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Second Report on relations between States and Inter-Governmental Organizations by Abdullah El-Erian, Special Rapporteur

Topic:
Representation of States in their relations with international organizations

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RELATIONS BETWEEN STATES AND INTER-GOVERNMENTAL ORGANIZATIONS

[Agenda item 2]

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Second report by Mr. Abdullah El-Erian, Special Rapporteur

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Introduction

A. *The basis of the present report*

1. In 1963, the Special Rapporteur presented a first report, and a working paper, on relations between States and inter-governmental organizations,[1] in which he made a preliminary study with a view to defining the scope of the subject and determining the order of future work on it. In 1964 he submitted a working paper [2] as a basis of discussion for the definition of the scope and mode of treatment of his topic.

2. This working paper contained a list of questions which related to:

(*a*) The scope of the subject (interpretation of General Assembly resolution 1289 (XIII));

(*b*) The approach to the subject (either as an independent subject or as collateral to the treatment of other topics);

(*c*) The mode of treatment (whether priority should be given to "diplomatic law" in its application to relations between States and international organizations);

(*d*) The order of priorities (whether the status of permanent missions accredited to international organizations and delegations to organs of and conferences convened by international organizations should be taken up before the status of international organizations and their agents);

(*e*) The question whether the Commission should concentrate in the first place on international organizations of a universal character or should deal also with regional organizations.

3. The conclusion reached by the Commission on the scope and mode of treatment of the topic, after discussing the preliminary study and list of questions mentioned above, was recorded in its report on the work of its sixteenth session (1964) in the following terms:

> At its 755th to 757th meetings, the Commission discussed these questions, and certain other related questions that arose in connexion therewith. The majority of the Commission, while agreeing in principle that the topic had a broad scope, expressed the view that for the purpose of its immediate study the question of diplomatic law in its application to relations between States and intergovernmental organizations should receive priority. Other suggestions made by members of the Commission will be considered in the preparation of a second report by the special Rapporteur.[3]

4. At its 757th meeting on 2 July 1964, the Special Rapporteur indicated to the Commission that he intended to contact the Office of Legal Affairs of the United Nations. Consultations at this stage of the work centred on the manner in which the legal advisers of the United Nations and the specialized agencies could best assist the Special Rapporteur in furnishing to him the necessary data and legal opinions on the problems which arose in practice concerning his topic.

5. The Special Rapporteur is gratified to report to the Commission that, pursuant to those consultations, two questionnaires were prepared and addressed by the Legal Counsel of the United Nations to the legal advisers of the specialized agencies and the International Atomic Energy Agency. The first questionnaire relates to the "status, privileges and immunities of representatives of member States to specialized agencies and IAEA", and the second to the "status, privileges and immunities of the specialized agencies and of IAEA, other than those relating to representatives".

[1] *Yearbook of the International Law Commission, 1963*, vol. II, pp. 159-186 (documents A/CN.4/161 and Add.1, and A/CN.4/L.103).

[2] A/CN.4/L.104.

[3] *Yearbook of the International Law Commission, 1964*, vol. II, p. 227 (document A/5809, para. 42).

6. The questionnaires were carefully prepared to be as comprehensive as possible with a view to eliciting all information that would be useful to the International Law Commission. The agencies to which the questionnaires were addressed were reminded, however, that the questions might not be exhaustive of the subject. They were therefore requested to describe in their replies any problems not covered by the questionnaire which might have arisen in their organizations and which they thought should be brought to the attention of the Special Rapporteur. The agencies were further reminded that as the questionnaire was designed for all the specialized agencies, its terminology might not be completely adapted to a particular organization, which should in such case endeavour to apply the question to its special position.

7. The Special Rapporteur is grateful to the Office of Legal Affairs of the United Nations and the legal advisers of the specialized agencies for the valuable information they have made available to him. He is happy to learn that the Secretariat intends to publish a series of studies containing this information and thus extend its usefulness. He is confident that such a publication will be a valuable guidance and reference manual to all those engaged in the application and interpretation of the mass of instruments relating to the diplomatic law of international organizations; besides, it will be of intrinsic value to scholars engaged in academic research.

B. *Scope of the present report and order of future work*

8. The tentative scope of the present report was indicated by the Special Rapporteur to the Commission at its meeting on 8 July 1966. At that meeting the Special Rapporteur stated the following:

> At its nineteenth session, the Commission would have before it his second report on the topic of relations between States and inter-governmental organizations; that report would contain a basic study of diplomatic law in its application to relations between States and inter-governmental organizations and a set of draft articles with commentaries relating to the status, privileges and immunities of representatives of States to international organizations. That aspect of the topic was ripe for codification in the form of a draft convention.
>
> With regard to the status, privileges and immunities of the organizations themselves, he was taking into careful consideration the apprehensions expressed by the legal advisers of international organizations and by some members of the Commission when the topic had been discussed in 1963 and 1964; those apprehensions related to the position of the general Conventions on the privileges and immunities of the United Nations and the specialized agencies. A thorough study of that question in all its ramifications would therefore be necessary before deciding on the appropriate course of action on that second aspect.
>
> He had therefore deemed it proper to give priority to the first aspect of the topic, namely the status, immunities and privileges of representatives of States to international organizations.[4]

9. Further reflection and study have convinced the Special Rapporteur of the desirability of the course of action outlined above, and he has therefore proceeded accordingly. He has in fact been led to do so principally for two reasons.

10. In the first place, this seems to reflect the prevailing trend of thought in the Commission as it emerged from the preliminary debates of 1963 and 1964 (a summary of these debates is presented in section I of this report). In the second place, while the two aspects of the diplomatic law of international organizations are interwoven and cannot altogether be kept apart, it would nevertheless facilitate the investigation if they were treated separately with priority being given to the first aspect, namely the status of representatives of States to international organizations. The reasons for this are both doctrinal and practical. From the doctrinal point of view, representatives of States to international organizations, though strictly speaking not accredited to States, are, by their legal nature, representatives of States. Their position is analogous to inter-State diplomatic representatives inasmuch as they possess the representative character which is the predominant basis of diplomatic immunities. International organizations and the persons connected with them, i.e. officials and experts, do not, on the other hand, represent States. They do not therefore possess the representative character, and their position is analogous to parliamentary immunities which are based on the functional theory. Considerations of a practical nature tend moreover to favour a separate and earlier treatment of the legal position of representatives of States to international organizations. The Commission is approaching its final phase ot the preparation of draft articles on inter-State special missions. It is to be noted, however, that the General Assembly of the United Nations has decided at its twenty-first session, by resolution 2166 (XXI), that an international conference of plenipotentiaries be convened to consider the draft articles on the law of treaties. The first session of the conference would be held early in 1968, and the second session early in 1969. It therefore appears difficult to envisage the convening of a conference to consider the draft articles on special missions in the next few years. Separate treatment of the status of representatives of States to international organizations may enable the Commission to consider the possibility of recommending to the General Assembly the convening of a single conference for the two sets of draft articles on special missions and representatives of States to international organizations. The adoption of these two sets of articles would thus complete the codification of the branch of law relating to representatives of States whether inter-State or to international organizations.

11. In the light of these considerations, the Special Rapporteur has decided to define the scope of the present report and the order of future work on the topic in the following manner:

(*a*) The study of the General Conventions on the privileges and immunities of the United Nations and the specialized agencies will be deferred to a later stage and will be the subject of a separate report;

(*b*) The scheme of the present report includes a preliminary summary of the debates of the International Law Commission on the first report of the Special Rapporteur, to be followed by a survey of the general problems relating to the diplomatic law of international organizations.

[4] *Yearbook of the International Law Commission, 1966*, vol. I, part II, p. 279, (886th meeting, paras. 7-9).

The emphasis in this survey will be on the problems of particular relevance to representatives of States to international organizations, but will touch on the general aspects of the status of international organizations as well, since, as mentioned before, the two aspects of the subject are interwoven and cannot altogether be kept apart. This survey of general questions will lead up to a brief survey of the evolution of the institution of permanent missions to international organizations. This general part of the report will be followed by a set of draft articles with commentaries.

I. Summary of the Commission's discussions at its fifteenth and sixteenth sessions

A. *Preliminary remarks*

12. In his first report of 1963 and the working paper attached thereto, the Special Rapporteur presented a broad outline of the topic, and suggested to the Commission a broad scope which could be given to the subject of relations between States and inter-governmental organizations. He classified the subject into the following groups of questions:

I. First group—general principles of the juridical personality of international organizations, which would include:
   (1) Legal capacity;
   (2) Treaty-making capacity;
   (3) Capacity to espouse international claims.

II. Second group—international immunities and privileges, which would include:
   (1) Privileges and immunities of international organizations;
   (2) Related questions of the institution of legation in respect to international organizations; and
   (3) Diplomatic conferences.

III. Third group—special questions:
   (1) The law of treaties in respect to international organizations;
   (2) Responsibility of international organizations;
   (3) Succession between international organizations.

13. The Special Rapporteur suggested to the Commission that:

(*a*) a distinction be made between the question of the juridical personality and immunities of international organizations and the other aspects of the subject of relations between States and international organizations, and

(*b*) consideration of these other aspects, namely, the law of treaties in respect to international organizations, responsibility of international organizations and succession between international organizations, be deferred to a future stage in the work of the Commission when it would have completed or made substantial progress in its work on these topics in relation to States.

14. The scope of the topic as interpreted by the Special Rapporteur, and in particular his suggestion that the subject of the general principles of the juridical personality of international organizations be taken up, provoked a division of views in the Commission. The preliminary discussion which started in 1963 [5] and was completed in 1964 [6] revealed differences of interpretation and approach to both the scope of the topic and the concept of international personality of international organizations. It provided an opportunity to explore a number of basic jurisprudential questions concerning the nature of international organizations, their place in the contemporary international legal order, and the stage of growth of their legal norms.

15. The interplay of theoretical concepts and practical considerations was indeed evident throughout the discussion which developed into a fruitful exchange of views. Agreement was sought, whatever the starting point, on an interim decision which would put aside doctrinal differences and define the scope of the topic for the purpose of immediate study and as a matter of priority. The subject of diplomatic law in its application to relations between States and international organizations presented the common ground for such an agreement.

16. Before proceeding to the summary of the views of the members of the Commission on the latter aspect of the topic, it may be appropriate to touch briefly on the Commission's views on two general questions: the interpretation of General Assembly resolution 1289 (XIII) which invited the Commission to consider the question of relations between States and inter-governmental organizations, and the varying concepts regarding the juridical personality of international organizations.

B. *Interpretation of General Assembly resolution 1289 (XIII)*

17. The antecedent of this resolution and the debates and proceedings which led to it were set forth in paragraphs 1 to 9 of the first report. Since, however, the restrictive interpretation given to it by some members of the Commission was based partly on the particular context of its adoption, it would be useful to recall briefly the circumstances which actuated the General Assembly to pass this resolution.

18. At the thirteenth session of the General Assembly in 1958, during the course of the consideration by the Sixth Committee of chapter III (diplomatic intercourse and immunities) of the report of the International Law Commission covering the work of its tenth session,[7] the representative of France submitted on 27 October 1958 a draft resolution whereby the General Assembly would request the Commission to include in its agenda the study of the subject of relations between States and international organizations.[8]

19. The French delegation's draft resolution referred to paragraph 52 of the report of the International Law

[5] *Yearbook of the International Law Commission, 1963*, vol. I, pp. 297-307 (717th-718th meetings).

[6] *Yearbook of the International Law Commission, 1964*, vol. I, pp. 206-223 (755th-757th meetings).

[7] *Yearbook of the International Law Commission, 1958*, vol. II, pp. 89-105 (document A/3859, chap. III).

[8] *Official Records of the General Assembly, Thirteenth Session, Annexes*, agenda item 56, document A/C.6/L.427.

Commission covering the work of its tenth session, which reads:

Apart from diplomatic relations between States, there are also relations between States and international organizations. There is likewise the question of the privileges and immunities of the organizations themselves. However, these matters are, as regards most of the organizations, governed by special conventions.

20. A revised draft later submitted by the representative of France (on 6 November 1958) referred further to paragraph 51 of the International Law Commission's report on its tenth session, which refers to *ad hoc* diplomacy and in particular to diplomatic conferences. The operative part of the draft was also revised to provide that the General Assembly would request the Commission to give further consideration to the question of relations between States and international organizations, in the light of the current study of diplomatic intercourse and immunities and of *ad hoc* diplomacy, and in the light of the discussion in the Assembly.[9]

21. Later, the representative of France orally amended the operative part of his draft resolution to request the International Law Commission to give further consideration to the question of relations between States and international organizations at the appropriate time and after the study of diplomatic intercourse and immunities, consular intercourse and immunities and *ad hoc* diplomacy had been completed, in the light of the results of that study and of the discussion in the General Assembly.[10]

22. Some members of the Commission opposed the broad scope of the topic as suggested by the Special Rapporteur. They pointed out that resolution 1289 (XIII) had originated in a paragraph in the Commission's own report on its tenth session which had dealt mainly with diplomatic intercourse and immunities; the resolution should therefore be interpreted primarily in that context. They further pointed out that the title chosen for the topic—relations between States and inter-governmental organizations—was explicit, for in fact the Assembly wished to complete the codification of diplomatic law. According to this restrictive interpretation the purpose of this topic is to supplement the codification of diplomatic law by examining relations between States and international organizations. The work should be towards a convention adding a new chapter or an additional protocol to what had been already done on diplomatic law.

23. The majority of the Commission, however, did not take such a restrictive view of resolution 1289 (XIII). They stated that in the absence of any definitive delimitation by the Assembly, the Commission was free to define the scope of the topic. In their view the broad interpretation would be in the spirit of the eighth paragraph of the preamble to General Assembly resolution 1505 (XV), which reads:

Considering that it is desirable to survey the present state of international law, with a view to ascertaining whether new topics susceptible of codification or conducive to progressive development have arisen, whether priority should be given to any of the topics already included in the Commission's list or whether a broader approach may be called for in the consideration of any of these topics.

Moreover, a broad scope would be in harmony with the Commission's own decisions in response to that resolution when it had defined the scope of the topics of State responsibility and the succession of States and Governments.

24. Some of the members of the Commission, while agreeing in principle with the broad scope of the topic, thought that with regard to this particular topic the difficulties were probably greater than in the case of State responsibility and State succession. They emphasized that the question of international organizations was one on which there had been many recent developments in international law; the rules were continually evolving. It was therefore difficult to determine which questions properly pertained to the topic and which should be left aside. They suggested, nevertheless, that an attempt should be made to limit the scope of the study, with a view to deciding which question should be taken up first. The Commission was urged by these members to adopt an empirical approach in its study of international organizations and to seek to codify the rules that were mature for codification and likely to be codified in practice.

C. *General principles of juridical personality of international organizations*

25. The part of the Special Rapporteur's first report devoted to the problem of the juridical personality of inter-governmental organizations has proved to be particularly controversial, both in the Commission at its fifteenth and sixteenth sessions, and in the Sixth Committee of the General Assembly at its eighteenth session. For example, one representative in the Sixth Committee had said that:

In the matter of relations between States and inter-governmental organizations, his delegation considered that sovereign and equal States were not only subjects of international law, in their capacity as holders of sovereignty, but also creators of international law. International organizations, despite their importance in the study and solution of the great problems facing mankind, were subjects of international law only to the extent that they needed that status in order to carry out their work; since they did not possess the same characteristics as a sovereign State, there could be no question of their holding the same status in international law.[11]

On the other hand, a proponent of the broader approach had said that:

His delegation attached great importance to the study of relations between States and inter-governmental organizations. Through their activities in the field of economic and social co-operation and in peacemaking, the United Nations and related specialized agencies had acquired an original legal personality.[12]

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[9] *Ibid.*, document A/C.6/L.427/Rev.1.

[10] *Ibid.*, document A/4007, para. 20.

[11] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 783rd meeting, para. 29.

[12] *Ibid.*, 786th meeting, para. 22.

26. Varying concepts regarding the juridical personality of international organizations, and in particular whether there existed any general principles relating thereto that were susceptible of codification or conducive to progressive development, were sharply reflected in the discussions of the International Law Commission.

27. Some members of the Commission expressed doubts on the existence of what may be called "general principles" of juridical personality of international organizations. They maintained that the legal personality of an organization was determined by its constitution. There were rules of general international law on the subject of the international personality of States, but none on the international personality of international organizations. There was therefore, they stressed, a great difference between States and international organizations in that respect. The rules on the personality of an international organization, which resulted from its constitution, were only binding on member States of the organization and on any States which explicitly accepted that international personality. They further pointed out that there were considerable differences in status between the various international organizations, and that this was true even of international organizations of a general character. One member among this group described the notions of international legal capacity and treaty-making capacity of international organizations as convenient academic expressions for conveying certain ideas which should be regarded as points of arrival after a great deal of experience, rather than as points of departure for the analysis of legal principles. Another member thought that there was a preliminary question to be settled. He posed the question whether there were or could be any general rules applying to international organizations. He replied to this question by stating that the Special Rapporteur would find fairly substantial general rules on diplomatic questions but few, if any, general rules for international organizations concerning agreements, State responsibility and State succession. In his opinion there was no rule of equality of international organizations in the present state of international relations: unlike States, they were fundamentally unequal, so that only minimum rules could be laid down.

28. A number of the members of the Commission took issue with such a strict concept. They agreed with the Special Rapporteur's suggestion that the general principles of the international personality of international organizations should be studied first. They thought that such an approach was more suited to a systematic and logical treatment of the subject. While recognizing that the general principles on the subject were rapidly evolving, they thought that the problems which arose ought to be studied and that it was desirable that the Commission should contribute to that work. One member among this group stated that it was true that the existing rules varied greatly according to the nature and functions of the organization concerned, but a study should be made to determine how far it was possible to propose uniform or analogous rules. Another member asserted that the independent character of each international organization had not prevented some measure of "common law" from emerging.

D. *Diplomatic law of international organizations*

29. As mentioned before, the majority of the Commission, while agreeing in principle that the topic had broad scope, expressed the view that for the purpose of its immediate study the question of diplomatic law in its application to relations between States and inter-governmental organizations should receive priority.[13]

30. The Commission did not take an explicit decision in favour of directing the Special Rapporteur to give priority to either of the two aspects of the subject of diplomatic law of international organizations, namely, the status of representatives of States to international organizations, and the status of international organizations. Some members suggested that the former be taken up first; others thought priority should be given to the latter. There was general agreement that the matter should be left to the Special Rapporteur to decide in the light of further study and considering the suggestions made by members of the Commission. Mention was made in particular of the usefulness of examining how the development of the law in the 1961 Vienna Convention on Diplomatic Relations[14] and the 1963 Vienna Convention on Consular Relations[15] needed to be reflected in the privileges and immunities of international organizations and the representatives accredited to them.

31. Two questions, however, caused considerable controversy among the members of the Commission: first, the effect which the work might have on the General Conventions on the privileges and immunities of the United Nations and the specialized agencies,[16] and second, whether regional organizations should be included in the set of rules envisaged by the Commission or left out.

32. The position of the General Conventions of 1946 and 1947 on the privileges and immunities of the United Nations and the specialized agencies and the effect which the work of the Commission on this topic might have on it caused a great deal of discussion. Concern about what was described by some members as "revision" of or "rewriting" or "replacing" these Conventions was manifest throughout the discussion, which gave rise to a number of issues of constitutional character relating to the competence of the Commission and the interpretation of the General Assembly's intention.

33. Two members questioned the competence of the Commission on the ground that the two Conventions had been adopted by the General Assembly in 1946 and 1947 respectively, in pursuance of Articles 104 and 105 of the Charter. They stated that they were not at all certain that the Commission was empowered to take any action regarding the two Conventions unless it had some specific indication that the General Assembly would

[13] *Supra*, paragraphs 3 and 15.

[14] *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II, p. 82 (document A/CONF.20/13 and Corr.1).

[15] *Official Records of the United Nations Conference on Consular Relations* vol. II, p. 175 (document A/CONF.25/12).

[16] United Nations, *Treaty Series*, vol. 1 (1946-1947), No. 4, p. 15, and vol. 33 (1949), No. 521, p. 261.

welcome such action. Other members, without necessarily sharing the doubts regarding the competence of the Commission, nevertheless took a cautious approach, and advised extreme caution to avoid what they called the "pitfall" of attempting to rewrite the General Conventions or the headquarters agreements.

34. On the other hand, a number of the members of the Commission stressed the point that there was a wealth of material available for a thorough study of the privileges and immunities of international organizations, and that the mere existence of the 1946 and 1947 Conventions should not deter the Commission from making a general study of the subject. They pointed out that since 1946 there had been considerable experience of interpretation and application of these Conventions, and use should be made of that experience. One member among this group stated that he believed it would be a great mistake to approach the topic without the intention of studying it thoroughly, and that even if the Commission's general study led it to suggest certain departures from those Conventions, that would not necessarily mean that their system would be disturbed. He concluded that when the Commission had completed its study it would be for States to decide the political question as to what would be done with the Commission's work. Another member stated that the difficulties to which some members had drawn attention should not deter the Special Rapporteur from suggesting possible lines of advance in relation to the matters dealt with in the General Conventions, and that the Commission, while maintaining the provisions of those Conventions in broad outline, should investigate the practical possibilities of introducing desirable improvements by way of progressive development.

35. The place of regional organizations in the work to be undertaken by the Commission on this topic was the subject of a division of opinion among its members. In his first report, the Special Rapporteur suggested that the Commission should concentrate its work on this subject first on international organizations of a universal character (the United Nations system) and prepare its draft articles with reference to these organizations only, and should examine later whether they could be applied to regional organizations as they stood, or whether they required modification. In explaining his suggestion, he stated that "The study of regional organizations raised a number of problems, such as recognition by, and relationship with, non-member States, which would call for the formulation of special rules for those organizations."[17]

36. Some members of the Commission took issue with this suggestion. They thought that regional organizations should be included in the study, pointing out that relations between States and organizations of a universal character might not differ appreciably from relations between States and smaller regional organizations. They further pointed out that if the Commission were to confine itself to the topic of the relations of organizations of a universal character with States, it would be leaving a serious gap, and that relations with States were apt to follow a very similar pattern whether the organization in question was of a universal or a regional character.

37. Several members of the Commission, however, expressed themselves in favour of the suggestions by the Special Rapporteur to exclude regional organizations at least from the initial stage of the study. They stated that any draft convention to be prepared concerning the relations between States and inter-governmental organizations should be concerned with those of a universal character and not with regional organizations, though the experience of the latter could be taken into account in the study. They argued that regional organizations were so diverse that uniform rules applicable to all of them could hardly be formulated. They therefore thought that it would probably be better to leave those regional organizations great latitude to settle their own relations with Governments. An interesting point of a constitutional character was raised by one member, who stated that some regional organizations had their own codification organs and it was undesirable that the Commission should invade the field assigned to them.

38. Before concluding this summary of the discussions of the Commission, mention should be made of the question of the organization and procedure of diplomatic conferences. This question was included by the Special Rapporteur in his first report as one of the various aspects of diplomatic law of international organizations. The question did not attract much attention on the part of the majority of the members. Those who referred to it in their statements thought that the law of international conferences was in process of development. They raised the question whether the subject should be considered with the topic of relations between States and inter-governmental organizations or treated separately.

39. One last point relates to the doubts expressed by one or two members of the Commission regarding the appropriateness of using such terms as "diplomatic relations" or "institution of legation" in relation to international organizations. This point will be discussed at the beginning of section IV of this report when the question of the title of the draft articles is taken up.

II. General problems relating to the diplomatic law of international organizations

A. *General remarks*

40. The growth in the number of international organizations, universal and regional, and the expansion of their activities have resulted in a significant expansion of both the scope and subject-matter of diplomatic law. The impact of this increase has been twofold. First, meetings of the United Nations and of the specialized agencies have provided States with regular and periodic diplomatic conferences. The advance from the stage of sporadic conferences to that of "institutionalized diplo-

[17] *Yearbook of the International Law Commission, 1963*, vol. I, p. 298 (717th meeting, para. 109).

matic conferences" is generally conceded as one of the significant achievements of international organizations.[18]

41. Second, as subjects of international law, international organizations enter into relations with States and with one another. To exercise their functions effectively, they establish headquarters in host States which concede a defined legal status and a number of privileges and immunities to the organizations, their premises and their personnel. In addition to their headquarters, these organizations set up a variety of regional centres and offices in member States, and sometimes even in non-member States. Permanent representatives are often assigned by them to some of their members. For example, the United Nations Technical Assistance Board has "Resident Representatives" in many countries, the United Nations High Commissioner for Refugees and the World Health Organization maintain "delegations", "missions of liaison" or "country representatives" in a number of countries, and the European Coal and Steel Community has a permanent mission to the United Kingdom Government, even though that Government is not a member of the Community.

42. Since the creation of the United Nations, the practice of establishing permanent missions of Member States at its Headquarters has developed. These missions are created to serve particularly for liaison between the Member States and the Secretariat, when the various organs of the United Nations are not in session. However, the activities of permanent missions demonstrate that they also perform diplomatic functions, and serve as channels of communication between Governments and the Secretary-General as well as between Governments of the Member States on matters dealt with by United Nations organs.[19] The permanent missions carry out these activities by methods and in a manner similar to those employed by diplomatic missions; moreover, their organization resembles that of the traditional diplomatic missions. In the introduction to his annual report on the work of the organization, 16 June 1958-15 June 1959, the Secretary-General of the United Nations observed that "The permanent representation of all Member nations, and the growing diplomatic contribution of the permanent delegations outside the public meetings . . . may well come to be regarded as the most important 'common law' development which has taken place so far within the constitutional framework of the Charter."[20]

[18] See Philip C. Jessup, "Parliamentary Diplomacy: An examination of the legal quality of the rules of procedure of organs of the United Nations", *Recueil des Cours de l'Académie de Droit international de La Haye*, vol. 89 (1956 - I), pp. 185-316.

[19] These functions were described by two writers who have served on the permanent missions of two States Members of the United Nations as follows: "They maintain contact with the United Nations Secretariat on a continuous basis, report on previous meetings, anticipate coming meetings and act as a channel of communication and centre of information for the relationship of their country with the United Nations."... "The Permanent Representative in New York has a wide and significant representational function to fulfil." John G. Hadwen and Johan Kaufmann, *How United Nations Decisions are Made* (Leyden, 1960), pp. 26 and 28.

[20] *Official Records of the General Assembly, Fourteenth Session, Supplement No. 1A* (A/4132/Add.1), p. 2.

B. *The place of custom in the law of international immunities*

43. Some writers state that international immunities, in contrast to immunities of inter-State diplomatic agents, are almost exclusively created by treaty law, and that international custom has not yet made any appreciable contribution to this branch of law.

44. Several writers acknowledge, however, that "a customary law appears to be in the process of formation, by virtue of which certain organizations endowed with international personality may claim diplomatic standing for their agents as of right",[21] and speak of "*l'existence d'une véritable* coutume internationale . . . *ou en tout cas d'un commencement de coutume.*"[22] One writer has summed up the position, as it has developed since the creation of the League of Nations, as follows:

En voie de création est une règle coutumière qui assure aux organisations internationales et à leurs fonctionnaires supérieurs les mêmes privilèges et immunités diplomatiques qu'au personnel diplomatique. Les étapes de ce développement sont constituées par les arrangements conclus entre la Suisse et la Société des Nations en 1921 et en 1926, ainsi que par ceux qui sont intervenus entre la Suisse, d'une part, les Nations Unies et l'Organisation internationale du Travail d'autre part, en 1946.

Le fait que certaines conventions internationales ont des contenus identiques, ce qui est particulièrement caractéristique pour les traités d'établissement, de consulat et d'extradition, n'entraîne pas en soi la formation d'une règle coutumière.[23]

45. A parallel development of concepts can be found in practice. In a diplomatic note by the United States Government dated 16 October 1933 it was stated that:

. . . under customary international law, diplomatic privileges and immunities are only conferred upon a well-defined class of persons, namely, those who are sent by one state to another on diplomatic missions. Officials of the League of Nations are not as such considered by this Government to be entitled while in the United States to such privileges and immunities under generally accepted principles of international law, but only under special provisions of the Covenant of the League which have no force in countries not members of the League.[24]

When, however, at the end of 1944 the British Diplomatic Privileges (Extension) Act, which provided for immunities, privileges and capacities of the international organizations, their staff, and the representatives of member Governments, was introduced in Parliament, the Minister of State explained that where a number of Governments joined together to create an international organization to fulfil some public purpose, the organization should have the same status, immunities and privileges as the foreign Governments members thereof enjoyed under the ordinary law. He elaborated that in principle they were entitled to it as a matter of international law which the

[21] L. Preuss, "Diplomatic Privileges and Immunities of Agents invested with functions of an international interest", *American Journal of International Law* (Washington, D.C.), vol. 25 (1931) p. 696.

[22] J. F. Lalive, "L'immunité de juridiction des États et des organisations internationales", *Recueil des Cours de l'Académie de Droit international de La Haye*, vol. 84 (1953 - III), pp. 304-305.

[23] Paul Guggenheim, *Traité de droit international public* (Geneva, 1953), vol. I, pp. 51-52.

[24] G. H. Hackworth, *Digest of International Law* (Washington, D.C., 1942), vol. IV, pp. 422-423.

English courts would regard as being part of the common law. However, legislation was regarded as desirable in order to put the legal position beyond dispute and to define with precision the extent of the prerogatives.

46. The Swiss Federal Council stated in a message dated 28 July 1955 to the Federal Assembly:

. . . une organisation internationale fondée sur un traité entre États jouit d'après le droit international d'un certain nombre de privilèges dans l'État où elle a fixé son siège . . .

. . . nous étions donc en présence d'un droit coutumier auquel notre pays ne pouvait pas se soustraire . . . .[25]

47. The Supreme Court of Mexico in its decision of 28 April 1954 declared that the United Nations Economic Commission for Latin America could enjoy immunities recognized by international law.

48. Reference may also be made in this respect to article III, section 3 of the Agreement between Egypt and the World Health Organization, which provides:

The Organization and its principal or subsidiary organs shall have in Egypt the independence and freedom of action belonging to an international organization according to international practice.[26]

C. *Accreditation of representatives to international organizations*

49. Representatives to international organizations are accredited to the organizations rather than to the host States. With reference to the United Nations, the question of accreditation was discussed at the third session of the General Assembly. The debates in the Sixth Committee revealed a general understanding that the term "credentials" was inappropriate "because it tended to give the impression that the United Nations was a State, headed by the Secretary-General".[27] The term is used for want of a better one and representatives are accredited to the United Nations "and any of its organs" or to specific organs. On 3 December 1948 after its discussion of accreditation, the General Assembly adopted resolution 257 A (III) on permanent missions to the United Nations, which recommended that credentials of permanent representatives be issued by the Head of State or Government or the Foreign Minister and that they "be transmitted to the Secretary-General". Some writers have interpreted this provision as implicitly ruling out the requirement of "*agrément*".[28]

50. The fact that representatives to international organizations are not accredited to the host State renders inapplicable the remedy of declaring a representative *persona non grata.* A further consequence is that representatives may be sent by Governments which do not have diplomatic relations with, or are not recognized by, the host State.

D. *Differences between inter-State diplomatic relations and relations between States and international organizations*

51. International intercourse within the framework of international organizations resembles in certain respects diplomatic relations between States. As noted above, permanent missions to international organizations carry out their activities by methods and in a manner similar to those employed by diplomatic missions. Their organization is also patterned on that of the traditional diplomatic composition and structure.

52. The evolution of conference diplomacy took a path analogous to bilateral diplomacy. The latter had passed through two clearly distinct periods: the period of non-permanent and *ad hoc* embassies, covering antiquity and the Middle Ages, and the period of permanent legations, beginning in Italy in the fifteenth century. Similarly, multilateral diplomacy developed from the stage of *ad hoc* temporary conferences, which are convened for a specific purpose and which come to an end once the subject-matter is agreed upon and embodied in an international agreement, to the stage of permanent international organizations with organs that function permanently and meet periodically.

53. A number of differences exist, however, between bilateral and conference diplomacy, which emanate from a basic difference in the legal relationships involved in the two types of diplomacy. In traditional inter-State diplomacy the relationship is a bipartite one between the sending State and the receiving State. However, in diplomacy within an international organization, the relationship is a tripartite legal position which involves the sending State, the international organization and the host State in whose territory the representative of the sending State or the international organization and its personnel enjoy the legal status conceded to them. Unlike its corresponding provision in the League Covenant, Article 105 of the United Nations Charter did not use the words "diplomatic privileges and immunities", but employed instead the words "privileges and immunities as are necessary for the fulfilment of its purposes". The report of the Rapporteur of Committee IV/2, which was adopted by the San Francisco Conference, includes the following comment on this Article:

In order to determine the nature of the privileges and immunities, the Committee has seen fit to avoid the term "diplomatic" and has preferred to substitute a more appropriate standard, based, for the purposes of the Organization, on the necessity of realizing its purposes and, in the case of the representatives of its members and the officials of the Organization, on providing for the independent exercise of their functions.[29]

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[25] Quoted in Philippe Cahier, *Le Droit diplomatique contemporain* (Geneva, 1962), pp. 47-48. The author rightly points out an important practical aspect of the question of the place of custom in the diplomatic law of international organizations by observing that "*L'existence d'une coutume peut permettre aussi de combler les lacunes que l'on rencontre parfois dans les accords de siège. C'est ainsi que par exemple l'accord du 28 mai 1946 conclu entre la Suisse et l'OIT* [Organisation internationale du Travail] *ne mentionne pas les privilèges des experts.*"

[26] United Nations, *Treaty Series*, vol. 223 (1955), No. 3058, p. 90.

[27] *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, 125th meeting. A summary of these debates is given in section III of this report.

[28] See Leo Gross, "Immunities and Privileges of Delegations to the United Nations", *International Organization* (Boston, Mass.) vol. XVI (1962), No. 3, p. 491.

[29] *Documents of the United Nations Conference on International Organization*, IV/2/42(2) (vol. XIII, p. 704).

The theoretical basis of the immunities of inter-State diplomatic agents has varied from age to age. In its general comments on the relevant provision of its draft articles on diplomatic relations and immunities, contained in the report on its tenth session (1958),[30] the International Law Commission, while recognizing the role played by the fiction of "exterritoriality", stated that it took as a theoretical basis the "functional theory" supplemented by the "representational theory". Since international organizations do not have territorial jurisdiction, no reliance could be placed on the fiction of exterritoriality, nor do they have the sovereign character possessed by States from which the "representational theory," emanates. International immunities, therefore, can only be based on the "functional theory".

E. *The special position of the host State*

54. As mentioned before, the representative of a State to an international organization is not accredited to the host State in whose territory the seat of the organization is situated. The same is true as concerns the personnel of the organization. Neither of them enters into direct relationship or transactions with the host State as in bilateral diplomacy. In the latter case, the diplomatic agent is accredited to the receiving State in order to perform certain functions of representation and negotiation between it and his own State. This legal situation is the basis of the institutions of acceptance by the receiving State of the diplomatic agent *(agrément)* and its right to request his recall when it declares him *persona non grata.*

55. It should be noted, however, that, notwithstanding the fact that the representative of a State to an international organization or an official of an international organization is not accredited to the host State, the territory of the latter is the field of application of his legal status. Its concern with the observance of regulations regarding its national security and with guarantees against the abuse of international immunities cannot be denied. Rules to accommodate the special position of the host State have been included in the headquarters agreements and the General Conventions of the United Nations and the specialized agencies, as supplemented by special agreements and developed in practice.

F. *Representatives to conferences convened by international organizations*

56. Article IV, section 11 of the Convention on the Privileges and Immunities of the United Nations stipulates that delegates to "conferences convened by the United Nations" shall enjoy the same privileges and immunities that the Convention accords to representatives of Members to the principal and subsidiary organs of the United Nations. Conferences convened by international organizations, sometimes referred to as "held under the auspices of international organizations," are to be differentiated from meetings of organs of international organizations. The former are conferences of States, and therefore have an independent status. For example, States not members of the organization convening the conference may be invited to participate. Because of this independent status the conferences may adopt their own rules of procedure. However, they are generally patterned on the rules of procedure of the General Assembly, e.g. the 1958 Conference on the Law of the Sea, and the 1961 and 1963 Conferences on Diplomatic Intercourse and Immunities and Consular Relations.

57. Special agreements are usually concluded with the host State in whose territory the conference is convened so that the General Convention may be applied even if the host State has not acceded to it. This arrangement is also necessary if the provisions of the General Convention are to apply to non-member States. The United Nations and Italy signed an agreement on 26 July 1963 [31] regarding the arrangements for the United Nations Conference on International Travel and Tourism, which provides in article VI, paragraph 1, for the application of the General Convention. Furthermore, paragraph 2 of this article specifies that representatives of non-member States attending the Conference shall enjoy the same privileges and immunities that the Convention accords to the representatives of member States.

G. *Status of observers from non-member States*

58. Permanent observers have been sent by non-member States to United Nations Headquarters at New York and its Office at Geneva. Since 1946 a permanent observer has been designated by the Swiss Government. Observers have been also appointed by States such as Austria, Finland, Italy and Japan, that later became Members of the United Nations. The Federal Republic of Germany, Monaco, the Republic of Korea and the Republic of Viet-Nam, which are not members of the Organization at the present time, maintain permanent observers. In addition, the Holy See has recently appointed permanent observers, both at New York and at Geneva.

59. There are no provisions relating to permanent observers of non-member States in the United Nations Charter, in the Headquarters Agreement or in General Assembly resolution 257 A (III) of 3 December 1948 relating to permanent missions of Member States. The Secretary-General referred to permanent observers of non-members in his report on permanent missions to the fourth session of the Assembly,[32] but no action was taken by the Assembly to provide a legal basis for permanent observers. Their status, therefore, has been determined by practice (see the memorandum to the Acting Secretary-General, issued by the Office of Legal Affairs, dated 22 August 1962).[33]

60. Since permanent observers of non-member States do not have an officially recognized status, facilities

[30] *Yearbook of the International Law Commission, 1958*, vol. II, pp. 94-95 (document A/3859, para. 53, section II of the draft articles).

[31] United Nations, *Treaty Series*, vol. 472 (1963), No. 6840, p. 173.

[32] *Official Records of the General Assembly, Fourth Session, Sixth Committee, Annex*, document A/939/Rev.1 and Rev.1/Add.1.

[33] *United Nations Juridical Yearbook, 1962* (ST/LEG/8), fascicle 2, p. 236.

provided for them by the Secretariat are confined to their attendance at public meetings. They are not entitled to diplomatic privileges or immunities under the Headquarters Agreement or under other statutory provisions of the host State. Those among them who belong to the diplomatic missions of their Governments to the United States may enjoy immunities in the United States on that basis. In *Pappas* v. *Francisci*, a claim to diplomatic immunities by a member of the staff of the Italian Observer to the United Nations prior to Italy's admission to membership was rejected by the Supreme Court of New York.[34]

III. Evolution of the institution of permanent missions to international organizations

A. *General remarks*

61. The practice of permanent representation to international organizations is not new. Many Members of the League of Nations had permanent delegates in Geneva.[35] They were usually members of the diplomatic missions accredited to Switzerland. Nevertheless, the practice had not been generally accepted of accrediting permanent delegations to the League of Nations. An early commentary on the Charter of the United Nations noted that since the new Organization had come into being, it had become common practice among Members to maintain permanent delegations at the interim Headquarters, and that in April 1948, forty-five Members had permanent delegations [36] (the total membership was then fifty-seven).

62. The Charter of the United Nations does not contain a general provision with regard to the question of permanent delegations to the United Nations. However, Article 28, paragraph 1 provides that:

> The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization.

In this Article provision was made for the Security Council to be able to function continuously, and accordingly every member of the Council had to be permanently represented thereon. In other words, the only permanent representation envisaged by the Charter is the permanent representation of the States members of the Security Council.

63. The provisional rules of procedure of the Security Council contain no provision bearing on the stipulation in Article 28, paragraph 1 of the Charter that each member of the Security Council shall be represented at all times at the seat of the Organization. Rule 13, in its first sentence, is limited to the provision that "Each member of the Security Council shall be represented at the meetings of the Security Council by an accredited representative", while the remainder of rule 13 contains provisions concerning credentials. All members of the Security Council have maintained delegations to the Security Council at Headquarters, usually consisting of the head of delegation, an alternate representative and one or more advisers.[37]

64. The Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946,[38] does not contain special rules for permanent representatives. Article IV, section 11 speaks in general terms of "Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations". It provides for the enjoyment by these representatives of certain privileges and immunities (mainly functional), e.g., immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind.

65. The omission of reference to permanent representatives was rectified in the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, signed on 26 June 1947,[39] which contains special provisions on the immunities of permanent representatives. Article V, section 15 of this Agreement provides that:

> (1) Every person designated by a Member as the principal resident representative to the United Nations of such Member or as a resident representative with the rank of ambassador or minister plenipotentiary,
>
> (2) Such resident members of their staffs as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned;
>
> . . .
>
> shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it . . .[40]

66. The same can be noticed in the legal instruments governing the status of the United Nations Office at Geneva. The Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, signed on 11 June and 1 July 1946, does not contain special provisions relating to permanent representation.[41] However, on 31 March 1948 the Swiss

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[34] *International Law Reports, 1953* (London, 1957), p. 380.

[35] See Pitman B. Potter, "Permanent Delegations to the League of Nations", *Geneva Special Studies* (League of Nations Association of the United States, Geneva, 1930), vol. I, No. 8.

[36] Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations, Commentary and Documents* (Second and Revised Edition, Boston, 1949), pp. 228-229.

[37] *Repertory of United Nations Practice*, vol. II, p. 110.

[38] United Nations, *Treaty Series*, vol. 1 (1946-1947), No. 4, p. 15.

[39] *Ibid.*, vol. 11 (1947), No. 147, p. 11.

[40] Cf. the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947, which regulates the status of "representatives of members" in general, and the headquarters agreements concluded between the various specialized agencies and the respective host Governments which contain separate provisions on "resident representatives".

[41] *United Nations Legislative Series*, ST/LEG/SER.B/10 (United Nations publication, Sales No.: 60.V.2), p. 196.

Federal Council adopted a resolution entitled "*Décision du Conseil fédéral suisse concernant le statut juridique des délégations permanentes auprès de l'Office européen des Nations Unies ainsi que d'autres organisations internationales ayant leur siège en Suisse*".[42] It reads as follows:

1. Les délégations permanentes d'États Membres bénéficient, comme telles, de facilités analogues à celles qui sont accordées aux missions diplomatiques à Berne.

Elles ont le droit d'user de chiffres dans leurs communications officielles et de recevoir ou d'envoyer des documents par leurs propres courriers diplomatiques.

2. Les chefs de délégations permanentes bénéficient de privilèges et immunités analogues à ceux qui sont accordés aux chefs de missions diplomatiques à Berne, à condition toutefois qu'ils aient un titre équivalent.

3. Tous les autres membres des délégations permanentes bénéficient, à rang égal, de privilèges et immunités analogues à ceux qui sont accordés au personnel des missions diplomatiques à Berne.

4. La création d'une délégation permanente, les arrivées et les départs des membres des délégations permanentes sont annoncés au Département politique par la mission diplomatique à Berne de l'État intéressé. Le Département politique délivre aux membres des délégations une carte de légitimation attestant les privilèges et immunités dont ils bénéficient en Suisse.

67. The powers of diplomatic representatives who had been accredited as permanent representatives to the United Nations were referred to during the General Assembly's consideration at its first special session of the Credentials Committee's report in plenary meeting in connexion with the Committee's finding on "provisional credentials". At that time it was maintained, as it had been in the Credentials Committee itself, that representatives permanently accredited to the Organization were legally qualified to represent their respective countries at all times at any meeting of any United Nations organ. That was particularly true in the case of special sessions of the General Assembly, which caused certain difficulties for some Governments because of the time element and the great distance involved.[43]

68. The competence of permanent missions was considered by the Interim Committee of the General Assembly at its meetings held from 5 January to 5 August 1948.[44] The Committee considered a proposal submitted by the Dominican Republic. According to this proposal, the heads of permanent delegations at the seat of the United Nations should, in that capacity, be automatically entitled to represent their countries on the Interim Committee. This, it was said, would provide for greater elasticity by making it unnecessary for each delegation to submit new credentials for each convocation of the Interim Committee. With regard to alternates and advisers, rule 10 of the rules of procedure of the Interim Committee [45] stated that they could normally be designated by the appointed representative. Consequently, special credentials would only be required when a Member of the United Nations desired to send a special envoy. It was said that such a procedure, in addition to its practical usefulness, would induce all Governments to set up permanent delegations, which would be an important contribution to the work of the United Nations.

69. It was pointed out, on the other hand, that the matter of credentials was properly one for the Governments concerned to decide for themselves. For example, in accrediting the head of a permanent delegation, it might be specified that, in the absence of notification to the contrary, he might act as representative on all organs or committees of the United Nations. The representative of the Dominican Republic made it clear, however, that the proposal submitted by his Government was intended to apply exclusively to the Interim Committee.

70. The Committee noted from the memorandum prepared by the Secretariat on permanent delegations to the United Nations [46] that not all Members had permanent delegations in New York, that there was great variety in the functions performed by such permanent delegations as well as in the manner of accrediting the heads or chiefs thereof to the United Nations, and that permanent delegations as such had no recognized legal status under the Charter or under the rules of procedure of the various organs of the United Nations. The Committee was sympathetic to the idea contained in the Dominican proposal. Nevertheless, it considered that the whole matter of credentials, particularly in relation to the credentials and status of the heads of permanent delegations, should be studied further before it would be possible to make appropriate recommendations with regard to the Dominican proposal.

71. In connexion with the matter of credentials of representatives, the Committee considered a proposal submitted by the Bolivian delegation on permanent missions to the United Nations. While the Committee generally recognized the value and interest of such a proposal, doubts were expressed as to whether the matter was properly within the terms of reference of the Interim Committee. The opinion was expressed that it was a matter which should be studied by the General Assembly itself, all the more so because in the limited time at its disposal the Interim Committee would not be in a position to devote to it the careful and thorough study it deserved. Consequently, it was decided that the Bolivian proposal should be submitted to the General Assembly as an annex to the Interim Committee's report.[47]

B. *General Assembly resolution 257 A (III)*

72. The Bolivian proposal on permanent missions to the United Nations was discussed by the General Assembly during the first part of its third session. In explanation of the draft resolution which the proposal contained, it was stated that:

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[42] *Ibid.*, p. 92.

[43] See *Official Records of the General Assembly, First Special Session, Plenary Meetings*, 69th meeting; *Repertory of United Nations Practice*, vol. I, pp. 247-248.

[44] For the Interim Committee's report on the subject, see *Official Records of the General Assembly, Third Session, Supplement No. 10* (document A/606).

[45] A/AC.18/89.

[46] A/AC.18/SC.4/4.

[47] *Official Records of the General Assembly, Third Session, Supplement No. 10* (document A/606, annex IV).

Since the creation of the United Nations, the practice has been developed by most Member States of establishing "permanent missions" at the seat of the United Nations as a means of following more closely the activities of the Organization and of its organs and to assist them generally in the fulfilment of their duties as Members. As is well known, this practice developed in the absence of any regulations governing the status of such permanent delegations or the rights and duties of the permanent representatives, heads of these delegations.

It is suggested that the Interim Committee and the General Assembly should consider whether the time has not come to consider the advisability of defining the status of the permanent delegations to the United Nations by means of a resolution which formally recognizes such an institution, to be called "Permanent Missions to the United Nations".[47]

73. In support of this proposal, the representative of Bolivia stated in the Sixth Committee on 26 November 1948 that:

The Bolivian proposal represented a constructive attempt to remedy an omission in the Charter with regard to the question of permanent delegations to the United Nations. Some regulations with respect to the matter were needed since custom had tended to stimulate the idea that States should send permanent delegations to the United Nations... The Bolivian delegation... considered that such a practice was highly desirable and most essential. It enabled delegations to discuss important documents relating to the work of the United Nations with their authors and to exchange opinions directly while the texts were under consideration. A truer appreciation of their contents and a more accurate reflection of the opinions of the various delegations could thus be transmitted by the permanent representative to his Government.

As the necessity had become apparent, permanent delegations to the United Nations had been set up, without, however, any legal basis, their existence being justified solely by practical considerations. The very real need for the establishment of permanent missions to the United Nations had become clear when problems arose in connexion with the Interim Committee of the General Assembly. At that time the Dominican Republic had presented a proposal (A/AC.18/40) that permanent delegates should be declared the *de facto* representatives of their countries on the Interim Committee.

The Secretary-General had submitted a memorandum regarding the representatives permanently accredited to the United Nations and the nature of their credentials (A/AC.18/SC.4/4). It had become apparent from that report that no set rule was followed in the matter of credentials, nor was there any established procedure founded on a legal basis.

When countries not represented on the main councils of the United Nations wished to participate in the work of those bodies, their representatives were obliged to go through complicated procedures to procure the necessary credentials, which sometimes arrived too late. The situation should obviously be remedied...[48]

74. The discussion of the Bolivian proposal in the Sixth Committee[49] gave rise to a substantial debate on a number of points. One paragraph of the draft resolution proved in particular to be controversial, i.e. operative paragraph 6, which would amend rule 24 of the rules of procedure of the General Assembly by adding a new paragraph reading:

The Credentials Committee shall, at each regular session, examine the credentials of the permanent representatives accredited to the United Nations since the closing of the preceding regular session and report to the General Assembly.

75. *The legal status of permanent missions.* The third preambular paragraph of the Bolivian draft resolution referred to the interest for all Member States and for the United Nations as a whole that a legal status be given to the institution of permanent missions to the United Nations. Some delegates pointed out that while it was true that no regulations governing the status of permanent missions existed, their legal status was already in existence. They cited paragraph 3 of Article 105 of the Charter, which states that the General Assembly "may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose", and article IV of the Convention on the Privileges and Immunities of the United Nations, which regulates the privileges and immunities of "the representatives of Members". They therefore thought that the problem did not lie in establishing the legal status of permanent missions but in laying down the general principles which should govern their establishment.

76. *The character of the institution of permanent missions.* A number of delegates expressed doubts concerning the advisability of including in the draft resolution the last paragraph of its preamble, which recommended "Member States of the United Nations, as they may deem useful and advisable, to establish permanent missions to the United Nations at the seat of the Organization...". They stated that, while they considered that it would be desirable for all Member States to have a permanent mission attached to the United Nations, they did not see the necessity of making a special recommendation to that effect in view of the fact that "for internal reasons certain Member States might not be able to establish a permanent mission". One member considered that the recommendation was "unprofitable, as it constituted interference in the internal administration of Member States". Another pointed out that a number of Member States were deterred from maintaining permanent missions at the seat of the Organization by "special budgetary or administrative expenses."

77. *Use of the term "credentials".* The use of the word "credentials" in the draft resolution was criticized by some delegations. It was stated by one delegate that "the word 'credentials' was out of place, because it tended to give the impression that the United Nations was a State, headed by the Secretary-General, and that the permanent representatives were accredited to him, and because the permanent representatives had to have full powers to enable them to accomplish certain actions, such as the signing of conventions". Mention was made of the fact that as matters stood, the permanent representatives of some countries to the United Nations had "full powers" and not "credentials" *(lettres de créance)*. A number of delegates did not, however, share this point of view, and preferred the use of the word "credentials", pointing out that it had been intentionally used in the draft resolution and that it was unnecessary for permanent representatives to receive full powers to carrey out their functions.

[48] *Ibid., Third Session, Part I, Sixth Committee,* 124th meeting.

[49] *Ibid.,* 124th-127th meetings.

78. *The competence of the Credentials Committee.* Reference has been made before to operative paragraph 6 of the Bolivian draft resolution and to the fact that it proved particularly controversial (paragraph 74 above). A number of delegates pointed out that they were not quite certain whether the Credentials Committee of the General Assembly could examine the credentials of the permanent representative of a State accredited to any other organ of the United Nations. It might, in fact, be simpler to recommend that the Secretary-General should be asked to make an annual report to the General Assembly regarding the credentials of permanent representatives of the United Nations, rather than to request a revision of the rules of procedure.

79. The representative of Bolivia introduced at the 126th meeting of the Sixth Committee a revised text of his draft resolution,[50] which took into account most of the observations expressed in the course of the discussion. This draft resolution, with some amendments proposed by Ecuador,[51] was recommended by the Sixth Committee to the plenary. On 3 December 1948, the General Assembly unanimously adopted resolution 257 A (III), which reads as follows:

The General Assembly,

Considering that, since the creation of the United Nations, the practice has developed of establishing, at the seat of the Organization, permanent missions of Member States,

Considering that the presence of such permanent missions serves to assist in the realization of the purposes and principles of the United Nations and, in particular, to keep the necessary liaison between the Member States and the Secretariat in periods between sessions of the different organs of the United Nations,

Considering that in these circumstances the generalization of the institution of permanent missions can be foreseen, and that the submission of credentials of permanent representatives should be regulated,

Recommends

1. That credentials of the permanent representatives shall be issued either by the Head of the State or by the Head of the Government or by the Minister of Foreign Affairs, and shall be transmitted to the Secretary-General;

2. That the appointments and changes of members of the permanent missions other than the permanent representative shall be communicated in writing to the Secretary-General by the head of the mission;

3. That the permanent representative, in case of temporary absence, shall notify the Secretary-General of the name of the member of the mission who will perform the duties of head of the mission;

4. That Member States desiring their permanent representatives to represent them on one or more of the organs of the United Nations should specify the organs in the credentials transmitted to the Secretary-General;

Instructs the Secretary-General to submit, at each regular session of the General Assembly, a report on the credentials of the permanent representatives accredited to the United Nations.

[50] *Official Records of the General Assembly, Fourth Session, Sixth Committee, Annex to summary records of meetings*, agenda item 54, document A/C.6/304.

[51] *Ibid.*, document A/C.6/300.

IV. Draft articles on the legal position of representatives of States to international organizations

PART ONE — PRELIMINARY QUESTIONS

A. *Title of the present group of draft articles*

80. The title of "diplomatic law of international organizations" was suggested by the Special Rapporteur in his first report as a title broad enough to cover the application of diplomatic law and of the institution of legation to relations between States and international organizations in their various aspects and manifestations. The expression "diplomatic relations between States and international organizations" was also used by the Special Rapporteur to distinguish between that kind of relations and other types of external relations between international organizations and States as individual and separate entities, such as treaties between States and international organizations, and the rules of international responsibility in their application to relations between States and international organizations. The expressions "diplomatic law of international organizations", "diplomatic relations between States and international organizations", and "application of the institution of legation in respect to international organizations" proved more or less acceptable to the members of the Commission as a convenient frame of reference for such subjects as the status, privileges and immunities of representatives of States to international organizations and the status, privileges and immunities of the organizations themselves.

81. One or two members of the Commission expressed doubts regarding the appropriateness of using terms such as "diplomatic relations" or "institution of legation" in relation to international organizations. Reluctance to apply the norms and terminology of the international legal system to international organizations is explainable by the fact that the rise of international organizations is a comparatively novel phenomenon, and much of what international legal theory exists was formulated in a framework of international law that regarded nation-States as the only proper "subjects" of that system.

82. Contemporary literature of international law reveals an increasingly steady tendency towards applying terms of diplomatic law to relations between States and international organizations. One writer, in attempting to establish the legal capacity of international organizations on an objective basis not dependent on their constitutions, traced the various manifestations of their performance in the practice of what he called "sovereign and international acts". He included among these acts "active and passive *jus legationis*".[52] One of the recent general works on diplomatic law classifies the sources of diplomatic law into two principal branches: sources of traditional diplomatic law, and sources of the law of international organizations.[53] The treatment of the subject

[52] Finn Seyersted, "International Personality of Intergovernmental Organizations: Do their Capacities Really depend upon their Constitutions?", *The Indian Journal of International Law* (New Delhi), vol. 4, (1964), No. 1, pp. 1 and 12.

[53] Philippe Cahier, *Le Droit diplomatique contemporain*, p. 43.

falls into two main parts: the first part relates to diplomatic missions and the second part relates to other forms of diplomacy, which comprise among others *ad hoc* diplomacy and "*la diplomatie à travers les organisations internationales*".[54] A special work on the international status of the United Nations reaches the conclusion that the United Nations is an international legal person and that it is endowed with international legal personality. Among the data presented in support of that thesis are the facts that "the Organization has been authorized to act as an entity . . . [and] . . . has been given the *jus legationum* . . .".[55]

83. Should the Commission, however, accept the suggestion made by the Special Rapporteur concerning the scope of the present draft articles (paragraphs 8 to 10 above) and decide to give priority to the first aspect of the topic, namely the status, immunities and privileges of representatives of States to international organizations, the title of the draft articles would have to be adjusted to their limited scope. Several titles could be suggested. The title "The Legal Status, Privileges and Immunities of International Organizations" was chosen by the United Nations Secretariat for its two volumes in the *United Nations Legislative Series* published in 1959 and 1961.[56] It was also given to the two questionnaires which were prepared by the Legal Counsel of the United Nations and addressed to the legal advisers of the specialized agencies and the International Atomic Energy Agency to solicit their assistance to the Special Rapporteur by furnishing him with the necessary data and legal opinions on the problems that arose in practice concerning his topic.

84. The Special Rapporteur would like to recommend to the Commission the title of "the legal position of representatives of States to international organizations". The expression "legal position" has the obvious advantage of brevity as compared with that of "legal status, privileges and immunities". Strictly and from a technical point of view, it may not have a meaning different from that of "legal status". Since the latter has, however, been used in the General Conventions on the privileges and immunities of the United Nations and the specialized agencies to refer in particular to legal capacities, the term "legal position" may give a broader connotation. It will include, in addition to legal capacity, privileges and immunities, rules such as those that relate to the functions, establishment and composition of permanent missions to international organizations, which constitute the principal object of the present group of draft articles.

85. The Special Rapporteur also believes that it would be sufficient to refer to "international organizations", and dispense with the unnecessary adjective "inter-governmental". The insertion of this adjective in resolution 1289 (XIII), by which the General Assembly invited the International Law Commission to consider the present topic, was the result of an oral suggestion made by the representative of Greece in the Sixth Committee that the draft should specify that the international organizations in question were inter-governmental.[57]

86. The Charter of the United Nations uses the term "international organizations" without qualification to indicate public (inter-governmental) organizations. So do Articles 66 and 67 of the Statute of the International Court of Justice. But Article 34 of the same Statute uses the term "public international organizations". Private transnational organizations, in spite of the great importance of some of them on the international plane and the role envisaged for them in the Charter of the United Nations (Article 71), are not international organizations in the proper sense. Their members are not States, and they are not created by a treaty, though some of them may be assigned certain functions by treaties. The Charter qualifies them simply as non-governmental organizations. The use of the term "international organization" is supported by the consistent practice of the International Law Commission. The provisions which use the term "international organization" as adopted by the Commission in its draft articles on the law of treaties[58] are as follows:

Article 2, paragraph 1 (i). "'International organization' means an inter-governmental organization."

Article 4. "The application of the present articles to treaties which are constituent instruments of an international organization or are adopted within an international organization shall be subject to any relevant rules of the organization."

Article 6, paragraph 2. "In virtue of their functions and without having to produce full powers, the following are considered as representing their State: . . . (*c*) Representatives accredited by States to an international conference or to an organ of an international organization, for the purpose of the adoption of the text of a treaty in that conference or organ."

The Vienna Convention on Diplomatic Relations uses the term "international organization". Article 5, paragraph 3, provides: "A head of mission or any member of the diplomatic staff of the mission may act as representative of the sending State to any international organization."[59]

B. *Form of the draft articles*

87. The views of the Special Rapporteur on this matter have already been stated in sub-section B of the intro-

[54] *Ibid*, pp. 405-438.

[55] Guenter Weissberg, *The International Status of the United Nations* (New York, 1961), p. 210.

[56] ST/LEG/SER.B/10 and 11 (United Nations publications, Sales Nos.: 60.V.2 and 61.V.3).

[57] *Official Records of the General Assembly, Thirteenth Session, Annexes*, agenda item 56, document A/4007, para. 21.

[58] *Yearbook of the International Law Commission, 1966*, vol. II, p. 178 (document A/6309/Rev.1, para. 38).

[59] *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II, p. 83 (document A/CONF.20/13 and Corr.1).

Cf., however, article 7 of the Convention on the High Seas, adopted by the United Nations Conference on the Law of the Sea of 1958, which reads: "The provisions of the preceding articles do not prejudice the question of ships employed on the official service of an inter-governmental organization flying the flag of the organization." *Official Records of the United Nations Conference on the Law of the Sea*, vol. II, p. 136 (document A/CONF.13/L.53).

ductory section of this report. They may be summed up as follows:

(*a*) These draft articles should be intended to serve as a basis for a draft convention.

(*b*) They should be referred to the same international conference of plenipotentiaries which may be convened to consider the draft articles on special missions. The adoption of these two sets of draft articles would thus complete the codification of the branch of law relating to representatives of States, whether inter-State or to international organizations. (For considerations in support of this suggestion, see paragraphs 8 to 10 above.)

C. *Scope of the draft articles*

88. In his first report, the Special Rapporteur suggested that the Commission should concentrate its work on this subject first on international organizations of a universal character and should prepare its draft articles with reference to these organizations only, and should examine later whether the articles could be applied to regional organizations as they stood, or whether they required modification. In explaining his suggestion, he stated that the study of regional organizations raised a number of problems, such as recognition by, and relationship with, non-member States, which would call for the formulation of special rules for those organizations.

89. This suggestion was the subject of a division of opinion among the members of the Commission. Several members expressed themselves in favour of the suggestion by the Special Rapporteur to exclude regional organizations at least from the initial stage of the study. Some members, however, took issue with the suggestion, pointing out that if the Commission were to confine itself to the topic of the relations of organizations of a universal character with States, it would be leaving a serious gap. A summary of these various views is presented in sub-section D of section I of this report, which contains a summary of the Commission's discussion of the first report of the Special Rapporteur at its fifteenth and sixteenth sessions in 1963 and 1964.[60]

90. The Special Rapporteur wishes now to put in a more definitive form the suggestion which he tentatively advanced to the Commission in his first report. A number of constitutional, technical and practical considerations could be advanced in support of excluding from the scope of these draft articles international organizations of regional character.

91. First, the formulation of the draft articles is based on the assumption that international organizations of a universal character, notwithstanding the fact that they are of varied and independent character, have nevertheless a certain measure of homogeneity which makes it possible to propose uniform or analogous rules. Regional organizations, on the other hand, vary greatly in their nature and functions. A great number of them follow the regular type of international organization, i.e. they are policy-making or deliberative organizations which are confined to the development of international policies through adoption of resolutions and making recommendations to member Governments, and which depend wholly on Governments for the implementation of policy. European regional organizations have evolved, however, a new type of international organizations which are now generally referred to as "supra-national organizations". The most important examples of this category are the European communities which replace Governments in the exercise of the sovereign powers of legislation, adjudication or the ultimate use of sanctions in a direct way over the populations and territories of member States without having, in doing this, to pass through their respective Governments.[61]

92. Secondly, the economy of the draft articles is conditioned by the pattern of relationships which prevails within the legal system of international organizations of a universal character. Membership in these organizations includes the great majority of States members of the community of nations, and only a comparatively limited number of States are non-members. The relationship between an organization and its member States occupies a central place in the draft articles (permanent missions of Member States to international organizations). Moreover, the universal character of these organizations justifies the interest of non-member States in their activities, as evidenced by the institution of observers of non-member States. On the other hand the recognition by non-member States of the juridical personality and position of these organizations does not pose as difficult problems as those which may be encountered in relation to regional organizations. There is substantial support for the submission that international organizations of a universal character enjoy international personality on an objective basis. Thus, in the advisory opinion of the International Court of Justice on reparation for injuries suffered in the service of the United Nations, one of the Court's finding was that:

> . . . fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone . . .[62]

93. Thirdly, the Special Rapporteur recognizes the force in the point of constitutional character which was raised by one member of the Commission during the discussion of the first report of the Special Rapporteur. That member pointed out that some regional organizations had their codification organs, and that it was undesirable that the Commission should invade the field assigned to them.

94. It should be noted, however, that the exclusion of regional organizations from the scope of the present draft articles is subject to certain qualifications:

(*a*) Regional organizations would not be excluded from the actual study; their valuable experience would have to be drawn upon. It should be remembered that the forerunner of all international organizations was

[60] *Supra*, paras. 35-37.

[61] See Pierre Pescatore, "Les relations extérieures des Communautés européennes", *Recueil des Cours de l'Académie de Droit international de La Haye*, vol. 103 (1961 - II), pp. 9-238.

[62] *I.C.J. Reports 1949*, p. 185.

the European Commission of the Danube, a regional body.

(*b*) Any work done on universal organizations is ultimately likely to have some bearing on regional organizations. The provisions relating to privileges and immunities in the constitutional instruments of regional organizations were largely inspired by Articles 104 and 105 of the Charter of the United Nations and the corresponding provisions in the constitutions of the specialized agencies. These constitutional provisions have been implemented by general conventions in the drafting of which the General Conventions on the privileges and immunities of the United Nations (1946) and of the specialized agencies (1947) served as prototypes and influential models.[63]

(*c*) It may be desirable to include in the draft articles a saving clause to the effect that the fact that these articles do not relate to international organizations of a regional character shall not affect the application to them of any of the rules set forth in these articles to which they would be subject independently of these articles.

D. *Delegations to organs of international organizations and to international conferences*

95. The treatment of the subject of delegations to organs of international organizations and to international conferences and its place in the present draft articles raises a number of preliminary questions:

(*a*) The extent of privileges and immunities of delegations to organs of international organizations and to international conferences, as compared with the full diplomatic immunities conceded to permanent missions to international organizations.

(*b*) The organization and procedure of diplomatic conferences, and whether those subjects should be regulated in these draft articles or should be the subject of a separate study.

(*c*) The immunities and privileges of delegations to conferences not convened by international organizations, and whether they should be treated in these draft articles in conjunction with delegations to conferences convened by international organizations or should be taken up in connexion with the topic of special missions.

The extent of privileges and immunities of delegations to organs of international organizations and to international conferences

96. These privileges and immunities are regulated by provisions in the Conventions on the privileges and immunities of the United Nations and the specialized agencies, of 1946 and 1947, and by the Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, of 1946. It is noteworthy that among these privileges and immunities, immunity from jurisdiction is limited to words spoken or written and all acts done by members of such delegations in their capacity as representatives. This rather limited immunity from jurisdiction is in contrast with the full diplomatic immunities accorded by these same Conventions to the Secretary-General and all Assistant Secretaries-General (e.g. article V, section 19 of the Convention on the Privileges and Immunities of the United Nations). It is also in contrast with the full diplomatic immunities which the members of the permanent missions to the United Nations and the specialized agencies enjoy in accordance with the provisions of the Headquarters Agreement concluded between the United Nations and the United States on 26 June 1947 and with the decision of the Swiss Federal Council dated 31 March 1948.[64]

97. Authors generally agree that representatives to international conferences enjoy full diplomatic status. Their position is summed up by Satow as follows:

> As regards delegates to the numerous conferences now held on a great variety of matters, some doubt might perhaps be felt, in the absence of cases arising for settlement, as to the extent of the immunities to which they and the members of their suites are entitled. Formerly international congresses and conferences were for the most part attended by personages of high ministerial rank, or by resident diplomatic agents who already possessed diplomatic privileges; now the plenipotentiaries appointed are often officials or persons chosen for their special knowledge of the subject to be discussed, who with their retinues constitute the delegations to the conference. In the view of most writers such representatives are entitled to full diplomatic privilege.[65]

98. Sometimes the foundation of this position is given as being the diplomatic character of the representative's mission. Thus, according to Hall:

> The case of negotiators at a congress or conference is exceptional. Though they are not accredited to the Government of the State in which it is held, they are entitled to complete diplomatic privileges, they being as a matter of fact representatives of their State and engaged in the exercise of diplomatic functions.[66]

99. The Pan-American Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928,[67] contains the following articles:

> *Article 1.* States have the right of being represented before each other through diplomatic officers.
>
> *Article 2.* Diplomatic officers are classed as ordinary and extraordinary. Those who permanently represent the Government of one State before that of another are ordinary.
>
> Those entrusted with a special mission or those who are accredited to represent the Government in international conferences and congresses or other international bodies are extraordinary.

[63] Examples: Agreement on Privileges and Immunities of the Organization of American States, opened for signature on 15 May 1949; General Agreement on Privileges and Immunities of the Council of Europe, signed at Paris on 2 September 1949; Protocole sur les privilèges et immunités de la Communauté européenne du charbon et de l'acier, signed at Paris on 18 April 1951; Convention on the Privileges and Immunities of the League of Arab States, approved by the Council of the League of Arab States on 10 May 1953; Convention concerning the juridical personality, privileges and immunities of the Council for Mutual Economic Assistance, signed at Sofia on 14 December 1959; and General Convention on Privileges and Immunities of the Organization of African Unity, 1964.

[64] *Supra*, paragraphs 64-66.

[65] Ernest Satow, *A Guide to Diplomatic Practice* (Fourth Edition, Glasgow, 1957), p. 207.

[66] W. E. Hall, *A Treatise on International Law* (Eighth Edition, Oxford, 1924), p. 365.

[67] League of Nations, *Treaty Series*, vol. CLV (1934-1935), No. 3581, p. 259.

Article 3. Except as concerns precedence and etiquette, diplomatic officers, whatever their category, have the same rights, prerogatives and immunities.

Etiquette depends upon diplomatic usages in general as well as upon the laws and regulations of the country to which the officers are accredited.

. . .

Article 9. Extraordinary diplomatic officers enjoy the same prerogatives and immunities as ordinary ones.

100. Hesitation on the part of some writers to concede full diplomatic immunities to delegations to international conferences is prompted by the fact that some of these conferences are purely technical and of secondary importance, and such treatment would place the delegations on a level higher than that of representatives of States to the organs of the United Nations. Thus, Cahier observes in this respect that:

. . . il paraît difficile d'assimiler les délégués aux diplomates, car si tel était le cas les délégués à une conférence très technique dont les fonctions sont donc relativement importantes jouiraient d'un statut privilégié supérieur à celui des représentants des États à l'Assemblée générale des Nations Unies par exemple, ce qui ne semble pas très logique.

He concludes, however, that:

Dans ce domaine aussi, il apparaît que la pratique internationale devrait tendre vers une certaine uniformisation entre le statut de la diplomatie ad hoc, *celui des délégués aux conférences ainsi que celui des représentants des États auprès des réunions d'organes des organisations internationales.*[68]

101. Pending discussion in the Commission of this preliminary question, the Special Rapporteur takes the position that representatives of States to organs of international organizations and to international conferences should be accorded in principle, and with particular reference to immunity from jurisdiction, diplomatic privileges and immunities such as those accorded to members of permanent missions to international organizations.

102. The basis of this position is that a number of recent developments have taken place in the codification of diplomatic law in the direction of the extension of diplomatic immunities and privileges rather than that of the restrictive functional approach. One of these developments is the evolution of the institution of permanent missions to international organizations and the assimilation of their status and immunities to diplomatic status and immunities. The second development is the tendency of the International Law Commission, as can be discerned from its discussions and formulation of the provisional draft articles on special missions, in favour of: (*a*) making the basis and extent of the immunities and privileges of special missions more or less the same as that of permanent diplomatic missions, and (*b*) taking the position that it was impossible to make a distinction between special missions of a political nature and those of a technical nature; every special mission represented a sovereign State in its relations with another State.

103. The Special Rapporteur is therefore of the view that, owing to the temporary character of their task, delegations to organs of international organizations and to international conferences, occupy, in the system of the diplomatic law of international organizations, a position similar to that of special missions within the framework of bilateral diplomacy. It follows that the determination of their privileges and immunities should be coordinated with those of special missions as finalized by the Commission. Apart from the adjustments necessitated by the fact that their task is temporary, their privileges and immunities should not differ in principle or in basis from those of permanent missions to international organizations.

The organization and procedure of diplomatic conferences

104. At its first session held at Geneva (meeting of 8 April 1925), the League of Nations Committee of Experts for the Progressive Codification of International Law adopted, among others, the following resolution:

(*g*) The Committee appoints a Sub-Committee [consisting of M. Mastny, as Rapporteur, and M. Rundestein] to examine the possibility of formulating rules to be recommended for the procedure of international conferences and the conclusion and drafting of treaties, and what such rules should be.[69]

The Rapporteur submitted a report containing two lists of the subjects to be examined in respect of procedure of international conferences and conclusion and drafting of treaties.

105. Out of the rules of procedure worked out by the different organs of the United Nations and the specialized agencies has grown a substantial body of rules and regulations concerning the organization and procedure of diplomatic conferences, which have become known as "multilateral" or "parliamentary" diplomacy.

106. Special mention should be made of the preparatory work on the method of work and procedures of the United Nations Conference on the Law of the Sea. This work was undertaken by the Secretariat of the United Nations with the advice and assistance of a group of experts in implementation of paragraph 7 of General Assembly resolution 1105 (XI), which reads as follows:

The General Assembly. . .

7. *Requests* the Secretary-General to invite appropriate experts to advise and assist the Secretariat in preparing the conference, with the following terms of reference:

. . .;

(*b*) To present to the conference recommendations concerning its method of work and procedures, and other questions of an administrative nature;

. . .

107. The report submitted by the Secretary-General pursuant to this request contained provisional rules of procedure which, for the most part, followed the standard pattern of the Rules of Procedure of the General Assembly. The same rules were adopted by the first and second United Nations Conferences on the Law of the Sea in 1958 and 1960, as well as the Conference on Diplomatic Intercourse and Immunities in 1961 and the Conference on Consular Relations in 1963, with a limited number of appropriate significant variations.

[68] Cahier, *op. cit.*, p. 402.

[69] See *Publications of the League of Nations, V—Legal, 1926.V.4* (annex to document C.47.M.24).

108. The first Special Rapporteur on special missions (Sandström) included provisions on the organization of congresses and conferences in the draft articles contained in his report on *ad hoc* diplomacy.[70] The Commission, however, decided not to include in the draft articles adopted at its twelfth session in 1960 any provisions on the organization of international conferences or the status of the delegations thereto. In its report covering that session, the Commission noted that the link with the subject of relations between States and inter-governmental organizations made it difficult to undertake the subject of diplomatic conferences in isolation, and the Commission accordingly decided not to deal with it for the moment.[71]

109. The question of the organization and procedure of diplomatic conferences was included by the Special Rapporteur in his first report as one of the various aspects of diplomatic law of international organizations. As mentioned before, this question did not attract much attention on the part of the majority of the members.[72] Those who referred to it in their statements thought that the law of international conferences was in process of development. They raised the question whether the subject should be considered together with the topic of relations between States and inter-governmental organizations or treated separately.

110. The question of the law of international conferences was again raised in the Commission in the course of its consideration at its sixteenth session in 1964 of the first report of the second Special Rapporteur on special missions (Bartoš).[73] The discussion centered on the specific preliminary question raised by the Special Rapporteur, i.e., "should the rules governing special missions cover the regulation of the legal status of delegations and delegates to international conferences and congresses?". One or two members of the Commission referred in passing to the broader question of the law of international conferences in general, and stated that the Commission should consider whether it was necessary to appoint a separate rapporteur for the law governing international conferences.[74]

111. The interpretation of the views of the Commission on the question of organization and procedure of international conferences leads the Special Rapporteur to conclude that the Commission does not wish to deal with this question at present.

Delegations to conferences not convened by international organizations

112. There is little disagreement on the treatment of the question of the privileges and immunities of delegations to conferences convened by international organizations within the framework of the present topic. Article IV, section 11 of the Convention on the Privileges and Immunities of the United Nations stipulates that delegates to "conferences convened by the United Nations" shall enjoy the same privileges and immunities that the Convention accords to representatives of Members to the principal and subsidiary organs of the United Nations. As rightly pointed out by the first Special Rapporteur on special missions (Sandström), a conference convened by the United Nations is, in a way, a prolongation of the United Nations Organization and it can be argued that such a conference ought to be regulated in the same way as the meeting of an organ of the United Nations.[75]

113. The second Special Rapporteur on special missions (Bartoš) stated in his first report:

> In view of the wide-spread and, today, almost universally adopted practice whereby the status of such delegations and delegates [to conferences convened by international organizations] 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.[76]

114. However, with regard to conferences not convened by international organizations, the question caused some divergencies of opinion. The second Special Rapporteur on special missions raised the question in his first report,[76] and expressed the view that the status of delegations and delegates to conferences convened by one or more States outside the framework of international organizations was similar in all respects to the status of special missions, and should be regulated by the rules on special missions.

115. Following a brief discussion of this question at its sixteenth session (1964), the Commission took the following position, as reflected in a paragraph quoted in its report on that session:

> At that session [1960] the Commission had also decided not to deal with the privileges and immunities of delegates to congresses and conferences as part of the study of special missions, because the topic of diplomatic conferences was connected with that of relations between States and inter-governmental organizations. At the present session [1963], 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.[77]

116. The question was again raised by the second Special Rapporteur on special missions in his second and third reports submitted in 1965 and 1966 respectively. He referred to the fact that the International Law Commission did not take a definitive position on this question, and decided not to take a final decision until it had

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[70] *Yearbook of the International Law Commission, 1960*, vol. II, pp. 113-114 (document A/CN.4/129, para. 51, chapter II of alternative I).

[71] *Ibid.*, p. 179 (document A/4425, para. 33).

[72] *Supra*, paragraph 38.

[73] *Yearbook of the International Law Commission, 1964*, vol. II, pp. 67-117 (document A/CN.4/166).

[74] *Yearbook of the International Law Commission, 1964*, vol. I, 725th meeting.

[75] *Yearbook of the International Law Commission, 1960*, vol. II, p. 111 (document A/CN.4/129, para. 41).

[76] *Yearbook of the International Law Commission, 1964*, vol. II, p. 73 (document A/CN.4/166, para. 21).

[77] *Ibid.*, p. 210 (document A/5809, para. 33).

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. He proceeded, thereafter, to reiterate his view that the status of delegations and delegates to conferences and congresses convened by one or more States outside international organizations was similar in all respects to the status of special missions and should be regulated by the rules on special missions. In support of his view, he stated that it should be noted that delegates attending international conferences and congresses were the most common examples of *ad hoc* diplomats.

117. The Special Rapporteur has given further consideration to and has reflected on the tentative views which he expressed on this question to the Commission when it discussed his first report in 1963 and 1964. It is his considered opinion that the question of the status of delegations to conferences not convened by international organizations should not be treated as a branch of the topic of special missions. The reasons for this are both doctrinal and practical. From the doctrinal point of view, the legal position involved in the status of delegations to international conferences is different from that involved in the status of special missions. In the latter the legal position is one of bilateral diplomacy which relates to special envoys accredited to the receiving State. In the former the legal position is one of multilateral diplomacy which relates to representatives of a State not accredited to the host State but representing their State at a conference which takes place in the territory of the host State. Considerations of a practical character tend, moreover, to favour joint treatment of the legal positions of delegations to conferences convened by international organizations or by States. With the increasing number of international organizations, both universal and regional, and the development of the organizational facilities they provide for the convening of conferences, the practice of holding conferences under the auspices of international organizations has become rather the regular pattern of conferences today. To give a separate and prior treatment to the less frequent conferences convened by States outside international organizations may result in a quaint arrangement of having different rules governing the two types of conferences and to have the group which is, or may become, the more important surrounded with less protection than the other. Lastly, it should be noted that in substance international conferences, whether convened by international organizations or by one or more States, are conferences of States. The distinction between the two types of conferences is purely formal, the criterion being who convenes the conference.

PART TWO — DRAFT ARTICLES WITH COMMENTARIES

Section I. General provisions

Article 1. Scope of the present articles

Alternative A

The present articles relate to representatives of States to the United Nations and the specialized agencies brought into relationship with the United Nations in accordance with the provisions o Articles 57 and 63 of the Charter of the United Nations.

Alternative B

The present articles relate to representatives of States to international organizations which are associations of States (or other entities possessing international legal personality) established by treaty, possessing a constitution and common organs, having a legal personality distinct from that of the member States, and whose membership is of a universal character.

Alternative C

The present articles relate to representatives of States to international organizations which are associations of States (or other entities possessing international legal personality) established by treaty, possessing a constitution and common organs, and having a legal personality distinct from that of the member States.

Article 2. International agreements not within the scope of the present articles

The fact that the present articles do not relate to international organizations of a regional character shall not affect the application to them of any of the rules set forth in the present articles to which they would be subject independently of these articles.

Article 3. Nature of the present articles; relationship with other international agreements

The application of the present articles to permanent missions of States to international organizations and other related subjects regulated in the present articles shall be subject to any relevant rules of the organization concerned.

Commentary

(1) Articles 1 and 2 have to be read together because the insertion of article 2 is based on the assumption that alternative B of article 1 will be favoured by the Commission.

(2) Article 1 has been presented in the form of three alternatives with a view to enabling the Commission to take a definitive position on the question which it discussed tentatively during its consideration of the first report of the Special Rapporteur. That is, whether the scope of the present articles ought to be confined to the United Nations system (the United Nations and the specialized agencies), extended to cover other international organizations of universal character, or extended further to include international organizations of a regional character.

(3) In determining the international organizations which come within the scope of the present articles, alternative A of article 1 follows a method of determination adopted by the General Convention on the Privileges and Immunities of the Specialized Agencies of 1947. It identifies the organizations in question as the United Nations and the specialized agencies brought into relationship with the United Nations in accordance with Articles 57 and 63 of the Charter of the United Nations. This method of determination leaves out organizations such as the International Atomic Energy Agency, which is not considered, strictly speaking, a specialized agency as defined above in view of the circumstances of its creation and the peculiar arrangements of its relationship with both the Economic and Social Council and the Security Council.

It also excludes other organizations of a universal character, such as the Bank for International Settlements, the Contracting Parties to GATT, the International Wheat Council and the Central Office for International Transport by Rail.[78] The wording of alternative B of article 1 is designed to fill such a gap.

(4) Alternative B of article 1 follows the method of definition. It defines international organizations which come within the scope of the present articles by reference to their constituent elements. The first element in the international organization as defined in alternative B is that it is an association of States and not an association of private individuals, professional organizations, etc. Private international organizations, in spite of the great importance of some of them and the role envisaged for them in the Charter of the United Nations (Article 71), are not international organizations in the proper sense. Their members are not States, and they are not created by a treaty, though some of them may be mentioned in or assigned certain functions by treaties. The Charter does not qualify them as international, but simply as non-governmental organizations, in Article 71. But it uses the expression "international organizations" without qualification in the same article as well as in the Preamble to indicate public international organizations. So do Articles 66 and 67 of the Statute of the International Court of Justice. But Article 34 of the same Statute uses the expression "public international organization". Secondly, every international organization has a conventional basis, a multilateral treaty, which forms the constitution of the organization. Thirdly, this constituent instrument creates organs of the organization and these organs assume a separate identity distinct from that of the member States who make up the organ. Fourthly, the organization so created possesses a separate legal personality distinct from that of the individual member States and is thus a subject, though in a limited degree, of international law.[79]

(5) Alternative B of article 1 contains a clause which restricts the scope of the present articles to international organizations of a universal character. Alternative C of the same article does not include such a restriction clause. As mentioned before, the place of regional organizations in the work to be undertaken by the Commission on this topic was the subject of a division of opinion among its members. The Special Rapporteur has already stated the reasons for which he suggests to the Commission that it should concentrate its work on this subject first on international organizations of a universal character, and should prepare its draft articles with reference to these organizations only.[80]

(6) Article 2 is included on the assumption that the Commission will adopt alternative B of article 1, which excludes regional organizations from the scope of application of the present articles. This will require a reservation to the effect that such a limitation of the scope of the articles is not to affect the application to them of any of the rules set forth in the present articles to which they would be subject independently of these articles. The purpose of this reservation is to give adequate expression to the view stated by some members of the Commission, when the first report of the Special Rapporteur was discussed, to the effect that relations with States were apt to follow a very similar pattern whether the organization in question was of a universal or regional character.

(7) Article 3 states the general principle which underlies the nature of the articles and its relationship with other international agreements. Its purpose is two-fold. Given the diversity of international organizations and their heterogeneous character in contradistinction with States, the present articles seek only to detect the common denominator and lay down the general pattern. The placing of this article at the beginning of the articles as a provision of a general character is designed to emphasize that their application does not affect the particular rules which may be applicable to one or more international organizations. Secondly, the article seeks to safeguard the position of other international agreements which govern some of the questions regulated in the present articles.

[78] For a list of inter-governmental organizations, see *Repertory of United Nations Practice*, vol. III, p. 125.

[79] For elaboration on these elements, see the first report of the Special Rapporteur, *Yearbook of the International Law Commission, 1963*, vol. II, pp. 164-169 (document A/CN.4/161 and Add. 1, paras. 38-81).

[80] *Supra*, paragraphs 88 to 94.