitled to privileges and immunities" (art. 10, para. 1 (d)).²⁶

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

63. The Special Rapporteur considers that reasons bearing on daily practice and the security of the receiving State require notification in the case of all members of the staff of a special mission, regardless of their position in the mission. In any case, this rule is accepted by the Vienna Convention on Diplomatic Relations (1961). The Government of Chile has lost sight of the fact that article 10 of the Vienna Convention should be read in the light of article 1 (b), (c) and (g). The same criterion has therefore been adopted in this draft as in the Vienna Convention on Diplomatic Relations. Practice has likewise provided complete justification for this system. Consequently, the Special Rapporteur does not favour the adoption of the suggestions of the Government of Chile.

64. The Government of Gabon asks that the text of article 8 should be condensed. The Special Rapporteur hopes that this suggestion will be considered by the Drafting Committee.

65. The comments of the Government of Japan read as follows:

As regards paragraph 2 which provides for a direct notification from the special mission to the receiving State, the Government of Japan considers it doubtful whether or not such a practice may well be called "a sensible custom", as is presumed to be in Comment (8).^{27, 28}

66. The Special Rapporteur considers that the almost universal practice in this matter is very elastic and convenient. A special mission which has commenced to function is entitled to make notifications direct and is not bound to request the permanent mission to act as an intermediary. Here again, the Special Rapporteur leaves the matter for the International Law Commission to decide.

Article 9. — General rules concerning precedence

67. The Government of Chile has raised the question of alphabetical order in determining precedence. Its comment reads as follows:

The alphabetical order used in the official diplomatic list of the receiving State cannot be followed, because it would not be applicable to cases in which States do not have diplomatic or consular relations with each other. To give greater precision to the rule laid down in paragraph 1 it should suffice to add the words "in the language of the receiving State" after the words "alphabetical order of the names of the States".²⁹

68. The Special Rapporteur considers that this question has already been dealt with adequately in his fourth report. He maintains the conclusions he has already presented on this point.

69. The Government of Gabon asks that the drafting of article 9, too, should be condensed. This question must be referred to the Drafting Committee.

²⁷ Paragraph (8) of the commentary on article 8. See *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009, p. 173.

²⁸ See *Yearbook of the International Law Commission, 1967* vol. II, document A/6709/Rev.1, annex I.

²⁹ *Ibid.*

Article 10. — Precedence among special ceremonial and formal missions

70. The only additional comment on article 10 is that by the Government of Gabon which requests that the drafting should be condensed. The Special Rapporteur proposes that this comment should be referred to the Drafting Committee.

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

71. Two Governments have made additional comments on article 11. They are the Governments of the United States and Gabon.

72. The comment of the United States Government reads as follows:

In regard to the question posed in paragraph 12 of the Commentary, the United States Government believes a rule of non-discrimination in regard to the mode of reception of special missions of the same character is unnecessary and, on balance, undesirable.³⁰

73. The Special Rapporteur points out that this question is dealt with under article 40 *bis*. The United States comment should therefore be considered when that provision is taken up.

74. Here again the Government of Gabon recommends a more condensed wording. The Special Rapporteur proposes that this question should be examined by the Drafting Committee.

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

75. As it has asked in the case of other provisions, the Government of Gabon requests that article 12 should be further condensed. This will naturally be considered by the Drafting Committee.

Article 13. — Seat of the special mission

76. Three Governments, those of Chile, the United States and Gabon have commented on article 13.

77. The observations of the Government of Chile deal with the two paragraphs of article 13. With regard to paragraph 1 the Government of Chile states:

Paragraph 1. This provision seems to be self-contradictory, for it would be applied "in the absence of prior agreement", i.e. in the absence of consent, in which case it would be pointless to require again the consent which (to judge by the words "proposed by the receiving State and approved by the sending State") could not be obtained in advance.

It would be more practical to state that "save as agreed to the contrary" (whether or not such agreement is prior) "the special mission shall have its seat at the place in which it is to discharge its task"; this is, in effect, the criterion followed in paragraph 2 for missions whose tasks involve travel to various places. If this criterion should be unacceptable, it could be indicated that, save as agreed to the contrary, the mission should have its seat at the place in which the organ referred to in article 41 of the draft is established.

³⁰ *Ibid.*

The considerations set forth in paragraph (4) of the commentary underline the need to include in the draft a more specific provision than paragraph 1 as it stands.³¹

78. The Special Rapporteur considers that the provision in article 13, paragraph 1, is not self-contradictory and that the rule it states applies in all cases "in the absence of prior agreement", which should not necessarily be presumed. He does not therefore agree with the view expressed by the Government of Chile.

79. With regard to article 13, paragraph 2, the Government of Chile observes:

Paragraph 2. To facilitate official contacts between the organ referred to in article 41 and a mission whose tasks involve travel, it would be advisable to add that one of the seats should be considered the principal seat and should be decided upon in the manner indicated in article 13, paragraph 1.³²

80. The Special Rapporteur has no objection to this proposal.

81. The Government of the United States has suggested that article 13 should be deleted. Its proposal is in the following terms:

The fact that a special mission is of a temporary character runs counter to its having a seat. Moreover, this article is without effect in so far as the remainder of the text is concerned. It is suggested that the article be deleted.³³

82. The Special Rapporteur considers that special missions, even if they are of a temporary character, always have a seat. Their seat exists, even when their task requires frequent travel. In practice, a special mission is required to have a seat, and, consequently, the Special Rapporteur does not recommend adoption by the Commission of the United States Government's suggestion that the article be deleted.

83. The Government of Gabon proposes that the drafting of article 13 should be condensed. This proposal must be considered by the Drafting Committee.

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

84. Article 14 has been the subject of additional comments by the Government of Chile and the Government of Gabon.

85. The Government of Chile has submitted three amendments to article 14.

86. In the first place, it has proposed that paragraphs 1 and 2 of the article should be drafted as follows:

Article 14, paragraph 1. The head and the members . . . may be of any nationality.

Paragraph 2. However, nationals of the receiving State . . .³⁴
(The rest of the article would remain unchanged.)

87. The Special Rapporteur cannot accept this amendment, which is incompatible with the system adopted by the Commission and applied in practice. The principle

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

is that special missions must be composed of nationals of the sending State.

88. Should its first amendment not be accepted, the Government of Chile proposes:

If the above amendment is not adopted and the present text of paragraph 1 is retained, this provision will be far more rigid than article 8 of the Vienna Convention on Diplomatic Relations, because the latter provides only that the diplomatic staff should in principle be of the nationality of the sending State, whereas the text under consideration extends that provision to administrative and technical staff. On this point the less rigid criterion adopted in the Convention on Diplomatic Relations should be applied.³⁵

89. The Special Rapporteur stands by the considerations set out in the commentary on article 14 in his fourth report.

90. The Chilean Government's third amendment reads as follows:

If the amendment to article 36 which is proposed below is accepted, article 14 should be amended to the same effect.³⁶

91. The Special Rapporteur will discuss this proposal under article 36.

92. The Government of Gabon requests that the drafting of article 14 should be condensed. This is a matter which will be discussed by the Drafting Committee.

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

93. In addition to the suggestion of the Government of Gabon that article 15 should be condensed, which will be considered by the Drafting Committee, the Greek Government has asked that the privileges accorded under this article should be restricted. The Special Rapporteur considers that no restriction is desirable, even if the functional theory is taken as a basis.

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

94. Three Governments have submitted additional comments on article 16. They are the Governments of Chile, Japan and the United States.

95. The comments of the Government of Chile relate to the commentary. They read as follows:

In order to clarify beyond all possibility of doubt the point dealt with in paragraph (6) of the commentary, a provision should be added to this article stating that the third State may at any time notify the special mission that it is withdrawing its hospitality, without stating a reason and even if the conditions which it has imposed have not been violated.³⁷

96. The Special Rapporteur agrees with this comment.

97. The Government of the United States has made a similar comment reading as follows:

The United States Government is not sure whether the third State assumes the obligations of a receiving State by expressly

consenting to permit a special mission to carry on functions in its territory. At all events, it should be provided that a third State's express consent may be conditioned in advance and withdrawn at any time.³⁸

98. The Special Rapporteur naturally endorses this comment.

99. The Government of Japan has raised the following two questions of interpretation:

The Government of Japan requests clarification as to the following two points for the purpose of interpretation.

(a) Is it not that "the third State" as referred to in the present article, once it has accorded its consent to the functions of special missions, has the rights and assumes the obligations of the "receiving State" under the present draft?

(b) If the definition of the special mission specified in article 1 of the provisional draft articles of the twelfth session of the International Law Commission is to be adopted, the special missions which are engaged in activities exclusively in the third State may not come under the category of "special missions" as defined. How can this problem be solved?³⁹

100. With regard to the question in point (a), the Special Rapporteur considers that in the hypothetical case given by the Government of Japan the third State stands on the same footing as the receiving State. With regard to point (b), the Special Rapporteur does not share the Japanese Government's concern. In his view, the fact that a special mission is working in the territory of a third State does not alter the nature of the mission. In that territory also the special mission represents the sovereign will of its State, so far as it is engaged on a temporary and limited task. The only special situation it has is vis-à-vis the third State.

101. If the Commission deems it useful, the Special Rapporteur is prepared to include these replies in the commentary.

PART II OF THE DRAFT ARTICLES: FACILITIES, PRIVILEGES AND IMMUNITIES

General considerations

102. Several States gave their views on general points relating to facilities, privileges and immunities.

103. The Canadian Government considers that a fairly restrictive wording should be adopted so that the grant of privileges and immunities to special missions is "... strictly controlled by considerations of functional necessity and ... limited to the minimum required to ensure the efficient discharge of the duties entrusted to special missions".⁴⁰

104. The Canadian Government therefore concludes in favour of the functional theory and the restriction of privileges and immunities.

105. The Government of Chile considers that, save as expressly provided to the contrary, no distinction need

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

be drawn between political and technical special missions.

106. The Government of Gabon comments in favour of the functional justification of special missions.

107. The Greek Government considers that privileges and immunities should be strictly functional and that a technical special mission of a limited or short-term nature should enjoy only limited privileges and immunities.

108. The Japanese Government has commented as follows:

The Government of Japan accepts, from the standpoint *de lege ferenda*, the basic position of the Commission's draft to accord to special missions, in principle, similar privileges and immunities to those due to permanent diplomatic missions, on the condition that the scope and nature of the special mission be precisely defined as suggested in the present comment on definition clause.

It also admits that it will be necessary to make somewhat detailed provisions in part II, once the fundamental line of thought is taken up, since the part deals with substantial rights and obligations of the States concerned. (This is not the case with part I. The institutional and procedural aspects dealt with in part I would not, even if left to practice alone, seriously affect the interests of the States concerned.)⁴¹

109. The Special Rapporteur does not consider that the opinions of the Governments referred to above alter the situation described in the fourth report.

Article 17. — General facilities

110. The Governments of Canada and the United States of America have expressed their views on article 17.

111. The opinion of the Government of Canada is as follows:

This article appears to be too vague. There is obviously some onus on the receiving State to assist special missions in finding accommodation, especially where there is no resident mission nearby.

It is the Canadian view that, logically, this article should follow articles 17-21 (which specify some of the facilities intended) and that it should be reworded either by referring to "all other facilities" or by specifying those other facilities.⁴²

112. The Special Rapporteur considers that article 17 should come first, because it states a principle and is not an additional provision for "all other facilities".

113. The United States Government has proposed a new wording for article 17. Its comments are as follows:

This article would be more balanced if it provided:

"The receiving State shall accord to the special mission facilities for the performance of its functions, having regard to the nature and task of the special mission."⁴³

114. The Special Rapporteur regards this proposal as dangerous because the word "*voulues*" [in the French version] gives a discretionary power to the receiving State. This position conflicts with the view that facilities are due *ex jure* from the receiving State.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

Article 17 bis. — Derogation by mutual agreement from the provisions of part II

115. The Government of Gabon has commented as follows on the idea expressed in article 17 *bis* of the draft:

... freedom to derogate from the rules established by the instrument on special missions, except where expressly otherwise provided, would make it possible to solve, at least provisionally, the most delicate problems raised by the proposed codification.

That applies, in particular, to the question of the *grant of privileges and immunities* (diplomatic) to the heads and members of special missions, which are increasing in number and growing more diverse and very often are only of a technical character. States should not, through codification, become involved in "inflation" in that respect.

The solution adopted by the International Law Commission, namely, to leave it to the States concerned to restrict the grant of certain privileges or immunities (excluding peremptory provisions) to a given mission or missions on the ground that those privileges or immunities are functionally justified in the cases in question, seems all the more necessary in that it is proving impossible, in an international legal instrument, to divide special missions into distinct and well-defined categories according to whether they are, for example, of a political or of a technical character.⁴⁴

116. In the view of the Special Rapporteur, this opinion is consistent with the decision of the International Law Commission.

Article 17 quater (new). — Status of the Head of State

117. The Government of Gabon has commented as follows on the question of the status of the Head of State:

At the most, the case of the head of State who leads a national or governmental mission might be mentioned in general terms with an indication that it was, of course, a special case which entailed adjustments in accordance with the protocol in force in the receiving State for the treatment of heads of State considered as such.⁴⁵

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

118. The Greek Government raises two points, one of form and the other substantive. Firstly, it considers that the terms used in article 18 require definition. Secondly, it maintains that the privileges and immunities granted to missions with a limited technical task must be restricted.

Article 19. — Inviolability of the premises

119. Four Governments, namely those of Canada, Chile, Greece and the United States of America, have made additional comments on article 19.

120. The observation of the Government of Canada is as follows:

This article appears to go too far in trying to uphold the inviolability of the offices of the special mission. The qualifications contained in article 31 of the Vienna Consular Convention for entry in the event of fire should be added. The relevant provisions of article 31, paragraph 2, of the 1963 Vienna Convention read as

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

follows: "Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action".⁴⁶

121. The Special Rapporteur notes that this point has already been discussed in the fourth report.

122. The Government of Chile has the following to say with regard to article 19, paragraph 1:

It should be made clear that the head of the permanent mission may authorize the local authorities to enter the premises of the special mission only when those premises are situated in a building normally occupied by the permanent mission. Such authorization should be granted only by the head of the special mission when the premises of his mission are situated in premises other than those occupied by the permanent mission. Otherwise, the special mission would, in effect, be subordinated to the permanent mission.⁴⁷

123. The Special Rapporteur thinks it is difficult to refuse the head of the permanent mission the right to authorize the legal authorities to enter the premises of the special mission, because the inviolability is guaranteed to the State and not to the special mission itself.

124. The Government of Chile proposes the following with regard to paragraph 2:

In order that the function of protection and prevention may be adequately discharged, the paragraph should state that the special mission must inform the receiving State what premises it occupies by means of suitable identification. This problem does not arise when the special mission is established in the premises of the permanent mission, but it may arise if the special mission has its offices on certain floors of a hotel or in different places in the same city. In the absence of such notification, the receiving State might be in a position to claim a lesser degree of responsibility for failure to fulfil this duty, on the ground that it was unaware of the actual circumstances.⁴⁸

125. The Special Rapporteur considers this a reasonable proposal and does not oppose its adoption.

126. The United States Government's comments illustrate the difficulties to which the rule of the inviolability of premises and property can give rise. These comments can be divided into three parts:

127. With regard to the inviolability of premises, the Government of the United States offers a commentary and makes a proposal. These are worded as follows:

The inviolability of premises raises special questions because, unless the special mission is housed in a permanent diplomatic mission, it will ordinarily be occupying hotel rooms or office space. Hotel rooms present special difficulties because of the danger of fire or similar catastrophe. The safety of other guests cannot be imperilled by the refusal of a mission to allow entry to firemen or police seeking to deal with an emergency. The same considerations apply, though with lesser force, to an office building. The suggestion that an emergency be handled by negotiations between the Foreign Office and the special mission is unrealistic.

The United States considers that a final sentence should be added to paragraph 1 of article 19 to have it correspond to article 31, paragraph 2 of the Vienna Convention on Consular Relations. The sentence would read: "The consent of the head of the special mission may, however, be assumed in case of fire or other disaster requiring prompt protective action".⁴⁹

128. The Special Rapporteur points out that this question has already been examined in the fourth report and that he has expressed his view as to the appropriate solution.

129. With regard to movable property of the special mission, the United States Government proposes the following:

The exclusion from legal process of furnishings, automobiles, and the like used by special missions raises questions if the property is rented or leased. There does not appear to be any overriding need why normal legal processes should not apply to such property so long as equivalent property is available for use.⁵⁰

130. The Special Rapporteur still believes that legal processes might create difficulties for the normal functioning of the special mission.

131. With regard to immovable property, the United States Government raises the following question:

Real estate also presents difficulties. If a hotel is being sold under a court order, how would it be possible to exclude the premises of the special mission in the hotel? This type of extraordinary exemption could make it more difficult for the special mission to acquire property for use on a short-term basis.⁵¹

132. The Special Rapporteur again stresses that legal processes might hamper the normal functioning of the special mission.

Article 20. — Inviolability of archives and documents

133. Only the Greek Government has commented on article 20 of the draft. It considers that the provision should be restricted in the case of technical or short-term special missions. The Special Rapporteur is of the opinion that no restriction should be imposed in this regard irrespective of the nature or character of the special mission involved.

Article 22. — Freedom of communication

134. The Government of Gabon suggests that, with regard to the bag of the special mission, the text be made more specific. It observes in this connexion:

In connexion with freedom of communication, it might be advisable to specify that where the sending State has a permanent diplomatic representative in the receiving State, the official documents of the special mission should whenever possible be sent in that representative's bag. In that case, the use of a supplementary bag belonging to the special mission, for which its head is responsible, should be exceptional.⁵²

135. The Special Rapporteur regards this comment as being in line with the ideas expressed on the subject by the International Law Commission.

136. The Greek Government has made two observations on article 22 of the draft:

(a) It considers that the article should provide for less extensive privileges and immunities. Its comments did not indicate the precise degree of restriction it desires.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

(b) It asks whether the privileges and immunities can be restricted, particularly in the case of technical and short-term missions. This raises a general question.

Article 23. — Exemption of the mission from taxation

137. The Greek Government stresses the strictly functional character of the privileges and immunities and doubts whether a special mission really needs all the privileges and immunities provided for in article 23 of the draft in order to do its work.

138. The Special Rapporteur considers that these observations raise the general question of the scope and extent of the privileges and immunities.

Article 24. — Personal inviolability

139. Comments on this article were submitted by the Government of Canada and the Government of Greece.

140. The Government of Canada submitted observations followed by a proposal. They read as follows:

A central problem in respect to this article is whether any of the members of a special mission should enjoy personal inviolability, which, in the Vienna context, has come to mean both special protection from *vis injusta* and immunity from *vis justa* i.e., from arrest and detention in respect of personal acts. It is considered that special protection in the first case is warranted in all cases i.e., that the international responsibility of the State is involved if it has failed to take reasonable precautions. As far as concerns the second meaning of the term, however, it would be the Canadian inclination that in the draft it should be denied to special missions, since it is equivalent to a virtual immunity from criminal jurisdiction and is thus not a necessary consequence of an immunity which Canada considers should be restricted to cover only official acts by public political agents.

Should it be considered by a majority of the Commission that there should be some safeguard from preventive arrest, although not from detention in execution of a sentence, a compromise formula could probably be based on that which was adopted in the case of consular personnel. It is expressed in article 41 of the Vienna Convention on consular relations as follows:

“Consular officers shall not be liable to arrest or detention preceding trial, except in case of grave crime and pursuant to a decision by the competent judicial authority. . . Except in the case specified in paragraph 1 of this article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.”⁵³

141. The Special Rapporteur recalls that the International Law Commission has on several occasions discussed the question raised in the Canadian Government's observations. The Commission has always shown itself ready to guarantee the members of special missions full personal inviolability. Since this is a question of substantive law, the Special Rapporteur recommends the Commission to examine it once again so that it can confirm the opinion it has already expressed.

142. The Greek Government indicates that it is unable to support the present wording of article 24 of the draft and suggests that it should provide for less extensive privileges and immunities, but it does not give any detailed explanations on the point.

Article 25. — Inviolability of private accommodation

The Governments of Canada and Greece have submitted comments on article 25.

143. The observations of Canada are as follows:

If one starts from the view that, in principle, no member of a special mission should be assimilated to a diplomatic agent, the import of the article seems somewhat excessive. It is questionable whether article 24 would not be sufficient, given that it seems rather unrealistic to ask for the special protection of the receiving State over residences which will usually be in hotel rooms: this appears to go beyond the standard requirement that the receiving State should take reasonable precautions. Moreover, even if it is to be retained in its present form, Canada believes this inviolability of the private accommodation should be subject to the same qualification regarding fire, etc. as is mentioned under our comment on article 19.⁵⁴

144. The Special Rapporteur feels that the inviolability of the private accommodation is one of the essential requirements for the performance of the task of a special mission.

145. The Greek Government has made two observations on article 25:

(a) It has suggested that the article should provide for less extensive privileges and immunities.

(b) It has also suggested that some restriction should be introduced in the case of technical or short-term missions, even if they are responsible for negotiating and signing a treaty.

146. The Special Rapporteur again stresses that in his opinion the inviolability of the private accommodation must be guaranteed if the special mission is to accomplish its task freely.

Article 26. — Immunity from jurisdiction

147. The Governments of Canada and Greece have submitted comments on article 26.

148. The Canadian Government is of the opinion that: this article goes too far in broadening the scope of immunities enjoyed by the members and staff of special missions. Moreover, the provisions of this article seem to spell out in detail those provided by the first two sentences of article 24. Consideration should therefore be given to combining these aspects of the two articles in a single article.⁵⁵

149. The Special Rapporteur does not think the provisions of articles 24 and 26 of the draft can be combined. Article 24 is important because it provides a guarantee of *habeas corpus*, whereas article 26 deals with a different point.

150. The Greek Government considers that the wording of article 26 should provide for less extensive privileges and immunities, but gives no further details.

Article 27. — Waiver of immunity

151. The Government of Chile has submitted a proposal concerning the place of article 27 in the draft. The proposal reads as follows:

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

This provision should follow article 36, once the status of all the persons referred to in article 36, paragraph 1, has been clarified.

152. The Special Rapporteur has proposed in his fourth report that the arrangement of the articles should be left until the full text of the draft has been adopted. That would be the appropriate stage at which to consider the proposal of the Chilean Government.

Article 28. — Exemption from social security legislation

153. The Governments of Chile and Greece have submitted additional comments on article 28.

154. The comments of the Chilean Government contain a proposal for amending the article and read as follows:

It may happen that persons who are nationals of the sending State but who are permanently resident in the receiving State are members of the diplomatic staff of the special mission. In such a case they should be covered by the provisions of paragraph 1 of this article. Paragraph 2 (a) should therefore be amended to read: "... to nationals of the receiving State or aliens domiciled there, unless the latter are members of the diplomatic staff of the mission".⁵⁶

155. The proposal of the Chilean Government raises an awkward conflict between two principles, viz.:

The principle already adopted by the Commission whereby the receiving State alone can decide whether privileges and immunities should be granted to members of special missions who are nationals or permanent residents of that State; and

The new principle proposed by the Government of Chile whereby permanent residents of the receiving State who are nationals of the sending State should benefit from the exemptions provided for in article 28 whenever they form part of the diplomatic staff of a special mission.

156. The opinion of the Special Rapporteur is that the solution adopted in the Vienna Convention on Diplomatic Relations (article 33, paragraphs 2 (a) and (b)) should be retained.

157. The Greek Government suggests that the privileges and immunities granted by article 28 should be restricted, but makes no specific concrete proposal in this regard.

Article 29. — Exemption from dues and taxes

158. Comments on this article have been submitted by the Governments of the United States of America and Greece.

159. The United States Government states:

The coverage of the final clause (beginning "and in respect") in this article is unclear. The clause should either be changed or eliminated.⁵⁷

160. The Special Rapporteur finds that the drafting in French is clear enough but that the English text should be improved and an addition made to the commentary.

161. The Greek Government suggests that the text of article 29 should not provide for such broad privileges and immunities and that additional restrictions should

be placed upon special missions with a limited technical or short-term task. This request raises the general question of the scope and extent of the privileges and immunities to be accorded to special missions.

Article 30. — Exemption from personal services and contributions

162. The Government of Canada states:

As drafted, this article appears acceptable. However the Canadian Government does not agree with paragraph 2 (b) of the commentary, which would confer on locally recruited staff the exemptions from personal services and contributions.⁵⁸

163. The Special Rapporteur believes that the Canadian Government's misgivings regarding paragraph 2 of the commentary are not justified in view of paragraph 3 of the commentary.

164. The Greek Government has expressed a wish that the immunities and privileges provided under draft article 30 should be restricted, especially for technical or short-term special missions. That is a matter to be settled in the light of the general decision taken by the Commission.

Article 31. — Exemption from customs duties and inspection

165. Comments have been made on this article by the Governments of Canada, Gabon, the United States and Greece.

166. The Canadian Government's comments are as follows:

This article provides for exemption from customs, duties and inspection of not only articles for the official use of the special mission but also of articles for the personal use of the head and members of the special mission, of the members of its diplomatic staff, or of the members of their family who accompany them.

It also provides for exemption from customs, duties and inspection of the personal baggage of the head and members of the special mission and of the members of its diplomatic staff, unless there are serious grounds for presuming that it contains articles not covered by the exemptions, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the person concerned, of his authorized representative, or of a representative of the permanent diplomatic mission of the sending State.

It is arguable that such exemption should be removed from this article because it should remain a matter of courtesy and reciprocity.⁵⁹

167. The Special Rapporteur emphasizes that customs exemptions should be granted *ex jure* and are not a matter of courtesy and reciprocity.

168. The United States Government has expressed some reservations concerning the scope of exemption from customs duties and inspection. Its comments are as follows:

The United States Government believes that fiscal and customs privileges granted to special missions should normally be limited to those necessary to enable them to perform the "specific tasks" for which they are sent. It does not favour setting up personal privi-

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

leges for members of special missions. It is concerned lest the burdens imposed on the receiving State under this and related articles persuade many of the States whose revenues come largely from customs duties that they cannot afford to receive special missions. Such a development would mark a serious step backwards in the conduct of foreign relations.⁶⁰

169. The Special Rapporteur believes that the comments of the United States Government raise a matter of principle which the Commission should settle before making any amendment to article 31.

170. The comments of the Government of Gabon are based on an approach which differs from that adopted by the Commission. They are as follows:

Exemption of members of special missions from customs duties is one of the matters in which some discretion should be left, in one way or another, to the authorities of the receiving State.⁶¹

171. The Special Rapporteur reiterates that customs exemption should be granted *ex jure* and cannot be left to the discretion of the receiving State.

172. The Greek Government considers that the privileges and immunities provided under draft article 31 should not be so extensive, but does not go into details.

Article 32. — Administrative and technical staff

173. Only the United States Government has submitted comments on draft article 32. They are as follows:

The privileges and immunities provided hereunder are broader than required by the nature of the services rendered. This observation applies with even greater force to paragraph 2 of article 35, which extends such privileges to members of the families of those covered by article 32. Given the temporary character of special missions, the question arises whether privileges and immunities of the families of members of permanent missions have any necessary application to families of members of special missions.⁶²

174. The Special Rapporteur considers that the reply to the United States Government's comments is to be found in the commentary on article 32 in the fourth report, where this question has already been discussed.

Article 33. — Members of the service staff

175. The only comment on this article is that by the Greek Government, which considers that the text should be made more restrictive as regards the privileges and immunities provided under it. The Special Rapporteur does not share this view.

Article 34. — Private staff

176. The Greek Government has submitted two comments on article 34. First, it considers that the article should provide for less extensive privileges and immunities. Secondly, it raises the question whether, from a strictly functional point of view, these privileges and immunities are really necessary. The Special Rapporteur considers that the "lesser immunity" for acts performed in the course of their duties is necessary even for the class of staff to which article 34 refers.

Article 35. — Members of the family

177. The Governments of the United States and Greece have submitted comments on draft article 35.

178. The Government of the United States has expressed the same reservations concerning this article as with regard to article 32 (see above).

179. The Special Rapporteur considers, however, that certain guarantees should be given to members of the family of the persons to which article 32 refers.

180. The Government of Greece believes that article 35 should provide for less extensive privileges and immunities, but it does not make any specific proposal in that regard.

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

181. Repeating an idea which it put forward also in connexion with article 28, the Government of Chile makes the following proposal:

We find the principle embodied in this article correct, with one reservation. Newly established States or States which have a small population and lack sufficient technicians or experts may find it imperative to include among the administrative and technical staff of special missions some of their nationals who are resident in the receiving State. In this case, we see no reason to treat them in a manner which would discriminate between them and the other members of the administrative and technical staff of the same mission who are not resident in the receiving State. Therefore, paragraph 1 should be amended to include all members of the administrative and technical staff, wherever they reside.

In return for this extension of privileges and immunities to certain persons who are residents of the receiving State, the receiving State must be given an additional safeguard. For this purpose, it should suffice to add to article 14 a provision requiring the consent of the receiving State to the inclusion among the diplomatic or administrative and technical staff of special missions of nationals of the sending State who are permanently resident in the receiving State.⁶³

182. The Special Rapporteur has already expressed his disagreement with this proposal in the section of this supplement dealing with article 14.

Article 37. — Duration of privileges and immunities

183. The only additional comments on article 37 are those of the Government of Chile, which relate more particularly to paragraph 2 of the article. They are as follows:

The exact moment at which privileges and immunities cease should be determined with the greatest possible exactitude. The phrase "on expiry of a reasonable period", which has simply been copied from article 39, paragraph 2, of the Vienna Convention on Diplomatic Relations, is extremely vague and could give rise to serious problems if the member of the mission remained in the receiving State after his functions had come to an end. In the Vienna Convention of 1961 the problem was solved by the addition in Spanish of the words "*que le haya concedido*" (granted by the receiving State*) after the words "reasonable period". Article 37

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

* *Translator's note:* The corresponding words in the English text are "in which to do so".

⁶³ *Ibid.*

of the draft should include this same clarification or another to the same effect, so that the duration of the "reasonable period" may be clearly indicated.⁶⁴

184. The Special Rapporteur agrees in principle with the Chilean Government's suggestion, but he is unable to find as a substitute for the classical formula "reasonable period", an expression both more precise and at the same time broader which would cover all the cases intended.

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

185. The question of transit through the territory of a third State has aroused interest and has evoked comments from three Governments, those of Chile, the United States and Greece.

186. The Chilean Government proposes the following amendment to article 39, paragraph 4:

Any reference to the ways in which the third State may be informed of the transit of the mission should be eliminated, for any omission might be interpreted to exclude channels not expressly mentioned. The relevant passage should read: ". . . only if it has been informed in advance of the transit of the special mission, and has raised no objection to it".⁶⁵

187. The Special Rapporteur considers this amendment acceptable and useful.

188. The comments of the United States Government are as follows:

The scope and effect of this article require further consideration, particularly in light of vehicular accidents which may occur *en route*.⁶⁶

189. The Greek Government considers that the privileges and immunities provided for in article 39 should be less extensive. It does not, however, propose any specific amendment to the provision.

Article 40 bis. — Non-discrimination

190. The Government of the United States and the Government of Gabon have commented on the question of non-discrimination.

191. The Government of the United States has expressed the opinion that a rule of non-discrimination in regard to the mode of reception of special missions of the same character is unnecessary and undesirable. Its comments are to be found in the section of this supplement dealing with article 11. The United States Government has not, however, expressed any view regarding discrimination as between special missions.

192. The Government of Gabon has expressed the following view:

The question of *discrimination* raises a similar problem: although the prohibition of discrimination may prove useful, it cannot be laid down as an absolute rule in the case of special missions, having regard to their diversity and their *ad hoc* character, which at times may lead the receiving State to apply to one of them treatment adapted to the circumstances.

⁶⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

The only purpose of prohibiting discrimination appears to be to prevent a delegation of *one* State from being subjected, under protest, to less advantageous treatment than that accorded to similar delegations *as a whole*. There is nothing, however, to prevent two States from agreeing between themselves to apply to a *given* special mission or category of special missions, unilaterally or mutually, less advantageous or more advantageous treatment (and, in the latter case, for specific and valid reasons) than that which similar foreign missions *as a whole* enjoy (provisions such as those of article 47 of the Vienna Convention on Diplomatic Relations).⁶⁷

193. The Special Rapporteur points out that this question was settled by the General Assembly's decision approving the report of the International Law Commission on the work of its eighteenth session.

PART III OF THE DRAFT ARTICLES: MISCELLANEOUS CLAUSES

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

194. The Government of Canada has made a suggestion concerning the commentary on article 41. It is as follows:

While there is no objection to this article itself, Canada considers that emphasis should be placed, in the official commentary, on the need for the prior agreement of the receiving State, at least in principle, to the communication by the special mission with other of its own organs than its Foreign Ministry.⁶⁸

195. The Special Rapporteur expresses his agreement with the Canadian Government's suggestion.

196. The Government of Chile suggests that article 41 should be included in part I, immediately following the present article 11. The Special Rapporteur draws attention to the Commission's decision to consider the structural arrangement of the articles only after it has adopted all the draft provisions.

Article 42. — Professional activity

197. Comments on article 42 have been received from the Governments of Canada and Greece.

198. The Government of Canada observes:

This article as drafted is restricted to precluding activities for personal profit and does not cover members of special missions who, on behalf of the sending State, might carry on activities not consonant with the mission's terms of reference. Perhaps it would be desirable to relate such activities, on behalf of the sending State, to the provision of paragraph 1 of article 40.⁶⁹

199. The Special Rapporteur agrees with the idea put forward by the Canadian Government and leaves it to the Commission to decide whether the connexion between articles 40 and 42 should be indicated in the text of article 42 itself or in the commentary.

200. The Greek Government believes that the privileges and immunities provided for in article 42 should be limited or even dispensed with for special missions with technical tasks or of short duration, even if these missions are responsible for negotiating and signing a treaty. The Special Rapporteur has some doubts as to the

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

desirability of such a distinction between special missions of different kinds.

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

201. The Government of Canada proposes that article 44 be amended as follows:

This article perhaps ought to be broadened to cover specifically the routine conclusion of functions due to the fulfilment of the objects of a special mission.⁷⁰

202. The Special Rapporteur leaves it to the Commission to decide whether the idea expressed in the Canadian amendment should be accepted. He points out, however, that the Commission has already decided not to make express provision for cases of cessation of functions which may be regarded as routine, and the conclusion of the Special Mission's task may be regarded as one such case.

Article "O" (provisional number). — Expressions used

203. Comments on this article have been submitted by the Governments of the United States, Gabon and Japan.

204. The Government of the United States proposes a definition of the special mission based on a concept different from that accepted by the Commission hitherto. The adoption of this proposal would therefore require the Commission to take a decision on substance first. The proposal of the United States Government reads as follows:

In its remarks on provisional article 0, the United States submits language to describe missions which should be treated specially. For such missions, the United States would support, in general, the privileges and immunities proposed in the draft articles.

The following remarks are not intended to be exhaustive, and do not suggest all the drafting changes necessary to satisfy the concerns expressed in the *General Remarks* section.

Provisional article 0:

(a) The United States proposes the following definition of "special mission" for the purposes of the draft articles:

A special mission is one:

(1) which is established by agreement between the sending State and the receiving State for a limited period to perform specifically designated tasks, and is headed or received by an official who holds the rank of Cabinet Minister or its equivalent, or a higher rank; or

(2) which is specifically agreed by the sending State and the receiving State to be a special mission within the meaning of this Convention.⁷¹

The United States Government also commented as follows on paragraphs (g) and (r) of article "0":

(g) It is not the practice of the United States to designate as plenipotentiary every official whom it sends to another State to represent it by performing a specific task. If the intention is to exclude from the coverage of the draft articles experts such as those discussed in the *General Remarks* above, it is suggested this end is better achieved by a revision of the definition of special mission. The United States doubts that such designation is general practice in most sending States.

(r) This definition appears unduly broad. It is suggested that the word "exclusively" be inserted between the words "used" and "for" in the second line of Provisional Article 0 appearing at page 33 of A/CN.4/189/Add. 1. Such amendment would make the definition, except for the final clause, correspond to article 1 (j) of the Vienna Convention on Consular Relations. In the view of the United States, the final clause should be narrowed by excluding from the definition the residence or accommodation of persons other than the head of the special mission.⁷²

205. The Government of Gabon has made the following comment on the terminology used in the draft:

On the other hand, in the preparation of the *introductory article*, which will contain valuable definitions of the expressions used in the document, an effort should be made to follow as closely as possible the terminology of the Vienna Convention of 18 April 1961.⁷³

206. The Government of Japan believes that certain definitions should be specified more clearly. Its comments are as follows:

In definition clause it is desirable to specify clearly and precisely the definition of the term "member" and the scope and nature of the term "special missions". It seems imperative, in particular, to define "special missions" clearly so as to confine them to only those which really deserve to enjoy the privileges and immunities envisaged in the present draft articles.⁷⁴

207. The Special Rapporteur notes that the Commission took account of the idea expressed by the Government of Gabon during the preparation of the draft. He expresses the hope that, with the Drafting Committee's assistance, he will be able to make the definitions as clear and precise as the Japanese Government would wish.

Article X (new). — Legal status of the provisions

208. The Government of Gabon has made the following comments on the question of the legal status of the draft provisions:

(1) *Freedom to derogate from the provisions of the proposed instrument*

The practice concerning special missions appears to be difficult to inventory and *a fortiori* difficult to codify; hence, the wisest view, and the one which seems to be accepted, is that the provisions of the draft articles on special missions, in principle, should be rules from which States are competent to derogate by agreement between themselves.

This basic principle should be clearly stated at the beginning of the document, it being understood that the future is not being prejudged and that time, experience, and court decisions may in due course modify the present situation.

(2) *The provisions from which States signing or acceding to the instrument may not derogate would therefore be exceptions, and would be mentioned as such. Such provisions might include, inter alia, the articles on:*

- (a) inviolability of archives and documents of the special mission;
- (b) inviolability of the premises of the special mission (unless the head of the permanent diplomatic mission of the sending State grants permission to enter them);
- (c) personal inviolability limited to the performance of functions;
- (d) freedom of communication.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

The provisions covering inviolability of the private accommodation of the head of the special mission and of the other members of the mission properly so-called (to the exclusion, of course, of the administrative, technical and service staff) might be added to that list, although that is not indispensable since inviolability has already been provided for the premises of the mission (which, moreover, are often combined with the private accommodation of the head and members of the mission) and for the persons concerned.

We should also remember that the inviolability of the premises of a foreign mission or of the private accommodation of its members raises the problem of the right of asylum — a problem so delicate and controversial that it was not mentioned in the Vienna Convention.

In that connexion, it might be advisable to stipulate, in any event, that not only “the premises of the special mission” but also “the private accommodation of all its staff” must not be used in any manner incompatible with the functions of the special mission as laid down in these articles or by other rules of general international law or by any special agreements in force between the sending and the receiving State (draft article 40).⁷⁶

Article “Y” (new). — Relationship between the present articles and other international agreements

209. The Government of Japan has submitted the following comment on the question of the relationship between the present articles and other international agreements:

⁷⁶ *Ibid.*

It is deemed advisable to adopt the same provisions as contained in article 73 of the Vienna Convention on Consular Relations, which provides:

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

“2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.”⁷⁶

210. The Special Rapporteur agrees in principle with the Japanese Government’s suggestion.

New article: proposal by the Greek Government

211. The comments of the Greek Government include the following proposal:

There should be special regulations for cases where the State sending a special mission has an embassy in the foreign country (the place of work of the special mission being in or near the town where the embassy is situated). The comments made in paragraph 2 above concerning the articles mentioned there would also be applicable here.⁷⁷

212. The Special Rapporteur hopes that his Greek colleague will help him to a better understanding of the idea underlying this proposal so that he may be able to give an informed opinion on the desirability of its adoption.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

Written comments by Governments received after the opening of the nineteenth session of the International Law Commission with the Special Rapporteur’s observations thereon (A/CN.4/194/Add.5)

CONTENTS

| | <i>Page</i> |
|--|-------------|
| PRELIMINARY NOTE | 128 |
| I. ADDITIONAL COMMENTS ON CHAPTER II OF THE FOURTH REPORT ON SPECIAL MISSIONS | 128 |
| A. General comments | 128 |
| B. Comments on specific points | 128 |
| II. ADDITIONAL COMMENTS ON CHAPTER III OF THE FOURTH REPORT ON SPECIAL MISSIONS. | 130 |
| <i>Part I of the draft articles: General rules</i> | |
| Articles 1 to 4 | 130 |
| Article 1: The sending of special missions. | 130 |
| Article 2: The task of a special mission | 130 |
| Article 5: Sending the same special mission to more than one State | 130 |
| Article 7: Authority to act on behalf of the special mission | 130 |
| and | |
| Article 8: Notification. | 131 |
| Article 9: General rules concerning precedence. | 131 |
| Article 11: Commencement of the functions of a special mission. | 131 |
| Article 14: Nationality of the head and the members of the special mission and of members of its staff | 131 |

CONTENTS (*continued*)

| | <i>Page</i> |
|---|-------------|
| <i>Part II of the draft articles: Facilities, privileges and immunities</i> | |
| General considerations | 131 |
| Article 17 <i>bis</i> : Derogation by mutual agreement from the provisions of part II | 132 |
| Article 17 <i>ter</i> : Differences between categories of special missions | 132 |
| Article 17 <i>quater</i> : Status of the Head of State | 132 |
| Article 22: Freedom of communication | 132 |
| Article 35: Members of the family | 132 |

Preliminary note

1. After the opening of the nineteenth session of the International Law Commission and the submission to it of the two parts of the supplement to his report (A/CN.4/194/Add.3 and 4), the Special Rapporteur received the comments of the Governments of Australia, Finland and Jamaica on the draft articles on special missions. In view of the importance of the suggestions contained in those comments, the Special Rapporteur has dealt with them in the present additional supplement to the report which he is placing before the Commission for consideration. The present addition follows the plan adopted for the supplement.

I. Additional comments on chapter II of the fourth report on special missions

A. GENERAL COMMENTS

2. Observations of a general nature have been submitted by the Australian and Finnish Governments.

3. Those of the Australian Government are as follows:

. . . The Australian Government has studied with interest the draft articles on temporary missions drawn up by the International Law Commission and wishes to express its appreciation of the detailed and careful work of the Commission in drafting these articles. . . . The Australian Government, while agreeing with the desirability of codifying the modern rules of international law on this subject, feels obliged to express its concern at, and opposition to, the apparent intention not only to apply these articles to a wide range of persons, but also to accord to those persons privileges and immunities which could well go beyond the bounds of functional necessity.¹

4. The general observations of the Finnish Government read as follows:

The use of special missions is in fact the earliest form of diplomacy, the traditions of which go back to a remote past, to a time when there were no permanent missions. In international politics of today the use of special missions is again becoming more frequent as co-operation between States extends to new fields and the scope and activities of international organizations increase. Therefore it is most important that the principles of international law as regards special missions be codified, made more explicit, and completed by such new dispositions as are considered necessary. In the opinion of the Finnish Government, the draft prepared to this

end by the International Law Commission and approved in a preliminary way by the Commission at its sixteenth and seventeenth sessions is essentially to the purpose, and a final text should be drawn up on these lines as soon as possible. The Finnish Government suggests, however, that the following points be considered when giving the draft the finishing touches.

As special missions are increasingly used their character and composition are becoming variable. Prominent delegations negotiating important political matters are paralleled by special missions on an inferior level which may be diplomatic missions or working groups sent out to perform a purely technical task. This category includes delegations to conferences and the representatives of States on the mixed committees and joint commissions frequent in international co-operation of today.

The concept, if it is not to be restricted, should evidently also include single officials who will more or less regularly represent their country at meetings or discussions with organs functioning in their particular line of activity in some neighbour State.

The Commission has brought the dispositions contained in the draft to bear on temporary special missions only. This means that there would still be no general provisions to specify the status and conditions of functioning of such special missions of a permanent character as are not covered by the provisions of the Vienna Convention on Diplomatic Relations; nor would the rules suggested include State representatives on various permanent mixed committees and joint commissions. Furthermore, it is established by the International Law Commission's report on the second part of the Commission's seventeenth session and on its eighteenth session that government delegations to various congresses and conferences would not be within the scope of the draft articles proposed.

. . . The Finnish Government takes the view that it is questionable whether the above restrictions, which would leave a considerable group of special missions in a vague position as to international law, are necessary and to the purpose. On the other hand, the restrictions under reference indicate an endeavour, useful in itself, to define the concept of the special mission. For it is evident that, as the use of such missions will increase and their purposes multiply, the concept is no longer neatly outlined. Moreover, one might ask expressly whether all the dispositions contained in the International Law Commission's draft are of a nature to cover all the various categories of special missions. This refers particularly to the facilities, privileges and immunities accorded to the missions and to persons attached to these.²

B. COMMENTS ON SPECIFIC POINTS

5. In addition to their general observations, the Australian and Finnish Governments have submitted com-

¹ *Ibid.*

² *Ibid.*

ments on some of the specific points examined in chapter II of the fourth report on special missions.

6. *The concept of the special mission.* Under the heading "What constitutes a 'special mission'?", the Australian Government writes as follows:

... The draft articles do not provide any substantive definition of what constitutes a temporary "special mission" for the purpose of the articles, nor is any such substantive definition given in the draft introductory article that has been prepared by the Special Rapporteur.³ The commentaries on the draft articles indicate that the intention is to give the term a very broad interpretation indeed, covering all temporary missions sent by one State to another State to perform specific tasks, irrespective of whether that task is dominantly political or of a purely technical character. The Special Rapporteur in his first report on the subject gave as instances of different kinds of missions that would come under the proposed new régime: political, military, police, transport, water supply, economic, veterinary, humanitarian and labour recruiting.

... The Australian Government shares the concern that has been expressed by some other Governments at the wide range of persons that appear to come within the scope of the draft articles. In its view, there are many kinds of bilateral intercourse of a technical or administrative nature between States in which flexibility of procedure is of considerable importance and it would not be advantageous to apply to such cases the formal régime proposed in the draft articles.

... In view of its concern on these points, the Australian Government wishes to refer to the following comments on the scope of the draft articles made by the Special Rapporteur in addendum 2 of his third report (A/CN.4/189/Add.2):

"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."

... While noting these comments, the Australian Government considers that as presently drafted, the draft articles and the commentaries do not adequately reflect the idea that States may themselves determine what they should regard as a special mission.

... The Australian Government appreciates that it is very difficult to make reservations in the text as to certain types of special missions—e.g. to make a distinction between special missions of a political nature and those of a technical nature. Nevertheless, the Australian Government believes that a further attempt should be made to clarify, and clearly limit, the range of special missions to which the draft articles are to apply.

... The lines of a practical solution may possibly be found by singling out those cases that are generally agreed as having the attributes of special missions to which the régime laid down in the draft articles should apply, and leaving the application of the draft articles to other cases to be dealt with by mutual agreement between the States concerned. The following are cases that might be considered for inclusion in the first suggested category:

- (a) Special missions led by Heads of State;
- (b) Special missions led by Heads of Government;
- (c) Special missions led by Ministers for Foreign Affairs;

- (d) Special missions led by other Cabinet Ministers;
- (e) Diplomatic ceremonial and formal missions;
- (f) Itinerant envoys.⁴

7. *Delegations to international conferences convened by States.* The Australian Government comments as follows on this point:

The Australian Government is of the opinion that the draft articles could usefully cover the situation of representatives to congresses and conferences other than congresses and conferences convened within the framework of an international organization. In this connexion it has noted that the Commission at its fifteenth session decided that, for the time being, the terms of reference of the Special Rapporteur should not cover the question of delegates to congresses and conferences. The Australian Government believes that the time is opportune to take up this matter again and notes with interest the statement of the Special Rapporteur in his third report (A/CN.4/189) 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 a Special Rapporteur on relations between States and international organizations).⁵

8. The Special Rapporteur hopes that by the end of the present session he will be in a position to submit conclusions on this point to the Commission jointly with the Special Rapporteur on relations between States and international organizations.

9. *Nature of the provisions relating to special missions.* The Australian Government has also expressed an opinion on this point. Its comments are as follows:

The Australian Government supports the decision of the Commission at its eighteenth session to ask the Special Rapporteur to base his draft on the view that the provisions of the draft articles could not in principle constitute rules from which parties would be unable to derogate by mutual agreement.⁶

10. The observations of the Australian Government should be seen in relation to the comments on the subject which are contained in the fourth report and the supplement thereto. The Special Rapporteur recalls that the Commission decided that it should, after adopting the draft articles in their entirety, specify which provisions are to be regarded as preemptory and which can be derogated from by the parties by mutual agreement.

11. *Relation between special missions and permanent diplomatic missions.* The Australian Government has expressed the following opinion on this point:

In the report of its seventeenth session⁷ the Commission requested views on whether a rule should be included in the final text of the articles on the relation between a special mission and the permanent diplomatic mission, and if so to what effect. The Australian Government considers that there is no need for an express rule on this point. In its view, any question of division of functions is basically for the sending State to determine and further it doubts whether the matter is likely to cause difficulties in practice.⁸

⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009, p. 167, para. (5) of the commentary on art. 2.

⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³ *Yearbook of the International Law Commission, 1966*, vol. II, document A/CN.4/189/Add.1.

12. The Special Rapporteur entirely agrees with the view expressed by the Australian Government on this point.

13. *Provision prohibiting discrimination.* The Australian Government comments as follows on this provision:

Because of the diverse character of special missions the Australian Government doubts whether it would be practical to include in the final text an article prohibiting discrimination. It will, however, study with interest the proposed article on this matter to be submitted by the Special Rapporteur.⁹

14. The Special Rapporteur recalls that the question of non-discrimination is dealt with in new article 40 *bis*.

15. *So-called high-level missions.* The Finnish Government comments on this point:

The Commission, it is true, suggests that the so-called high-level special missions form a group apart and provides for this group rules that would somewhat differ from those applied to special missions in general, but even so there would hardly be adequate reasons to grant the fairly extensive facilities, privileges and immunities specified in the draft to each of the various single negotiators and delegations making up the "general group" of special missions. The Finnish Government would advocate a further consideration of the Commission's draft with a view to establishing whether special missions on an inferior level, appointed to perform tasks of a mainly technical nature, could be detached, particularly as regards facilities, privileges and immunities, from the rest of the delegations within the concept under reference.¹⁰

16. The Special Rapporteur considers that he has dealt with this question adequately in chapter II of his fourth report on special missions (see section 13). He also points out that during the discussion of article 1 at the present session the Commission expressed the desire to revert to the question of so-called high-level *special missions*.¹¹

17. *Form of the instrument.* The Finnish Government has made the following comments on this point:

The International Law Commission has not yet taken a definite view of the fact whether it should recommend that the articles concerning special missions be attached as an additional record to the 1961 Vienna Convention on Diplomatic Relations or whether a separate convention in the matter should be aimed at. The Commission, however, has prepared its recommendation to suit the second alternative. Nevertheless, the draft, particularly its part I, contains a great many dispositions which in view of an eventual convention might be considered to go too much in detail or else to be more appropriate in a "code" to serve for the guidance of the States than in an international convention binding them. In a general way, the articles contained in the draft should be cut down and the text condensed as much as possible. Furthermore, it would be useful to make clear and expressly to state in the text which articles, if any, contain items of law compulsory and binding on the States.¹²

18. In the view of the Special Rapporteur, this question was settled by the Commission at its eighteenth session and by the General Assembly which approved the Commission's report (see chapter II of the fourth report).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ See *Yearbook of the International Law Commission, 1967*, vol. I, 897th meeting, para. 47.

¹² See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

II. Additional comments on chapter III of the fourth report on special missions

PART I OF THE DRAFT ARTICLES: GENERAL RULES

Articles 1 to 4

19. The Finnish Government comments that articles 1 to 4 of the draft conform to general practice and seem to be to the purpose.¹³

Article 1. — The sending of special missions

20. The Australian Government's opinion on the concept of a special mission has been given above.¹⁴ The Special Rapporteur draws attention to the fact that that opinion was discussed by the Commission on 11 May 1967 in the course of the debate on article 1.¹⁵

Article 2. — The task of a special mission

21. The Jamaican Government writes concerning article 2:

A rule on the matter of overlapping authority should not be included in the articles. The question as to whether the task of a special mission is to be deemed to be excluded from the competence of the permanent diplomatic mission is one that ought to be left to the particular agreement governing that mission between the sending State and the receiving State.¹⁶

22. The Special Rapporteur has indicated on several occasions that in his view this matter might be usefully settled in the text of the draft article itself. The Commission considered, however, that it was sufficient to mention it in the commentary.

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

23. The Finnish Government comments:

As for article 5, which deals with the sending of the same special mission to more than one State, it would be useful to limit it to concern the simultaneous accrediting of one special mission to several countries; for the fact that the mission has previously functioned in another country is hardly relevant in this connexion. In any case, the last sentence of the article seems superfluous since it is established by article 1 of the draft that the sending of a special mission requires the consent of the receiving State.¹⁷

24. The last sentence of article 5 reads: "Each of those States might refuse to receive such a mission." The Special Rapporteur feels that the sentence is useful, since it provides safeguards to the States concerned.

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

and

¹³ *Ibid.*

¹⁴ See para. 6 above.

¹⁵ See *Yearbook of the International Law Commission, 1967*, vol. I, 898th meeting, paras. 25-46.

¹⁶ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹⁷ *Ibid.*

Article 8. — Notification

25. The Finnish Government makes the following proposal regarding articles 7 and 8:

It would seem appropriate to complete article 7 of the draft by adding a provision that the head of a special mission may authorize a member of the mission to perform particular acts on behalf of the mission and to issue and receive official communications. In this context, a reference may be made to article 8, paragraph 2 of which states that certain official notifications may be communicated by members of the mission's staff.¹⁸

26. The Special Rapporteur observes that he has already accepted a similar proposal by other Governments.

Article 9. — General rules concerning precedence

27. The Governments of Finland and Jamaica have criticized article 9.

28. The Finnish Government writes:

Paragraph 2 of article 9 (precedence) could perhaps be made more explicit by adding a statement that it concerns the precedence of the members of one special mission. The need to specify this arises from the fact that the previous paragraph deals with precedence among several special missions which carry out a common task.¹⁹

29. The Special Rapporteur considers that the question of the precedence of members within a single mission concerns only the sending State, that no international rule should be laid down on this point and that the head of the special mission should be left free, as the Commission has agreed, to settle the matter himself.

30. The Jamaican Government comments:

Since the draft articles are to be the basis of an international convention on special missions, the alphabetical order of the names of States should be prescribed for determining the order of precedence of special missions, and for the sake of uniformity the order should be that used by the United Nations.²⁰

31. The Special Rapporteur points out that a similar comment has already been made by several Governments.

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

32. The Jamaican Government comments on draft article 11:

Since any discrimination is contrary to the principles of international law, the inclusion of a rule of this nature would be unnecessary.²¹

33. The Special Rapporteur agrees with this comment.

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

34. Concerning article 14 the Finnish Government writes:

Article 14, concerning the nationality of persons attached to special missions, may seem too strict. Under its paragraph 3, the receiving State may reserve the right not to approve as mem-

bers of a special mission or of its staff nationals of a third State who are not also nationals of the sending State. Both of the Vienna Conventions, it is true, contain a similar provision, which explains its presence in the article under reference.²²

35. The Finnish Government does not, however, submit any specific proposal or conclusion. The Special Rapporteur therefore considers that there is no reason to amend article 14.

PART II OF THE DRAFT ARTICLES: FACILITIES, PRIVILEGES AND IMMUNITIES*General considerations*

36. The Australian Government has made the following general comments on the question of privileges and immunities:

The wide scope of the draft articles also causes the Australian Government particular concern because of the intention to extend to all missions that come within the articles a range of privileges and immunities based on those contained in the Vienna Convention on Diplomatic Relations, which deals of course with permanent diplomatic missions. The Australian Government does not believe that the extension of this wide range of privileges and immunities to all types of special missions would be justified. It considers that the grant of privileges and immunities should be determined by functional necessity; i.e., they should be limited strictly to those required to ensure the efficient discharge of the functions of the special mission and should have regard to the temporary nature of the mission in that connexion. It is also necessary to have regard to the status of the person who is the head of the special mission. Standards of privileges and immunities that would be appropriate in the case of high level missions, whose heads hold high offices of State, should not be made automatically applicable to other cases.²³

37. The Finnish Government comments:

In part II of the draft (articles 17-44), concerned with facilities, privileges and immunities of the special missions, the system laid down by the above-mentioned Vienna Conventions is fairly closely followed. The leading principle that the functioning of the mission must be ensured is extended to special missions in addition to which some aspects of the theory of representation have been applied. In a general way the commission's recommendation grants special missions, their members and staff a juridical position equal to that of permanent missions and persons fulfilling analogous functions in these. This means that in certain instances the juridical position of the persons under reference is more efficiently ensured than that of career consuls and consular officials. In view of the character of the special missions, particularly their temporariness and the varying nature of their tasks, it has been felt that the privileges and facilities granted them and their staffs should be more extensive, or more restricted as the case may be, than those enjoyed by permanent missions and persons attached to these. This proposition seems to require further consideration, with due regard to the above-mentioned views of different types of special missions.²⁴

38. The Special Rapporteur notes that the comments of these two Governments show that they are still hesitating between the representational theory and the functional theory as regards the facilities, privileges and immunities of special missions.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

Article 17 bis. — Derogation by mutual agreement from the provisions of Part II

39. With regard to derogation from the provisions of Part II of the draft the Australian Government writes:

The Australian Government appreciates the proposal made by the Special Rapporteur to insert a new paragraph 2 in article 17 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.”

The Australian Government considers, however, that this proposal would not allay the anxieties already expressed by some Governments about the extension of a wide range of privileges and immunities to all types of special missions. In the absence of agreement between both parties the receiving State would be obliged to accord the range of privileges and immunities set out in the draft — or not receive the mission at all.²⁵

Article 17 ter. — Differences between categories of special missions

40. The Australian Government's views on the question of differences between categories of special missions have already been quoted under the heading: “The concept of the special mission”.²⁶

Article 17 quater. — Status of the Head of State

41. The Jamaican Government considers that any attempt to draft special rules to govern missions at the highest level would be a retrograde step.²⁷

Article 22. — Freedom of communication

42. The Finnish Government has expressed the following opinion concerning the difference of views with regard to draft article 22:

As regards article 22 (freedom of communication), opinions have varied as to whether special missions should be entitled to use code or cipher telegrams and to designate persons not attached to the mission as *ad hoc* couriers. The affirmative conclusion suggested in the draft seems judicious. Also, the courier bags should enjoy unconditional inviolability; in this respect, the principle adopted would be that of the Vienna Convention on Diplomatic Relations, not that of the Convention on Consular Relations.²⁸

²⁵ *Ibid.*

²⁶ See para. 6 above.

²⁷ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁸ *Ibid.*

43. The Special Rapporteur makes no observation on this comment.

Article 35. — Members of the family

44. The Finnish Government comments on article 35:

The juridical position of members of the families of persons attached to special missions is specified in article 35 of the recommendation, partly in accordance with the analogous article (37) of the Vienna Convention on Diplomatic Relations. Members of the families of special mission staff would, however, be entitled to accompany the head of the family to the receiving State only if authorized by the latter to do so. This provision would seem too strict in view of the fact that some special missions will carry on their activities for a considerable period of time.²⁹

Former provisions on so-called high-level special missions

45. The Finnish Government writes on this point:

With regard to the rules proposed for so-called high-level special missions,³⁰ it is evident that the latter cannot in every respect be placed on a par with other special missions, wherefore particular rules for them are appropriate. Yet the necessity of sub-paragraph (a) of rules 2, 3 and 4 seems questionable. The fact mentioned in the sub-paragraph may be ascertained in advance by taking the matter up at the consultations preceding the sending of a high-level special mission. It appears from rules 4 and 5 that when a special mission is led by the Minister for Foreign Affairs or by a Cabinet Minister other than the head of Government he may have his personal suite, the members of which shall be treated as diplomatic staff. An analogous provision is missing from rule 3 which deals with the juridical position of the head of Government.

It would seem that the rules concerning high-level special missions might be a good deal simplified. Rules 2 to 5 could perhaps be condensed into one enumerating exceptions and specifying the category of high-level special mission to which each exception refers. Still, the most convenient way might be to complete the articles of the recommendation concerning special missions by adding particular rules for high-level special missions where needed.³¹

46. In view of the discussion in the International Law Commission at the nineteenth session and, in particular, the debate on article 1,³² the Special Rapporteur reserves the right to comment at a later stage on this suggestion by the Finnish Government.

²⁹ *Ibid.*

³⁰ See the “Draft provisions concerning so-called high-level special missions,” prepared by the Special Rapporteur, *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009, pp. 192 and 193.

³¹ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³² See *Yearbook of the International Law Commission, 1967*, vol. I, 898th to 900th meetings.