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

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RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

[Agenda item 1]

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

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ABBREVIATIONS

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

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

2. At its twenty-second session in 1970, the Commission expressed its intention to conclude at its twenty-third session in 1971 the second reading of the draft articles on relations between States and international organizations.⁵ Consequently, the Commission has instructed the Secretariat to request the Governments and the international organizations to which the third group of draft articles was to be transmitted to submit their observations not later than 15 January 1971,⁶ in order that the Commission might be in a position to consider them at its twenty-third session. Also in 1970, the General Assembly at its twenty-fifth session adopted resolution 2634 (XXV) which, *inter alia*, recommended that the Commission continue its work on relations between States and international organizations, taking into account the views expressed at the twenty-third, twenty-fourth and twenty-fifth sessions of the General Assembly and the comments which may be submitted by Governments, with the object of presenting in 1971 a final draft on the topic.

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

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

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

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

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

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

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

THE BASIS OF THE PRESENT REPORT

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

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

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

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

⁴ *Ibid.*, p. 276, para. 24.

⁵ *Ibid.*, p. 309, para. 86.

⁶ *Ibid.*, p. 276, para. 25.

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

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

⁹ *Ibid.*, para. 20.

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

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

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

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

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

8. The present report starts with preliminary considerations summarizing the views expressed regarding the form and scope of the draft articles; it then reviews article by article the comments of delegations, Governments and international organizations¹⁴ as well as the observations and suggestions of the Secretariat referred to above (para. 7). The Special Rapporteur has taken all the comments into account in his re-examination of the draft articles, even though it has not been possible for him to deal with every one of them in the text of his report. He has given special attention to the observations of the Governments of the United States of America and Switzerland, owing to the special position of these two countries as host States in relation to the United Nations, the Office of the United Nations at Geneva and a number of specialized agencies.

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

Preliminary considerations

A. THE FORM OF THE DRAFT ARTICLES

1. PREVIOUS DECISION OF THE COMMISSION

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

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

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

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

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

2. OBSERVATIONS OF GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS

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

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

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

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

¹⁴ See foot-note 12.

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

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

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

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

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

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

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

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

3. OBSERVATIONS OF THE SPECIAL RAPPORTEUR

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

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

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

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

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

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

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

Second, the Convention on the Privileges and Immunities of the United Nations²⁰ (1946) was opened for accession by States only, notwithstanding the fact that it contained provisions granting rights to and imposing obligations on the United Nations. It has been asserted by the United

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

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

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

¹⁷ See foot-note 12 above.

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

B. SCOPE AND TITLE OF THE DRAFT ARTICLES

1. PREVIOUS DECISIONS OF THE COMMISSION

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

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

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

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

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

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

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

19. At the twenty-second session of the Commission, the Special Rapporteur submitted a fifth report²⁵ containing draft articles, with commentaries, on permanent observer missions to international organizations (part III) and delegations to organs of international organizations and to conferences convened by international organizations (part IV). The Commission adopted a provisional draft of sixty-six articles²⁶ on the subjects included in sections 1 (permanent observer missions in general), 2 (facilities, privileges and immunities of permanent observer missions), 3 (conduct of the permanent observer mission and its members) and 4 (end of functions) of part III (permanent observer missions to international organizations) and sections 1 (delegations in general), 2 (facilities, privileges and immunities of delegations), 3 (conduct of the delegation and its members) and 4 (end of functions) of part IV (delegations of States to organs and to conferences).

The Special Rapporteur also submitted at the twenty-second session a working paper on temporary observer delegations and conferences not convened by international organizations²⁷ but the Commission did not consider that it should take up the matter at that time.²⁸

2. OBSERVATIONS OF GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS

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

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

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

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

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

²⁷ A/CN.4/L.151.

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

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

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

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

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

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

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

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

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

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

The Belgian Government states that

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

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

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

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

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

takes the view that

The definition may nevertheless still seem somewhat too wide.

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

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

The Government of Yugoslavia states that

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

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

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

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

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

The Government of Pakistan indicates that

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

Finally, the Government of Poland states that

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

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

3. OBSERVATIONS OF THE SPECIAL RAPPORTEUR

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

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

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

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

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

Part I. General provisions

A. CONTENTS AND TITLE OF PART I

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

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

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

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

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

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

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

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

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

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

³³ See para. 22 above.

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

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

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

B. INDIVIDUAL ARTICLES

Article 1. Use of terms

GENERAL

(a) *Observations of Governments and international organizations*

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

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

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

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

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

(b) *Observations of the Special Rapporteur*

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

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

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

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

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

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

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

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

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

PARTICULAR SUB-PARAGRAPHS OF ARTICLE 1

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

(a) *Observations of Governments and international organizations*

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

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

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

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

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

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

(b) *Observations of the Special Rapporteur*

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

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

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

(a) *Observations of Governments and international organizations*

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

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

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

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

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

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

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

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

(b) *Observations of the Special Rapporteur*

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

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

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

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

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

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

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

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

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

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

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

(a) *Observations of Governments and international organizations*

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

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

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

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

(b) *Observations of the Special Rapporteur*

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

63. The Special Rapporteur is unable to share the view that the purpose and meaning of the expression "representative character" as used in sub-paragraph (d) are not clear. The expression serves the purpose of differentiating the permanent mission from non-governmental missions which do not represent the State. It has been reflected in the corresponding provisions of the Vienna Convention on Diplomatic Relations and the Convention on Special Missions⁴¹ without any need for indicating in what manner or on the basis of what criteria the representative character is to be determined.

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

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

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

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

(a) Observations of Governments and international organizations

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

(b) Observations of the Special Rapporteur

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

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

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

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

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

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

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

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

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

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

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

(a) Observations of Governments and international organizations

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

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

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

(b) Observations of the Special Rapporteur

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

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

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

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

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

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

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

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

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

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

Sub-paragraph (k) bis:⁴² Meaning of the "premises of the permanent mission"

(a) Observations of Governments and international organizations

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

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

(b) *Observations of the Special Rapporteur*

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

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

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

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

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

(b) *Observations of the Special Rapporteur*

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

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

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

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

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

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

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

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

Article 1. Use of terms

For the purposes of the present articles:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 2. Scope of the present articles

(a) *Observations of Governments and international organizations*

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

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

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

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

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

(b) *Observations of the Special Rapporteur*

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

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

⁴⁸ See paras. 49-54 above.

stated in the report of the Commission on the work of its twentieth session.⁴⁴

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

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

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

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

Article 2. Scope of the present articles

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

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

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

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

⁴⁶ See para. 29 above.

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

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

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

Article 5. Derogation from the present articles

(a) Observations of Governments and international organizations

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

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

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

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

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

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

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

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

98. In the opinion of the Government of Belgium

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

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

100. IMF refers to the study prepared by the United Nations Secretariat on the practice of the United Nations, the specialized agencies and IAEA concerning their status, privileges and immunities.⁴⁷ It contends that it was recognized in that study⁴⁸ that questions relating to permanent representatives or member delegations to international organizations are not applicable to the Fund in the light of the Fund's organizational structure. It

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

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

(b) *Observations of the Special Rapporteur*

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

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

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

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

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

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

⁴⁸ *Ibid.*, p. 206, paras. 76-78.

⁴⁹ *Ibid.*, p. 204, para. 67.

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

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

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

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

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

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

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

Article 5. Derogation from the present articles

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

Part II. Permanent missions to international organizations

SECTION 1. PERMANENT MISSIONS IN GENERAL

Article 6. Establishment of permanent missions

(a) Observations of Governments and international organizations

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

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

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

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

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

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

They may establish a single permanent mission to several organizations.

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

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

(b) Observations of the Special Rapporteur

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

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

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

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

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

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

Article 6. Establishment of permanent missions

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

Article 7. Functions of a permanent mission

(a) Observations of Governments and international organizations

117. In the course of the consideration by the Sixth Committee of the first group of draft articles at the twenty-third session of the General Assembly, several representatives expressed support for the text of article 7 as adopted by the International Law Commission. Others, on the contrary, thought that it should be redrafted. It was suggested, for example, that in sub-paragraph (c) negotiations in the organization should be mentioned first instead of second so as to make it clear that permanent missions performed their functions in the context of multilateral diplomacy. Two observations were made on sub-paragraph (e). Some representatives said that it added nothing new and that either the sub-paragraph should be deleted or the words "in the Organization" should be added before the word "co-operation". Others proposed that the text should follow the corresponding provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations⁵⁰ and that

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

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

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

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

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

121. The Government of Belgium made the following observation:

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

122. The ILO expressed its views as follows:

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

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

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

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

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

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

(b) *Observations of the Special Rapporteur*

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

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

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

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

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

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

Article 7. Functions of a permanent mission

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

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

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

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

(a) *Observations of Governments and international organizations*

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

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

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

bodies to lay down rules departing from this general pattern.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"(a) etc . . ."

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

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

"1. The same person may be:

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

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

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

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

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

“Article 9. Other accreditations or appointments

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

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

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

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

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

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

(b) Observations of the Special Rapporteur

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 10. Appointment of the members of the permanent mission

(a) Observations of Governments and international organizations

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

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

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

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

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

146. Another Government [Israel] took the view that

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

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

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

(b) *Observations of the Special Rapporteur*

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

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

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

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

Article 10. Appointment of the members of the permanent mission

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

Article 11. Nationality of the members of the permanent mission

(a) *Observations of Governments and international organizations*

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

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

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

(b) *Observations of the Special Rapporteur*

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

⁵³ See para. 147 above.

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

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

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

Article 11. Nationality of the members of the permanent mission

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

Article 12. Credentials of the permanent representative

(a) Observations of Governments and international organizations

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

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

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

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

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

(b) Observations of the Special Rapporteur

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

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

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

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

Article 12. Credentials of the permanent representative

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

Article 13. Accreditation to organs of the Organization

(a) Observations of Governments and international organizations

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

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

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

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

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

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

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

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

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

(b) Observations of the Special Rapporteur

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

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

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

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

Article 13. Accreditation to organs of the Organization

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

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

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

(a) Observations of Governments and international organizations

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

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

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

⁵⁴ In the Vienna Convention on the Law of Treaties article 6 has become article 7.

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

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

(b) *Observations of the Special Rapporteur*

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

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

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

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

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

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

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

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

Article 15. Composition of the permanent mission

(a) *Observations of Governments and international organizations*

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

(b) *Observations of the Special Rapporteur*

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

Article 15. Composition of the permanent mission

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

Article 16. Size of the permanent mission

(a) *Observations of Governments and international organizations*

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

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

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

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

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

(b) *Observations of the Special Rapporteur*

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

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

Article 16. Size of the permanent mission

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

Article 17. Notifications

(a) *Observations of Governments and international organizations*

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

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

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

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

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

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

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

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

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

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

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

(b) *Observations of the Special Rapporteur*

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

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

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

Article 17. Notifications

1. The sending State shall notify the Organization of:

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

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

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

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

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

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

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

Article 18. *Chargé d'affaires ad interim*

(a) *Observations of Governments and international organizations*

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

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

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

(b) *Observations of the Special Rapporteur*

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

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

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

Article 18. Chargé d'affaires ad interim

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

Article 19. Precedence

(a) *Observations of Governments and international organizations*

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

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

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

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

(b) *Observations of the Special Rapporteur*

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

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

Article 19. Precedence

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

Article 20. Offices of permanent missions

(a) *Observations of Governments and international organizations*

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

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

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

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

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

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

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

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

(b) *Observations of the Special Rapporteur*

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

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

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

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

Article 20. Offices of permanent missions

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

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

Article 21. Use of flag and emblem

(a) *Observations of Governments and international organizations*

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

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

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

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

(b) *Observations of the Special Rapporteur*

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

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

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

Article 21. Use of flag and emblem

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

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

* * *

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

NOTE

The present addendum is based on the comments of Governments and international organizations referred to in the introduction to the report⁵⁵ and on the additional comments received by the Special Rapporteur before 31 March 1971, namely, those from Japan. It is arranged along the same lines as explained in the introduction.⁵⁶

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

⁵⁶ *Ibid.*, p. 11, para. 8.

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

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

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

1. In the course of the debate in the Sixth Committee,⁵⁷ a number of representatives indicated in general their approval of sections 2, 3 and 4 of part II of the draft articles. Others stressed the importance which they attached to matters covered by some of the draft articles contained in those sections. In this connexion, particular mention was made of articles 24, 25, 27, 28, 29, 30, 31, 32 and 44.⁵⁸ The observation was made by certain representatives that the twenty-nine draft articles included in part II

seemed to deal only with permanent missions of States other than the host State. In their view, they should also cover the permanent mission of the host State itself, to which many of the twenty-one draft articles adopted in 1968 applied. Finally, it was remarked that the Commission should be a little more bold in recasting the material and departing from the structure and contents of the 1961 Vienna Convention on Diplomatic Relations, in order to simplify the presentation of the draft. Articles 39 and 40, for example, were confused, when read after articles 30 to 38.⁵⁹

2. In their written comments some Governments⁶⁰ [*inter alia*, those of Australia, Cyprus, Finland and Mauritius] expressed in general their agreement with the articles contained in part II of the draft. One Government [Finland] stated in this connexion that they were "suited as a basis for the final draft". It was also stated [Cyprus] that the articles were

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

3. One Government [Finland] pointed out that the provisions contained in articles 22 to 50 were "closely related" to the Vienna Convention on Diplomatic Relations,⁶¹ the Vienna Convention on Consular Relations⁶² and the Convention on Special Missions⁶³ and were

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

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

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

⁶⁰ See foot-note 12 above.

⁶¹ See foot-note 38 above.

⁶² See foot-note 50 above.

⁶³ See foot-note 41 above.

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

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

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

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

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

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

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

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

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

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

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

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

(b) *Observations of the Special Rapporteur*

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

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

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

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

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

SECTION 2. FACILITIES, PRIVILEGES AND IMMUNITIES

General observations

(a) *Observations of Governments and international organizations*

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

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

2. Some representatives said that,

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

3. Several representatives agreed that

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

4. The view was expressed that

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

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

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

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

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

6. The belief was expressed that

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

7. The view was held that

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

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

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

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

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

It further observed that

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

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

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

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

It was also observed [Netherlands] that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16. The same Government observed that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

However, it expressed the opinion that

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

It feared that

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

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

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

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

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

(b) *Observations of the Special Rapporteur*

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

Article 22. General facilities

(a) *Observations of Governments and international organizations*

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

Article as a whole

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

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

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

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

First sentence

3. One Government [Netherlands] expressed the opinion that

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

Second sentence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁰ *Ibid.*, para. 35.

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

⁶⁹ *Ibid.*, para. 34.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18. The secretariat of UPU stated the following:

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

19. The secretariat of IBRD stated the following:

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

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

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

⁷³ See below, Article 24, para. 3 of the observations.

⁷⁴ See foot-notes 20 and 45 above.

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

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

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

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

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

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

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

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

(b) *Observations of the Special Rapporteur*

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

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

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

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

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

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

25. As regards the comments reflected in paragraphs 10 and 11 above, the Special Rapporteur wishes to refer to his observations in paragraph 23 above as well as to those he made in the context of articles 3, 4 and 5.⁷⁶ Furthermore, he wishes to point out that the obligatory character of the duties imposed on the organization is a result of the fact of their establishment as such in the legal norm, not of their nature in the light of the position which may be ascribed to the organization in the draft as a whole.

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

⁷⁵ See para. 2 above.

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

⁷⁷ *Ibid.*, p. 12, paras. 14-16.

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

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

Article 22. General facilities

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

Article 23. Accommodation of the permanent mission and its members

(a) Observations of Governments and international organizations

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

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

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

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

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

Paragraph 2

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

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

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

5. WHO indicated that as regards

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

6. UNESCO stated the following:

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

(b) Observations of the Special Rapporteur

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

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

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

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

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

⁷⁹ See above, Article 22, para. 6 of the observations.

⁸⁰ See foot-note 36 above.

Article 23. Accommodation of the permanent mission and its members

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

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

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

(a) Observations of Governments and international organizations

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

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

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

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

3. Another Government [Netherlands] observed that

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

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

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

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

5. WHO stated the following:

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

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

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

(b) Observations of the Special Rapporteur

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

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

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

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

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

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

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

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

⁸² *Ibid.*, para. 38.

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

Article 25. Inviolability of the premises of the permanent mission

(a) *Observations of Governments and international organizations*

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

Article as a whole

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

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

Paragraph 1

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

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

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

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

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

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

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

⁸⁵ *Ibid.*, para. 40.

⁸⁶ *Ibid.*

It was also considered that

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

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

8. Another Government [Belgium] expressed the view that

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

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

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

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

Paragraph 3

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

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

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

New provision

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

(b) *Observations of the Special Rapporteur*

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

⁸⁷ *Ibid.*, para. 39.

⁸⁸ *Ibid.*, para. 41.

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

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

16. As regards the criticisms levied against expressions or words such as "public safety" or "disaster" used in the last sentence of paragraph 1, the Special Rapporteur wishes to refer to his observation in the context of article 23.⁹⁰

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

⁹⁰ See above, Article 23, para. 8 of the observations.

17. The Special Rapporteur agrees with the view expressed in the Sixth Committee, reflected in paragraph 11 above, that the expression "other property thereon" in paragraph 3 of the article should be more closely defined. He therefore proposes that the word "thereon" be replaced by "attaching to those premises".

18. As regards the comments reflected in paragraph 12 above, the Special Rapporteur points out that no reasons were given in support of the suggested restriction of the immunity of means of transport to official journeys, to be further restricted along the lines of paragraph 2 of article 38 of the present draft. The Special Rapporteur wishes to recall that, in the opinion of the same Government which made the suggestions, the similarity, from the sending State's point of view, between the positions of permanent missions to States and to international organizations

justified the privileges and immunities in the present draft being wider in scope than those laid down in the Convention on Special Missions; they conform in a large measure to those laid down in the 1961 Vienna Convention on Diplomatic Relations.

That Government further stated that in the context of the present draft, it would not "make proposals designed to restrict privileges and immunities" such as that whereby "the rule of no immunity in the event of damage due to road accidents [should] be extended to official journeys". The Special Rapporteur is in agreement with the approach reflected in the preceding passages and he therefore sees no reason to depart from the precedent of the Vienna Convention on Diplomatic Relations (para. 3 of article 22) in the context of the provision of paragraph 3 of article 25 of the present draft.

19. As regards the suggestion referred to in paragraph 13 above, the Special Rapporteur is of the view that questions relating to the expropriation of property of another State, including the determination of the nature of compensation, are to be dealt with more appropriately in the context of the law of State responsibility than in that of the present draft.

20. In the light of the foregoing, the Special Rapporteur is of the view that the article should be retained in its present form, subject to the amendment referred to in paragraph 17 above. Article 25 would therefore read as follows:

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

1. The premises of the permanent mission shall be inviolable. The agents of the host State may not enter them, except with the consent of the permanent representative. Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the permanent representative.

2. The host State is under a special duty to take all appropriate steps to protect the premises of the permanent mission against any intrusion or damage and to prevent any disturbance of the peace of the permanent mission or impairment of its dignity.

3. The premises of the permanent mission, their furnishings and other property attaching to those premises and the means of transport of the permanent mission shall be immune from search, requisition, attachment or execution.

Article 26. Exemption of the premises of the permanent mission from taxation

(a) *Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 26 related to the article as a whole and specifically to paragraph 1 of the article, and paragraph 2 of the article in the light of paragraph 3 of the Commission's commentary on the article.

Article as a whole

2. One government [Canada] expressed the view that

This article appears to be acceptable [. . .] in its present form now that a definition of the term 'premises of the permanent mission' has been added to article 1 as indicated in the report of the Commission on the work of its twenty-first session.

3. Another Government [Finland] observed that the article

seems to refer to direct taxes but leaves room for the interpretation that also indirect taxes (sales tax and other similar taxes) are covered.

In its view,

Indirect taxes, levied for the building elements and for services in connexion with construction, although buildings or parts thereof are in themselves tax exempt, should be excluded from the exemption. Difficulties may also arise in obtaining tax exemption, especially in a federal State, with regard to the implementation of tax laws imposed by a State or some other non-federal authority.

Paragraph 1

4. One Government [Israel] considered that

The expression "another member of the permanent mission acting on behalf of the mission" introduces a new element which may be of much broader significance than this article. In so far as it embraces the "acting permanent representative", it would seem preferable that the issue of principle be dealt with elsewhere and the text of article 26 co-ordinated with it. On the other hand if, as seems to be the case, article 26 does not mean to refer to an acting permanent representative, then some other language should be used than the phrase in question.

In this context, it made reference to its observations on article 18.⁹¹

5. In its editorial suggestions, the Secretariat of the United Nations considered that the words "or another member" should be replaced by "and the members", as in article 95, paragraph 1. In its view "since this is an enumeration of the entities and persons exempted from taxation, the correct conjunction to use is 'and', and not 'or'". (A/CN.4/L.162/Rev.1, section B.)

6. One Government [Finland] drew attention to the fact that in its country

There have been difficulties in interpretation with regard to taxation of apartments of diplomatic missions [. . .] held by virtue of the shares of the title-holder in housing corporations. Article 26 should be altered to take the ownership of these shares into consideration. The words "in respect of the premises" cannot be interpreted so broadly as to include the exemption of such shares.

⁹¹ See above, p. 36, document A/CN.4/241 and Add.1 and 2, para. 197.

Paragraph 2

7. In paragraph 3 of its commentary to the article the Commission indicated its intention to examine the matters dealt with therein

again at the second reading of the draft articles in the light of the information which the Special Rapporteur would elicit from the specialized agencies and the view of Governments.

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

It was only fair that the exemption established in article 26 should extend to any premises rented by the mission, so that States which were not in a position to purchase the necessary premises would not be deprived of the benefits provided for in the article.⁹²

9. In its written comments, one Government [Cyprus] stressed that it would like to see a formulation exempting the premises of the permanent missions from taxation, "not only in cases where the premises are owned by the mission, but also when such property is leased or rented". It further stated that

While appreciating the practical difficulties that may exist in certain cases, it is nevertheless of the opinion that a system should be devised to enable missions, the Governments of which are unable to purchase premises, to enjoy the same benefit of exemption as missions whose Governments can afford to own their premises. In the nature of things, it is the less well-off States that would be obliged to content themselves with rented premises, and it is both paradoxical and unfair that the wealthy States, which can afford to own their premises, should take advantage of the exemption, while the former would not.

10. Other Governments, however, took a different position on the question. In the view of one Government [Yugoslavia], "in principle, the provisions of paragraph 2 [. . .] should not go further than those of the Convention on Diplomatic Relations. Another Government [Canada] considered that "the inclusion of paragraph 2 of the article continues to be important". In its opinion, "residents of the Host State should be subject to real property taxes, such as those levied by municipalities, on real property they own, even when they lease it to members of permanent missions".

11. Also in this connexion, one Government [Sweden] observed that the inequality mentioned in paragraph 3 of the Commission's commentary on the article would

seem to be that premises owned by the sending State are not subject to taxation, while rented premises may be subject to taxes which are in law payable by the private owner but which in fact are charged to the sending State by being included in the rent. In the case of a special tax on rents it would probably be rather simple technically to exempt from such a tax rents paid for mission premises. Exemption from property tax based on a periodical evaluation of the property would be a more complicated matter, in particular if the mission premises are only part of the property. With respect to income taxes, it would hardly seem desirable to allow the owner to deduct from his income rent paid for mission premises. It may be doubted that the inequality referred to is grave enough to justify imposing on the receiving States tax exemptions which may cause both technical and political difficulties. Moreover, it is far from certain that the sending State and not the owner would in fact be the beneficiary of such exemptions.

⁹² *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 42.*

Another Government [Netherlands] indicated that the practice in its country was that

premises *owned* by the sending State are exempt from land tax if and as long as they are intended for use by the diplomatic service. The exemption does not apply to *leased* premises, which are subject to land tax, to a tax levied on the value of the furnishings of the premises (and on their rental value) (called “*personele belasting*”) and to some municipal and polder-board dues and taxes. Since only small sums are involved, [it] is of the opinion that for the situation [in its country], special regulations are not called for in respect of leased premises.

(b) *Observations of the Special Rapporteur*

12. As regards the comments reflected in paragraph 3 above the Special Rapporteur does not believe that the article could be interpreted as covering also indirect taxes in view of the provisions of article 36 of the present draft, in particular sub-paragraph (a). He is also of the view that the difficulties referred to in the case of federal States would not appear to be likely to arise in view of the reference in paragraph 1 of article 26 to “regional or municipal dues and taxes”.

13. As regards the comment referred to in paragraph 4 above concerning paragraph 1 of the article, the Special Rapporteur wishes to recall his observations in the context of article 18 of the present draft.⁹⁹ Furthermore, he is of the opinion that the expression “another member of the permanent mission acting on behalf of the mission”, which does not necessarily refer to an acting permanent representative finds its *raison d'être* and is to be understood only within the narrow context of the provision of article 26.

14. As regards the comment referred to in paragraph 5 above, the Special Rapporteur is unable to agree to the suggested replacement of the words “or another member” by “and the members” in view of the provisions of sub-paragraph (f) of article 1 of the present draft according to which the “members of the permanent mission” mean “the permanent representative . . .”.

15. With respect to the comment referred to in paragraph 6 above, the Special Rapporteur is of the view that, in so far as the ownership of shares of the titleholder in housing corporations might be said to imply, however indirectly, ownership of real property, it would be covered by the provision of article 26.

16. As regards the question referred to in paragraph 3 of the Commission's commentary concerning paragraph 2 of the article the Special Rapporteur takes the view that the manner in which the Commission might dispose of the question cannot be said to have been clearly indicated by the comments of Governments reflected in paragraphs 8 to 11 above.

17. In the light of the foregoing the Special Rapporteur proposes that the article be retained in its present form. Article 26 would, therefore, read as follows:

Article 26. Exemption of the premises of the permanent mission from taxation

1. The sending State, the permanent representative or another member of the permanent mission acting on behalf of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the permanent mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State, the permanent representative or another member of the permanent mission acting on behalf of the mission.

Article 27. Inviolability of archives and documents

(a) *Observations of Governments and international organizations*

1. Only one Government [Cyprus] commented on article 27, by stressing the significance it attaches to the provision of the article.

(b) *Observations of the Special Rapporteur*

2. The Special Rapporteur has no observations to make on the text of the article. He therefore proposes that the article be retained in its present form. Article 27 would then read as follows:

Article 27. Inviolability of archives and documents

The archives and documents of the permanent mission shall be inviolable at any time and wherever they may be.

Article 27 bis. Entry into the host State
[*New article*]

(a) *Observations of Governments and international organizations*

1. In paragraph 2 of its commentary to article 48 the Commission indicated that it had

considered the possibility of including in the draft, as a counterpart to article 48, a general provision on the obligation of the host State to allow members of permanent missions to enter its territory to take up their posts. However, the Commission postponed its decision on this matter until the second reading of the draft.

2. In the view of one Government [Yugoslavia], the idea thus expressed by the Commission warranted “separate examination”.

3. In commenting on article 48 another Government [Israel] took the view that “a clause obliging the host State to allow members of permanent missions to enter its territory to take up their posts should be included in the draft articles.”

4. Another Government [Japan], however, considered it superfluous to include a provision on the obligation of the host State to allow members of permanent missions to enter its territory such as appears in paragraph 2 of the commentary [to article 48].

⁹⁹ See above, p. 36, document A/CN.4/241 and Add.1 and 2, para. 199.

5. The Secretariat of the United Nations expressed its views on the question in the following manner:

Right of entry and sojourn

The Secretariat of the United Nations believes it desirable that express provision should be made in the draft articles to ensure to members of permanent missions and their families the right of entry into and sojourn in the territory of the host State and the freedom of transit to and from the premises of the international organization concerned. The Commission has indicated, in paragraph 2 of its commentary to article 48 of the draft articles, that it would consider this point at its second reading of the draft.

Entry into the territory of the host States is an indispensable privilege and immunity for the independent exercise on the part of members of permanent missions of their functions in connexion with the organization to which they are accredited. It is a prerequisite to all other privileges and immunities in the host State. Provisions for it have been made in the Convention on the Privileges and Immunities of the United Nations (section 11, para. *d*), the Convention on the Privileges and Immunities of the Specialized Agencies (section 13, para. *d*), and the Agreement on the Privileges and Immunities of IAEA (section 12, para. *d*). Similar provisions are contained in the headquarters agreements of the United Nations and in those of various specialized agencies, of IAEA, and of the subsidiary organs of the United Nations such as the regional economic commissions and UNIDO.

In the draft articles in their present form, the right of entry is probably implied in article 28 dealing with "freedom of movement" in the host State, in article 48 on "facilities for departure" and in article 45, paragraph 2, on "recall". These provisions, on the other hand, appear to make its omission all the more conspicuous. Indeed, its absence renders the enumeration of privileges and immunities of representatives logically incomplete and the enjoyment of those already provided for possibly nugatory. Under article 42, every person entitled to privileges and immunities shall enjoy them only "from the moment he enters the territory of the host State". This provision would preclude a representative from claiming vis-à-vis the host State, any privilege and immunity, including that of entry, until he has entered the host State. It is therefore imperative to expressly provide for the right of entry into the host State. Without such a provision, a host State might in effect be given the unintended power of veto over the appointment by States of their representatives.

In the experience of the Secretariat of the United Nations, there have been occasions when—convention, headquarters agreement and/or "host agreement" notwithstanding—a representative of State has been refused entry by a host State. While most of such cases concerned representatives to a specific session of a United Nations organ or to an *ad hoc* meeting convened under the auspices of the United Nations, members of permanent missions have on occasion been involved too. Indeed, sessions of a regional economic commission have had their venue changed from one Member State to another because entry was not assured for the representative of a State entitled to attend.

The Secretariat of the United Nations would therefore suggest that an article be added to provide for members of permanent missions the right of entry into the host State in order to exercise their functions in connexion with the organization to which they are accredited. In the context of the existing text of the draft articles, in the light of provisions on the subject of existing conventions and headquarters agreements, and on the basis of the experience of the Secretariat, the additional article on entry might comprise several elements:

- (1) The host State should facilitate
 - (a) entry into its territory, and
 - (b) sojourn in its territory
 of all members of all permanent missions and members of their families forming part of their respective households;

- (2) It should ensure the freedom of transit to and from the organization to any person referred to in 1 above;
- (3) Visas, where required, should be granted free of charge and as promptly as possible; and
- (4) Laws or regulations of the host State tending to restrict the entry or sojourn of aliens should not apply to any person referred to in 1 above.

With reference to the privilege of sojourn in the host State, it is noted that article 45 of the draft articles envisages the recall or termination by the sending State of any member of its permanent mission "in case of grave and manifest violation of the criminal law of the host State" by the person concerned.

Should the Commission decide to add a new article in the sense suggested above, the new article may be inserted so as to precede existing article 28 ("Freedom of movement"). For the convenience of the Commission in its consideration of this matter, the Secretariat appends the following draft text which indicates the substance which such article might cover:

"Article 27 bis. Entry into and sojourn in the host State"

"1. The host State shall take all necessary measures to facilitate the entry into and sojourn in its territory of any person appointed, in accordance with article 10, by a State member of the Organization as a member of that State's permanent mission and of any member of the family forming part of the household of such member of permanent mission.

"2. The host State shall ensure to all persons referred to in paragraph 1 of this article the freedom of transit to and from the Organization and shall afford them any necessary protection in transit.

"3. Visas, where required for any person referred to in paragraph 1 of this article, shall be granted free of charge and as promptly as possible.

"4. Laws or regulations of the host State tending to restrict the entry or sojourn of aliens shall not apply to any person referred to in paragraph 1 of this article."

6. The secretariat of IAEA noted that

although article 43 provides for the facilitation of transit of permanent representatives and staff through "third States", and article 48 for that of departure from the "host State", there appears to be no provision on the facilitation of the entry of permanent representatives and staff into the "host State". It would be desirable to introduce a provision on the facilitation of granting visas, wherever necessary, by the "host State" to the members of permanent missions. Furthermore, it may be borne in mind that "Host Government Agreements" concluded for holding meetings in the territories of member States contain such a provision.

(b) Observations of the Special Rapporteur

7. At the outset, the Special Rapporteur notes that the Commission, in its commentary to article 48, and the Governments which commented on the question there raised, referred to the possible inclusion of a new provision on "the obligation of the host State to allow members of permanent missions to enter its territory to take up their posts". The secretariat of the IAEA likewise referred to a new provision on "the facilitation of the entry of permanent representatives and staff into the host State", and, in addition, to a new provision on "the facilitation of the granting of visas". The Secretariat of the United Nations referred to a more detailed new provision

aimed at ensuring to "members of permanent missions and their families the right of entry into and sojourn in the territory of the host State and the freedom of transit to and from the premises of the international organization concerned". The United Nations Secretariat also included as elements to be covered by the new provision the granting of visas, as well as the inapplicability to the persons concerned of laws and regulations of the host State restrictive of entry and sojourn.

8. As regards the question of the possible inclusion of a provision on the obligation of the host State to allow members of permanent missions to enter its territory to take up their posts, the Special Rapporteur wishes to recall his view, transmitted to the Commission on the occasion of the discussion of the text prepared by the Drafting Committee on facilities for departure, to the effect that "there was no need for a special provision on the matter, which he believed was already covered by article 22".⁹⁴ The Special Rapporteur remains of the same opinion. Nevertheless, in view of the comments made by Governments and international organizations, he considers it appropriate to submit to the Commission in the present report a text for such a provision as a basis for discussion.

9. In his view, such a text should simply state, in general and unequivocal terms, the obligation of the host State. In this respect, the Special Rapporteur would note that although the Secretariat of the United Nations referred in its comments to a "right", it couched the text of its suggested provision in language which placed the emphasis rather on the obligation of the host State. The Special Rapporteur would be further of the view that such a general statement of the obligation would imply the inapplicability to the persons concerned of any restrictive laws or regulations, as well as facilitating the issue of visas, and that it would be superfluous to refer to them specifically in the text.

10. The Special Rapporteur would note also that an explicit reference in the new provision to the freedom of transit might be thought unnecessary in view of the provisions of article 28. However, in this latter article the freedom of movement and travel is in a given respect made subject to the laws and regulations of the host State; in order to avoid giving the impression that transit to and from and entry into the premises of the organization might be subject also to such a restriction, the Special Rapporteur would consider that a reference to this element would be warranted in the new provision. Lastly, the Special Rapporteur would deem it unnecessary to refer generally to "sojourn" in the new provision, as such element is inherent in most of the provisions of the present draft.

11. With regard to the facilitation of the granting of visas, the Special Rapporteur would agree with the secretariats of the United Nations and IAEA that the new article should provide for the prompt issuance of visas where required; he would not believe it appropriate,

however, to go into such detail as to specify that the visas should be granted free of charge.

12. As regards the placing of the new provision, the Special Rapporteur would consider that it might be inserted as a separate article preceding article 28 or could be made into the first paragraph of a new article containing as paragraph 2 the present text of article 28, under an appropriate heading.

13. In the light of the foregoing considerations, the Special Rapporteur submits to the Commission, as a basis for discussion, the following text for a new article 27 bis:

Article 27 bis. Entry into the host State

1. The host State shall ensure entry into its territory and freedom of transit to and from the premises of the Organization to members of the permanent mission and members of their families forming part of their respective households.

2. Visas, where required for any person referred to in paragraph 1 of this article, shall be granted as promptly as possible.

Article 28. Freedom of movement

(a) Observations of Governments and international organizations

1. In the course of the debate in the Sixth Committee the opinion was expressed that article 28

should be restricted to movement of members of the mission that was necessary in the performance of the functions of the mission, and that there was no need to extend it to their families.⁹⁵

2. In its written comments, one Government [Yugoslavia] stated that it regarded

the broadening of the provisions concerning freedom of movement and travel of members of permanent missions and their families beyond the scope of the Vienna Conventions as sound, particularly as the principle of reciprocity does not apply in multilateral diplomacy.

3. The Government of Switzerland, while stressing that "it has never taken and does not intend to take any restrictive measures with regard to members of permanent missions", observed that "these facilities, unlike those provided for diplomatic and consular agents, are not really justified by the functions of the persons concerned". In that connexion, it made reference to article 27 of the Convention on Special Missions. Other Governments took a similar position. Thus, one Government [Japan] stated that the article, "goes beyond the Vienna Convention on Diplomatic Relations in extending freedom of movement to members of the families of members of the permanent mission". In its view

it does not seem essential for the performance of the functions of the permanent mission to assure such an extensive freedom of movement to "all members of the permanent mission and members of their families". It is doubtful if the liberal practice as mentioned by the Commission with regard to the members of the families of diplomatic agents can be regarded as an expression of a customary

⁹⁴ *Yearbook of the International Law Commission, 1969*, vol. I, p. 218, 1032nd meeting, para. 16.

⁹⁵ *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 43.

rule. It, therefore, suggested that the Commission should reconsider the matter so that the formulation be aligned with the provision of article 26 of the Vienna Convention on Diplomatic Relations.

Another Government [United Kingdom] likewise indicated that it was

not entirely convinced of the arguments in favour of a more extensive privilege in the matter of freedom of movement than that conferred by the Vienna Convention on Diplomatic Relations and the Convention on Special Missions.

(b) Observations of the Special Rapporteur

4. The Special Rapporteur notes that the comments made by Governments related to the two main questions referred to in the Commission's commentary on the article, namely, whether the provision of article 28 should not be restricted to movement which was necessary for the purposes of the functions of the permanent mission and whether it should go beyond the corresponding text of the Vienna Convention on Diplomatic Relations by covering also members of the families of the members of the permanent mission. The Special Rapporteur wishes to recall that both questions were thoroughly discussed in the Commission and that the Commission's commentary to the article includes some of the views expressed by members on it and states some of the reasons supporting the present formulation. No additional arguments were presented by Governments when commenting on those two questions. In these circumstances the Special Rapporteur, who is in agreement with the Commission's conclusions as reflected in the Commission's commentary, proposes that the article be retained in its present form. Article 28 would therefore read as follows:

Article 28. Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure freedom of movement and travel in its territory to all members of the permanent mission and members of their families forming part of their respective households.

Article 29. Freedom of communication

(a) Observations of Governments and international organizations

1. The comments made by Governments and international organizations in connexion with article 29 concerned the article as a whole and specifically paragraphs 1 and 7 of the article. The inclusion of a new provision was also suggested.

Article as a whole

2. One Government [Cyprus] stressed the significance it attaches to the provision of article 29.

Paragraph 1

3. One Government [Yugoslavia] considered, having regard to the development of international relations and the need to ensure that representatives of States and their missions are

provided with appropriate means of communication with their Governments, and in the interests of the normal performance of the tasks of the international organization itself, [. . .] justifiable to allow permanent missions to send messages in code or to use a wireless transmitter, as provided in the Vienna Conventions system.

4. The secretariat of the IAEA stated the following:

Article 29 establishes the freedom of communication of the "permanent mission" with the government of the sending State, its diplomatic missions, its permanent missions, its consular posts and its special missions. Since the draft articles are intended to regulate relations between States and international organizations the question comes to mind whether the freedom of communication of the "permanent mission" with the organization to which it is accredited should not be ensured in the same manner. This question would have particular merits if a "permanent mission" is established in a "third State".

Paragraph 7

5. In its editing observations, the United Nations Secretariat considered that, although the expression "to land at [a] port" appears in article 27, paragraph 7, of the Convention on Diplomatic Relations and in article 28, paragraph 8, of the Convention on Special Missions, the word "land" in the third line of paragraph 7 of the present article should be replaced by "arrive" or "call", which would be closer to the French and Spanish versions, as "a ship does not 'land' at a port". (A/CN.4/L.162/Rev.1, section B.)

New provision

6. One Government [United Kingdom] indicated that it would favour the inclusion of a provision on the lines of article 28, paragraph 3, of the Convention of Special Missions.

(b) Observations of the Special Rapporteur

7. The Special Rapporteur is unable to agree with the interpretation given by IAEA in its comment reflected in paragraph 4 above. In the opinion of the Special Rapporteur the first sentence of paragraph 1 of the article establishes in general the freedom of communication on the part of the permanent mission "for all official purposes" and thus covers, above all, the freedom of communication of the permanent mission, wherever situated, with the organization. The reference in the second sentence of paragraph 1 to the Government of the sending State, its diplomatic missions, its permanent missions, its consular posts and its special missions is only made in relation to the means ("all appropriate means, including couriers and messages and code or cipher . . .") which the permanent mission may employ in communicating with those listed subjects. That reference cannot be interpreted as establishing the freedom of communication of the permanent mission only in respect of the government of the sending State, its missions and consular posts.

8. As regards the suggestion reflected in paragraph 6 above, the Special Rapporteur wishes to point out that article 28 of the Convention on Special Missions departed from article 27 of the Vienna Convention on Diplomatic Relations, apart from the requisite adaptations, only in that it added the provision contained in paragraph 3 of

said article 28. Such addition was justified by the particular nature of special missions but is not so in the present part II concerning permanent missions to international organizations, the relevant provision of which (article 29) is likewise based on article 27 of the Vienna Convention on Diplomatic Relations, relating to permanent diplomatic missions.

9. With respect to the editorial suggestion of the United Nations Secretariat reflected in paragraph 5 above the Special Rapporteur wishes to point out that the first sentence of paragraph 7 does not admit only of the interpretation which the Secretariat gives to it, namely, that the word "land" applies also to "a ship". In these circumstances, the acceptance of the Secretariat's suggestion might imply an unwarranted departure from the precedent of the Convention on Diplomatic Relations. But even accepting that the interpretation referred to by the Secretariat were the correct one, the Special Rapporteur considers that the fact the word "land", which was originally used in the Convention on Diplomatic Relations, was kept after thorough discussion in the corresponding provision of the Convention on Special Missions, would seem to indicate that for the purpose of the instruments codifying diplomatic law, the word "land" in the context of the provisions concerning freedom of communication has acquired, as regards ships, a juridical meaning equivalent to the grammatically more correct terms "arrive" or "call".

10. For the foregoing considerations, the Special Rapporteur proposes that the article be retained in its present form. Article 29 would, therefore, read as follows:

Article 29. Freedom of communication

1. The host State shall permit and protect free communication on the part of the permanent mission for all official purposes. In communicating with the Government of the sending State, its diplomatic missions, its permanent missions, its consular posts and its special missions, wherever situated, the permanent mission may employ all appropriate means, including couriers and messages in code or cipher. However, the permanent mission may install and use a wireless transmitter only with the consent of the host State.

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

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

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

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

6. The sending State or the permanent mission may designate couriers *ad hoc* of the permanent mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the permanent mission's bag in his charge.

7. The bag of the permanent mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized

port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a courier of the permanent mission. The permanent mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

Article 30. Personal inviolability

(a) Observations of Governments and international organizations

1. One Government [Cyprus] stressed the significance it attaches to the provision of article 30.

2. Another Government [Netherlands] recalled its general comment⁹⁸ according to which the similarity, from the sending State's point of view, between the positions of permanent missions to States and to international organizations "justifies the privileges and immunities in the present draft being wider in scope than those laid down in the Convention on Special Missions". It, therefore, stated that it would "not propose—as it did in its comments on the draft articles on special missions—that the personal inviolability of diplomatic staff be restricted to acts performed in the discharge of official duties". In its view, it seemed

inappropriate to regulate the position of permanent representatives to international organizations on this point in conformity with the Convention on Diplomatic Relations.

3. One Government [Canada] was of the view that consideration should be given to the insertion of a second paragraph in draft article 30 which would read as follows:

"This principle does not exclude, in respect of the permanent representative, either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing serious crimes or offences."

(b) Observations of the Special Rapporteur

4. With respect to the suggestion reflected in paragraph 3 above, the Special Rapporteur fails to see the need for the insertion of a provision stressing the right of personal self-defence, inherent to every individual and recognized in all systems of criminal law of which he is aware, in the absence of any provision, in article 30 or elsewhere in the draft, which could possibly be interpreted as excluding or restricting such right. Furthermore, the questions implied in the suggested second paragraph are covered by article 45, in particular its paragraph 2.

5. For the foregoing considerations, the Special Rapporteur proposes that the article be retained in its present form. Article 30 would therefore read as follows:

Article 30. Personal inviolability

The persons of the permanent representative and of the members of the diplomatic staff of the permanent mission shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

⁹⁸ See above, Section 2, General observations, para. 10.

Article 31. Inviolability of residence and property

(a) Observations of Governments and international organizations

1. One Government [Cyprus] stressed the significance it attaches to the provision of article 31.

2. In its editorial suggestions, the Secretariat of the United Nations expressed the view that the text of paragraph 1

should be amended to read "The private residence of the permanent representative and of the members of the diplomatic staff . . .". The present wording implies that all the persons mentioned have one and the same residence, which may not be the case. (A/CN.4/L.162/Rev.1, section B.)

(b) Observations of the Special Rapporteur

3. With regard to the editorial suggestion of the United Nations Secretariat reflected in paragraph 2 above, the Special Rapporteur wishes to point out that the text included in the document containing the Secretariat's suggestion is precisely that which appears in paragraph 1 of the article as presently drafted. This must be the result of a typographical mistake and the Special Rapporteur ventures to suggest that, in view of its explanation, the Secretariat's proposed change consists in putting the word "residence" in the plural. (See A/CN.4/L.162/Rev.1/Corr.1.) If his assumption is correct, the Special Rapporteur would agree to such change. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, subject to the terminological change referred to before. Article 31 would, therefore, read as follows:

Article 31. Inviolability of residence and property

1. The private residences of the permanent representative and of the members of the diplomatic staff of the permanent mission shall enjoy the same inviolability and protection as the premises of the permanent mission.

2. Their papers, correspondence and, except as provided in paragraph 3 of article 32, their property, shall likewise enjoy inviolability.

Article 32. Immunity from jurisdiction

(a) Observations of Governments and international organizations

1. The comments made by Governments and international organizations in connexion with article 32 related to the article as a whole and specifically to sub-paragraph (d) of paragraph 1, in the light of paragraph 4 of the Commission's commentary on the article.

Article as a whole

2. One Government [Cyprus] stressed the significance it attaches to the provision of article 32.

Paragraph 1, sub-paragraph (d)

3. In paragraph 4 of its commentary on article 32 the Commission observed that "after a lengthy discussion", it had been unable, "owing to a wide divergence of views, to reach any decision on the substance of the provision in sub-paragraph 1 (d)". The Commission further stated that it had decided "to place the provision in brackets and to bring it to the attention of Governments".

4. In the course of the debate in the Sixth Committee a number of representatives supported the provision laid down in paragraph 1 (d) of article 32, as

being a means of protecting the victims of motor accidents. Some representatives considered that the exception provided for in that provision should extend to accidents caused by a vehicle used in the performance of official functions. Certain representatives considered also that provisions should be adopted requiring representatives to international organizations to be insured against liability for accidents caused by vehicles used by them. In this connexion, some representatives were of the opinion that such provisions should be so drafted as not to enable insurance companies to evade their obligations by relying on the immunity of the insured.⁹⁷

5. On the other hand, a number of representatives considered that

The corresponding provisions of the Vienna Convention on Diplomatic Relations constituted a better solution than that offered by the provision in paragraph 1 (d). The opinion was expressed that, although such a provision might be appropriate in a convention on special missions, which were temporary in character, it would be out of place as regards permanent missions. Emphasis was also laid on articles 34, 45 and 50 of the draft as offering adequate guarantees to cover the situation in question.⁹⁸

6. Referring to article 34, some representatives stated that

The problem could be solved by a general waiver. Others, however, considered that paragraph (d) of draft article 32 should be completed by a sentence along the lines of the provision contained in article 34, to the effect that the sending State should use its best endeavours to bring about a just settlement of the claims, but without the necessity for waiving immunity.⁹⁹

7. In its written comments, one Government [Israel], after noting paragraph 4 of the commentary and recognizing the interconnexion between paragraph 1 (d) of article 32 and article 34 of the draft articles, indicated that it "would wish to reserve its position on article 32, paragraph 1 (d) for the time being".

8. A number of Governments expressed support for the retention of the provision contained in sub-paragraph (d) of paragraph 1 [see the comments of Belgium, Finland, Japan, Netherlands, Sweden, Switzerland and United Kingdom]. That provision was deemed to be "reasonable and necessary" [Japan]. It was also said [Finland] that although valid reasons had been given in favour of the alternative described in the Commission's commentary, namely, inclusion or exclusion, the former one seemed to be "more pertinent for the sake of clarity". Reference

⁹⁷ *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 44.*

⁹⁸ *Ibid.*, para. 45.

⁹⁹ *Ibid.*, para. 46.

was further made by one Government [Netherlands] to the fact that its delegation to the United Nations Conference on Diplomatic Intercourse and Immunities had already advocated the inclusion of such a provision. In this connexion, it was noted [see comments of Finland and the United Kingdom] that the provision was now contained in article 31, paragraph 2 (d), of the Convention on Special Missions.

9. In that respect, the view was also expressed by one Government [Sweden] that there was

undoubtedly a growing tendency, based on public opinion, to limit the immunity in the case of traffic accidents, a tendency which has found expression *inter alia* in the report of the Council of Europe on the privileges and immunities of international organizations.¹⁰⁰

The same Government observed that the fact that a corresponding provision was not included in the Convention on Diplomatic Relations could hardly be a decisive argument as the Convention and the draft articles were not quite comparable in this respect; the Convention dealt with immunities accorded by a receiving State, the draft articles with immunities accorded by a host State, and the problems caused by immunities might well be much greater in the latter than in the former State. Furthermore, it considered that, as it had already pointed out, opinions had developed since 1961 in the direction of restricting immunity from jurisdiction, particularly in traffic cases. In its view, "an element of progressive development", as stated in the Commission's commentary on article 26, should be incorporated in article 32.

10. Another Government [Netherlands] indicated that in paragraph 30 of its comments on the draft articles on special missions,¹⁰¹ it had proposed that, as regards missions *ad hoc*, the rule of no immunity in civil actions for damages arising out of road accidents be extended to official journeys. It had now considered whether it would be appropriate to make such a proposal in the case of the present draft. In its opinion, however, the similarity between permanent missions to States and permanent missions to international organizations

justifies the immunity accorded in this respect under the present draft being wider in scope than that accorded to missions *ad hoc* in the Convention on Special Missions.

11. In the opinion of the same Government,

if the proposed provision was adopted, the question of including in the present draft a provision requiring from diplomats entitled to immunity a third party liability-insurance lost much of its relevance. Moreover, many States already imposed an obligation of this kind.

However, another Government [Japan] was of the view that, in addition to the provision of sub-paragraph (d), provisions be included requiring members of permanent missions to be insured against liability for accident caused by vehicles used by them.

¹⁰⁰ Council of Europe, *Privileges and immunities of international organizations: Resolution (69)29 adopted by the Committee of Ministers of the Council of Europe on 26 September 1969, and Explanatory Report* (Strasbourg, 1970).

¹⁰¹ See *Yearbook of the International Law Commission, 1967*, vol. II, pp. 388 *et seq.*, document A/6709/Rev.1, annex I.

12. Two other Governments favoured the inclusion of a provision concerning insurance as an alternative to the inclusion of sub-paragraph (d). In this connexion one Government [Madagascar] stated the following:

Since experience has shown that it is somewhat unrealistic to rely on the goodwill of States to bring about a just settlement of this type of case within a reasonable period, [...] it would be advisable to concentrate on eliminating the difficulties encountered by victims of traffic accidents in obtaining compensation.

However, the provision in question [sub-paragraph (d)] does not [...] provide an effective means of achieving that goal. How will it be established that the vehicle was being used outside official functions? Will the court hearing the case decide that point? Is the court to accept the version of the facts given by the permanent mission, or can it go beyond that interpretation? Will it have to suspend judgement? What if the vehicle was being used "on duty"? These questions will not be easy to answer, and the delays or disputes which they may engender will bar the way to the desired aim.

It might be better to provide that permanent missions must take out insurance to cover any damage their vehicles might cause to third parties. This would avoid the introduction of one more exception in the context of immunities, while at the same time settling a problem which causes annoyance to host States.

13. Another Government [Australia], after referring to "the difficulty felt by members of the Commission in relation to accidents arising out of the use of motor cars", which appeared "*inter alia* in the Commission's commentary on article 32", expressed the following view:

The advent of the motor car and the frequency of accidents caused by its use have required modifications in traditional legal notions all over the world. In some places, States have gone so far as to exclude all notions of fault in relation to the recovery of compensation for injury caused in such accidents. In other States, modification of traditional notions has not gone so far but various forms of insurance are compulsory, it being a criminal or quasi-criminal offence not to insure against liability for injury caused in such an accident. It may be that a solution to the differences of opinion within the Commission on this matter could be found by resort to provisions requiring representatives to international organizations to be insured against liability for accidents caused by vehicles used by them. If such a solution were adopted, it would of course be necessary also to make provision to ensure that insurance companies would not be free in the exercise of their rights of subrogation to rely on the diplomatic immunity of the insured.

14. Two Governments expressed their opposition to the inclusion of the provision of sub-paragraph (d) in the article. One Government [Yugoslavia] did

not regard it as essential to include in this article the exception provided for in paragraph 1 (d), especially since the application of the functional test is a very complex matter.

In the view of another Government [Belgium], although a clause such as that of sub-paragraph (d) was "certainly very much to the point", the question was whether such a clause

should not have been included in the Convention on Diplomatic Relations; for, while it would be wrong to give permanent missions more privileges than are prescribed for diplomatic missions, it is surely unfair to adapt the status which the latter enjoy by means of accretions that would only operate to the detriment of the former.

15. The secretariat of UNESCO took a position similar to that described in the preceding paragraph. In its comments it was stated that:

In article 32, I consider that paragraph 1 (*d*), which already appears in brackets, should be deleted completely. Such a provision would constitute an exception to immunity from civil jurisdiction and might give rise to other exceptions that would not be desirable. The problem of judicial action arising out of a third-party insurance policy does not seem relevant, since in most States the victim of an automobile accident would have a direct claim against the insurer and that claim could be enforced even if the policy-holder, having immunity from jurisdiction, could not be sued. I think that, as stated in the commentary (para. 4), "the Vienna precedent should be followed" and that the principles set forth in draft articles 34 and 45 (not article 44, as wrongly stated in the French version of the penultimate sentence of paragraph 4 of the commentary) [. . .] should be adhered to.

16. As regards the scope of sub-paragraph (*d*), one Government [Netherlands] recommended that "aircraft and ships be included [. . .] since these too may cause considerable damage".

17. As to the wording of sub-paragraph (*d*), one Government [Belgium] took the view that the term "official functions" could be broadly interpreted and ought to be clarified.

(b) *Observations of the Special Rapporteur*

18. The Special Rapporteur wishes to note at the outset that, with the exception of the provision contained in sub-paragraph (*d*) of paragraph 1 to which reference will be made below, the text of article 32 was not made the subject of comments by Governments or international organizations. As he himself has no observations to make on the provisions of the article other than that contained in sub-paragraph (*d*) of paragraph 1, he proposes that the text of those provisions be retained in its present form.

19. As regards the provision of sub-paragraph (*d*) of paragraph 1, the Special Rapporteur wishes to refer to paragraph 4 of the Commission's commentary on the article which states that "after a lengthy discussion, the Commission was unable, owing to a wide divergence of views, to reach any decision on the substance" of that provision. The comments made by Governments and international organizations on the question, as systematically presented in the preceding section, confirm the existence of the divergence referred to by the Commission. The views expressed in the Sixth Committee and in written comments evidence three distinct approaches to the question: (*a*) in favour of the retention of the provision; (*b*) opposed to its retention; (*c*) in favour of an alternative provision concerning insurance.

20. In relation to the first approach, reference was made, *inter alia*, to the following questions: whether the provision should extend to the use of vehicles in the performance of official functions and, in this connexion, whether the term "official functions" ought not to be clarified; whether the provision should be complemented with provisions requiring the taking out of insurance and in this connexion how should such provisions be drafted so as not to enable insurance companies to evade their obligations; whether the provision should be completed by a sentence along the lines of the provision contained in

article 34; and whether the provision should be extended to cover aircraft and ships.

21. The arguments advanced in connexion with the three approaches referred to above reproduce in general those which were made in the course of the discussion in the Commission, some of which are reflected in paragraph 4 of the Commission's commentary on the article. In these circumstances, the Special Rapporteur considers that the comments of Governments and international organizations are not sufficient in themselves to give to the Commission any clear directive as to the manner in which the question should be finally resolved.

22. As for himself, the Special Rapporteur wishes to recall the view he expressed during the discussion held in the Commission, to the effect that "considering the provisions of articles 33 and 44, article 31 should be retained without the proposed addition [of sub-paragraph (*d*) of paragraph 1]"¹⁰² The Special Rapporteur remains of the same opinion.

23. In the light of the foregoing, the Special Rapporteur deems it appropriate to include in the text of article 32 with which he must provide the Commission in the present report, the provision of sub-paragraph (*d*) of paragraph 1 in the same manner in which it was submitted by the Commission to Governments and international organizations, namely, within brackets. Subject to the Commission's final decision on the bracketed provision, article 32 would, therefore, read as follows:

Article 32. Immunity from jurisdiction

1. The permanent representative and the members of the diplomatic staff of the permanent mission shall enjoy immunity from the criminal jurisdiction of the host State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the host State unless the person in question holds it on behalf of the sending State for the purposes of the permanent mission;

(b) An action relating to succession in which the person in question is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the person in question in the host State outside his official functions;

[(*d*) An action for damages arising out of an accident caused by a vehicle used outside the official functions of the person in question.]

2. The permanent representative and the members of the diplomatic staff of the permanent mission are not obliged to give evidence as witnesses.

3. No measures of execution may be taken in respect of the permanent representative or a member of the diplomatic staff of the permanent mission except in cases coming under sub-paragraphs (*a*), (*b*) [and] (*c*) [and (*d*)] of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of the permanent representative or of a member of the diplomatic staff of the permanent mission from the jurisdiction of the host State does not exempt him from the jurisdiction of the sending State.

¹⁰² *Ibid.*, 1969, vol. I, p. 27, 995th meeting, para. 70.

Article 33. Waiver of immunity

(a) Observations of Governments and international organizations

1. The comments made by Governments and international organizations in connexion with article 33 related to the nature of the principle of the waiver of immunity embodied in the article and specifically to paragraphs 1 and 3 of the article.

Nature of the principle of the waiver of immunity

2. The Government of Switzerland and the secretariats of two international organizations [ITU and IBRD] addressed themselves to this question in comments covering either articles 33 or 34, or both, the latter article being that which establishes in principle a duty to waive immunity in respect to civil claims. Since in the draft as presently organized, articles 33 and 34 state, respectively, the general rule and the exception to it, the Special Rapporteur has deemed it appropriate to include those comments, which are of a general nature, under article 33. The Government of Switzerland expressed regret

that article 34 of the text should lag behind the Conventions relating to international organizations now in force, which specify that the sending State "has the right" and "is under a duty" to waive immunity from jurisdiction, without limiting the "duty" to the case of civil immunity. It is generally agreed that the provision authorizing the sending State to waive the diplomatic immunity of a diplomatic agent contained in article 32 of the Convention on Diplomatic Relations is virtually never applied. The sanction in criminal matters is usually a request for recall or a declaration of *persona non grata*. The latter institution is not provided for in the draft articles, for the same reasons which rule out a genuine *agrément* procedure. Recall is possible in the case of article 45, paragraph 2, [. . .] which is not fully satisfactory.

It further expressed the view that

one of the reasons which led to the granting of what is in practice total immunity to diplomatic agents is the fact that, as an intermediary between the sending State and the receiving State, the diplomatic agent may be liable simply through the normal exercise of his functions, to arouse the resentment of the receiving State. In the case of a permanent representative, such a possibility is more remote, for the representative's activity in the organization has generally nothing to do with the host State. It would therefore be justifiable to specify not only a right but, as in the existing agreements with and concerning international organizations, a "duty" to waive immunity in cases other than those mentioned in article 34.

3. The secretariat of ITU stated the following:

We are in the process of negotiating a Headquarters Agreement with Switzerland to replace the exchange of letters of 1948 whereby we were granted the benefits of the Agreement between it and the United Nations. It may be of interest to know that the Confederation has requested that the following article be included in the new Agreement:

"Article 13—Objet des privilèges et immunités accordés aux représentants"

"Les privilèges et immunités sont accordés aux représentants des membres de l'Union non à leur avantage personnel, mais dans le but d'assurer en toute indépendance l'exercice de leurs fonctions en rapport avec l'Union. Par conséquent, un membre de l'Union a non seulement le droit, mais le devoir de lever l'immunité de son représentant dans tous

les cas où, à son avis, l'immunité entraverait l'action de la justice et où elle peut être levée sans compromettre les fins pour lesquelles elle avait été accordée."

[Provisional translation:]

"Article 13—Purpose of the privileges and immunities accorded to representatives

"Privileges and immunities are accorded to the representatives of members of the Union, not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connexion with the Union. Consequently, a member not only has the right but is under a duty to waive the immunity of its representatives in any case where, in the opinion of the member, the immunity would impede the course of justice, and where it can be waived without prejudice to the purpose for which the immunity is accorded."

4. The secretariat of IBRD, after referring to paragraphs 1 and 2 of the Commission's commentary to the present article, expressed regret that the "commendable" provision contained in the second sentence of article IV, section 14 of the Convention on the Privileges and Immunities of the United Nations, which is quoted in paragraph 1 of said commentary and reproduced in the article referred to by the secretariat of ITU (see preceding paragraph) "only appears in weakened form in article 34".

Paragraph 1

5. One Government [Israel] suggested that

in paragraph 1, in the place of the phrase: "The immunity from jurisdiction of the permanent representative or members of the diplomatic staff of the permanent mission and persons enjoying immunity under article 40", there should be substituted the following: "The immunity from jurisdiction of the permanent representative or members of the diplomatic staff of the permanent mission, and of persons enjoying immunity under article 40".

6. In its editorial suggestions, the Secretariat of the United Nations expressed the view that the text should be amended to read:

The immunity from jurisdiction of the permanent representative and members of the diplomatic staff of the permanent mission and of persons enjoying immunity under article 40. . . .

In the Secretariat's view, as

three classes of persons are mentioned, there seems to be no reason for using the word "or" between the first and second class, but "and" between the second and third. The change proposed brings the wording closer to that of article 32, paragraph 1 of the Convention on Diplomatic Relations, which says "and of persons enjoying immunity . . .". (A/CN.4/L.162/Rev.1, section B.)

Paragraph 3

7. In the view of the secretariat of UNESCO, there seemed to be

every justification for providing that, in the situation covered by paragraph 3, the person concerned "shall [be precluded] from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim". However, [. . .] this should apply to appeals as well as counter-claims, as is generally provided by the makers of diplomatic law; for it is impossible to see how a person enjoying a privileged status who had obtained a judgement could be allowed to block his opponent's appeal by relying on his immunity from jurisdiction.

(b) *Observations of the Special Rapporteur*

8. With regard to the question whether the provision concerning waiver of immunity should specify not only a "right" but also a "duty" in cases other than those mentioned in article 34, the Special Rapporteur notes the arguments advanced in particular by the Government of Switzerland. In this connexion he wishes to recall that, although section 14 (article IV) of the Convention on the Privileges and Immunities of the United Nations and section 16 (article V) of the Convention on the Privileges and Immunities of the Specialized Agencies refer both to a "right" and a "duty", only the notion of the waiver of immunity as a "right" was reflected in the relevant provisions of the Vienna Conventions on Diplomatic and Consular Relations (articles 32 and 45, respectively), and the Convention on Special Missions (article 41). The Special Rapporteur wishes further to recall that in the matter of privileges and immunities, the Commission's basic approach to the present draft, namely, the assimilation of permanent missions to diplomatic missions, has been widely supported by Governments and international organizations, including, in no equivocal terms, the Government of Switzerland. The Special Rapporteur wishes also to draw attention to the incorporation in the present draft, as a separate article (article 34), of a provision concerning the "duty" to waive immunity in respect to civil claims, and to the accompanying explanation given in paragraph 2 of the Commission's commentary on said article 34. In the light of the foregoing, the Special Rapporteur is of the view that there is no compelling reason to depart from the system embodied in the conventional instruments on diplomatic law by including in article 33 a reference to "duty".

9. As regards the drafting suggestions concerning paragraph 1 of the article, the Special Rapporteur agrees to the replacement of the word "or" by "and", between "representative" and "members", as well as to the inclusion of the word "of" before "persons" (without a comma to precede "of"), since, in his view, those changes represent a terminological improvement of the text.

10. As regards the comment of the secretariat of UNESCO reflected in paragraph 7 above, the Special Rapporteur considers that the contention to the effect that "it is impossible to see how a person enjoying a privileged status who had obtained a judgement could be allowed to block his opponent's appeal by relying on his immunity from jurisdiction" has no basis in the text of article 33 as presently worded. In this connexion, the Special Rapporteur refers to the language of paragraph 4 of the article which explicitly states that it is "in respect of the execution of the judgement" that "waiver of immunity from jurisdiction [. . .] shall not be held to imply waiver of immunity". In view of the specific reference thus made it must be concluded that only at the stage of "execution of the judgement" could a person rely on his immunity from jurisdiction, since a separate waiver is necessary in order that a judgement may be executed against the privileged person. The stage at which a judgement can be "executed" necessarily represents the culmination of the judicial process issuing from the presentation of the

original claim, of which appeal is but one of the possible instances. If the possibility for appeal still exists the judgement of a lower court cannot be deemed to be capable of "execution". The issue is different as regards a counter-claim, which implies a judicial process of its own, whether it be joined or not to that issuing from the original claim. In these circumstances, the Special Rapporteur is of the view that the suggested addition of a reference to "appeals" would be superfluous.

11. For the foregoing reasons, the Special Rapporteur proposes that the article be retained in its present form subject to the drafting changes referred to in paragraph 9 above. Article 33 would, therefore, read as follows:

Article 33. Waiver of immunity

1. The immunity from jurisdiction of the permanent representative and members of the diplomatic staff of the permanent mission and of persons enjoying immunity under article 40 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by the permanent representative, by a member of the diplomatic staff of the permanent mission or by a person enjoying immunity from jurisdiction under article 40 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.

Article 34. Settlement of civil claims(a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee some representatives regarded the provisions of article 34 as judicious and necessary. Others, while agreeing that they were desirable in themselves, nevertheless considered that they might not be appropriate for a legal text, since the sending State's obligation under the article depended very largely on its own subjective criteria. In this connexion, the suggestion was made that in the last sentence, the expression "it shall use its best endeavours to bring about" should be replaced by the words "it shall bring about".¹⁰³

2. In its written comments, one Government [Belgium] stated that

This article, which reproduces the operative part of resolution II (consideration of civil claims) annexed to the Convention on Diplomatic Relations, [104] adds nothing more than the recommendation itself, since in the final analysis it rests on the discretion and goodwill of the sending State.

3. Five other Governments expressed support for the provision of the article. The Government of Switzerland regarded it

¹⁰³ *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 47.

¹⁰⁴ *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No. 62.XI.1), p. 90.

as an important advance that resolution II accompanying the Convention on Diplomatic Relations has been embodied in the text of article 34 and that a clear obligation is now laid on the sending State.

Another Government [Yugoslavia], in commenting on article 32, considered that the provisions of article 34 "satisfactorily safeguards the interests of the host State and the exercise of the functions of the permanent representative". A third Government [United Kingdom] indicated its support for "the inclusion of this provision in the body of the convention itself as a progressive step which would help to reassure parliamentary and public opinion". Other Governments [Israel, Japan] expressed their hope that the article should be retained in the final text.

4. In the view of UNESCO, the importance of the principle set forth in the article "should not be underestimated".

(b) *Observations of the Special Rapporteur*

5. The Special Rapporteur observes that most of the comments of Governments and international organizations were in support of the Commission's decision to embody the provision in an article of the draft. As regards the suggestion made in the Sixth Committee, reflected in paragraph 1 above, the Special Rapporteur wishes to point out that it was precisely on the basis of that decision that the provision was couched in the language of a legal convention and not in that of a recommendation, by using the word "shall" instead of "should". In this connexion, he fails to understand how, in the presence of the clear obligation thus established, it can still be argued that the provision "adds nothing more than the recommendation itself, since [. . .] it rests on the discretion and good will of the sending State". Further, the Special Rapporteur is unable to agree with the suggested deletion of the words "use its best endeavours". In his view, such words, which appear both in resolution II adopted by the United Nations Conference on Diplomatic Intercourse and Immunities and in General Assembly resolution 2531 (XXIV) are not the determinant of the obligatory character of the provision but rather of the scope of the obligation. The Special Rapporteur considers that the scope thus determined is the appropriate one in the context of the provision: no obligation could be imposed on the sending State alone "to bring about a just settlement" as the result thus sought is of necessity dependent on the endeavours of at least the opposing party in the claim in question.

6. For the foregoing considerations, the Special Rapporteur proposes that the article be retained in its present form. Article 34 would, therefore, read as follows:

Article 34. Settlement of civil claims

The sending State shall waive the immunity of any of the persons mentioned in paragraph 1 of article 33 in respect of civil claims in the host State when this can be done without impeding the performance of the functions of the permanent mission. If the sending State does not waive immunity, it shall use its best endeavours to bring about a just settlement of such claims.

Article 35. Exemption from social security legislation

(a) *Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 35 concerned the article as a whole and, specifically, paragraphs 1, 2 (first sentence and sub-paragraph *b*) and 3 of the article and paragraph 5 of the article in the light of the question raised in paragraph 3 of the Commission's commentary on the article.

Article as a whole

2. The secretariat of the IAEA stated the following:

Article 35 provides for exemption of the permanent representative and the diplomatic staff of the permanent mission from social security provisions of the "host State", both as employers and employees. However, the exemption of the employer of the permanent representative and the diplomatic staff has not been secured in the article.

3. One Government [Canada] although observing that the article "would seem to be satisfactory", nevertheless expressed the view that

It might be necessary to make it clear that the exemption from the social security legislation of the receiving State conferred by the article does not include an exemption from social security taxes of an indirect nature and is thus not in conflict with the intent of sub-paragraph (a) of article 36 which permits the receiving State to impose indirect taxes.

Paragraph 1

4. In its editorial suggestions the Secretariat of the United Nations expressed the view that "the last two lines of paragraph 1 should be amended to read 'be exempt from the social security provisions in force in the host State' ". While recalling that the present wording is taken from article 33, paragraph 1 of the Convention on Diplomatic Relations and appears also in article 32, paragraph 1 of the Convention on Special Missions, the Secretariat nevertheless considered that wording to be wrong, since it means that the persons mentioned shall be exempt from social security provisions of the kind specified, which, quite incidentally, may be in force in the host State. This is not the meaning intended. (A/CN.4/L.162/Rev.1, section B.)

Paragraph 2

5. In the opinion of the Government of Switzerland, referring to the use of the expression "persons who are in the sole private employ", in the opening sentence of the paragraph, it seemed that

The purpose of using the expression "private staff" of members of the mission in the Convention on Special Missions, instead of the expression "private servants" which had been used in the Convention on Diplomatic Relations, was to take account of the differences between permanent missions and special missions, the latter being of a temporary nature, with the result that their members often do not employ servants. In the present draft, it would seem preferable to keep to the wording employed in the Vienna Convention.

6. In its editorial suggestions (A/CN.4/L.162/Rev.1, section B), the Secretariat of the United Nations expressed

the view that in sub-paragraph (b) the words "which may be" should be deleted, for the reasons given in connexion with the similar suggestion made on paragraph 1 of the article.¹⁰⁵

Paragraph 3

7. In its editorial suggestions (A/CN.4/L.162/Rev.1, section B, the Secretariat of the United Nations expressed the view that, in paragraph 3 "the words 'who employ' should be replaced by 'if they employ', since all permanent representatives and members of the diplomatic staff may not employ non-exempted persons". The Secretariat referred to the corresponding passage in the Convention on Diplomatic Relations (article 33, para. 3) which reads: "A diplomatic agent who employs [. . .]" which in the Secretariat's view makes it clear that not all diplomatic agents do.

Paragraph 5 and the question raised in paragraph 3 of the Commission's commentary

8. In paragraph 3 of its commentary on the article, the Commission stated that it

intends to consider, in the light of the comments to be received from Governments, whether paragraph 5 is necessary in view of the provisions of articles 4 and 5 of the present draft.

9. Three Governments addressed themselves in their written comments to the question thus raised. One Government [Netherlands] stated that its answer was in the negative. Another Government [Israel] was of the view that paragraph 5 "adds nothing to the provisions of articles 4 and 5, and that it could with advantage be omitted". A third Government [Sweden] likewise considered that

Since the general provisions in articles 4 and 5 apparently cover the special provision in paragraph 5 of article 35, that paragraph could accordingly be omitted.

(b) Observations of the Special Rapporteur

10. As regards the comments made by IAEA reflected in paragraph 2 above, the Special Rapporteur wishes to point out that the IAEA statement to the effect that "Article 35 provides for exemption of permanent representative and the diplomatic staff [. . .] both as employers and employees" cannot be understood in an absolute sense in view of the provisions of paragraph 3 of the article according to which, when acting as employers in the circumstances specified therein "the permanent representative and the members of the diplomatic staff [. . .] shall observe the obligations which the social security provisions of the host State impose upon employers". Also, the Special Rapporteur fails to see how, as it is contended by IAEA, the statement securing the exemption of the permanent representative and the diplomatic staff "both as employer and employees" necessarily requires that a corresponding statement be made securing the exemption "of the employer of the permanent representative and the diplomatic staff". Be it as it may, the

Special Rapporteur wishes nevertheless to point out that a second statement along the lines suggested by IAEA appears to be out of place in the present draft. In effect, keeping within the frame of the IAEA comments, the Special Rapporteur considers that the only "employer" of the permanent representative and the diplomatic staff is the sending State, since the provisions of article 46 on professional activity exclude the possibility of the existence of other "employers" for such persons. In these circumstances, the Special Rapporteur does not consider that, given the basic role which attaches to the principle of the immunity of the State in the law of diplomatic relations, there is need to make a specific reference to such immunity in the context of the provisions on exemption from the social security legislation in the present draft.

11. As regards the comment reflected in paragraph 3 above, the Special Rapporteur is of the view that the provision of sub-paragraph (a) of article 36, which is of a general character, covers the specific case of indirect social security taxes. However, if the Commission so desires, an appropriate cross-reference on the point could be made in the Commission's commentary to the final text of either article 35 or article 36.

12. In relation to the editorial suggestions of the Secretariat of the United Nations concerning paragraph 1, the Special Rapporteur agrees that the change suggested by the Secretariat, namely, to add "the" before "social" and to delete "which may be" would represent a terminological improvement of the text. He therefore agrees to its inclusion.

13. With respect to the comment of the Government of Switzerland reflected in paragraph 5 above, the Special Rapporteur wishes to make reference to paragraph 2 of the Commission's commentary on the article which explains the change in terminology for reasons, which the Special Rapporteur considers valid, other than those having to do with the differences between missions on account of the "temporary" or "permanent" nature of the mission concerned.

14. On the editorial suggestion of the United Nations Secretariat concerning paragraph 2, the Special Rapporteur takes a similar view to the one he expressed in paragraph 12 above.

15. The Special Rapporteur agrees with the explanation of the United Nations Secretariat reflected in paragraph 7 above, regarding the meaning of the words "who employ" in paragraph 3 of the article. However, he considers that the same reasons apply in the case of the Secretariat's amended version "if they employ". In the view of the Special Rapporteur, what is important in this regard and appears to be the ground for the Secretariat's suggestion, is to have the wording bring out the element of "actual employment". He considers that this could be achieved by replacing the words "who employ" by "when they employ", a change which he therefore proposes to make.

16. The Special Rapporteur expresses his agreement with the comments of Governments reflected in paragraph 9 above to the effect that paragraph 5 of the article

¹⁰⁵ See para. 4 above.

is unnecessary in view of the provisions of articles 4 and 5 of the present draft. He therefore proposes its deletion.

17. In the light of the foregoing considerations, the Special Rapporteur proposes the following text for article 35:

Article 35. Exemption from social security legislation

1. Subject to the provisions of paragraph 3 of this article, the permanent representative and the members of the diplomatic staff of the permanent mission shall with respect to services rendered for the sending State be exempt from the social security provisions in force in the host State.

2. The exemption provided for in paragraph 1 of this article shall also apply to persons who are in the sole private employ of the permanent representative or of a member of the diplomatic staff of the permanent mission, on condition:

(a) That such employed persons are not nationals of or permanently resident in the host State; and

(b) That they are covered by the social security provisions in force in the sending State or a third State.

3. The permanent representative and the members of the diplomatic staff of the permanent mission when they employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the host State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the host State provided that such participation is permitted by that State.

Article 36. Exemption from dues and taxes

(a) Observations of Governments and international organizations

1. The comments made by governments and international organizations in connexion with article 36 related to the opening sentence and sub-paragraphs (a) to (e) of the article, sub-paragraph (f) of the article and the related question raised in paragraph (5) of the Commission's commentary to the article and paragraph 4 of the same commentary.

Opening sentence

2. One Government [Canada] suggested that

The drafting committee might wish to rephrase the opening sentence so as to make it clear that the phrase "personal or real, national, regional or municipal" applies to "dues" as well as to "taxes".

Sub-paragraphs (a) to (f)

3. The secretariat of IAEA, after observing that in sub-paragraphs (b), (c) and (d) of article 36, the exemptions are specifically those from dues and taxes of the "host State", raised the question whether "the omission of such specification in sub-paragraphs (a), (e) and (f) mean that those particular exemptions are from dues and taxes of any State?"

Sub-paragraph (a)

4. One Government [Canada], although considering sub-paragraph (a) to be acceptable nevertheless suggested that "the phrase 'Indirect taxes incorporated in the price of goods or services, whether invoiced separately or not' could be used as an alternative".

Sub-paragraph (b)

5. One Government [Canada] considered that

The phrase "unless the person concerned holds it on behalf of the sending State for the purposes of the mission" could, to avoid any undesirable extension of the exemption, be deleted and replaced by the words "subject to the provisions of article 26".

6. Another Government [Finland], on the basis of its comments on article 26¹⁰⁶ was of the view that

Article 36 (b) should also provide that its provision shall apply to the [...] shares [of the title-holder in housing corporations] which cannot be considered as real property.

Sub-paragraph (d)

7. One Government [Canada] suggested that

the phrase "and capital taxes on investments made in commercial undertakings in the host State", which is almost identical to the corresponding provision in sub-paragraph (d) of article 34 of the Convention on Diplomatic Relations, is less satisfactory than the wording of sub-paragraph (d) of article 49 of the Convention on Consular Relations which reads, "dues and taxes on private income, including capital gains, having its source in the receiving [host] State and capital taxes relating to investments made in commercial or financial undertakings in the receiving [host] State;".

Sub-paragraph (f) and the related question raised in paragraph 5 of the Commission's commentary on article 36

8. In the course of the debate in the Sixth Committee, the provisions of sub-paragraph (f) were considered "too specific".¹⁰⁷

9. In its written comments, one Government [Canada] indicated that it would prefer to have the phrase "with respect to immovable property" deleted.

10. In paragraph 5 of its commentary on article 36 the Commission stated:

(5) The final phrase of paragraph (f) may give rise to difficulties of interpretation mainly because it states an exception to a rule which is itself an exception. It is, however, based on the corresponding provision (art. 34) of the Vienna Convention on Diplomatic Relations. The Commission would be interested to learn whether Governments have found any practical difficulties in applying that provision.

11. Three Governments responded to the question thus raised. One Government [Netherlands] pointed out that in its country

registration fees, paid on the transfer to the sending State of immovable property intended for official use, are refunded.

¹⁰⁶ See above, Article 26, para. 6 of the observations.

¹⁰⁷ Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 48.

Documents signed solely by members of foreign diplomatic missions are exempt from stamp duty. This practice does not give rise to difficulties.

The Government of Switzerland indicated that in its country

although the Convention on Diplomatic Relations rule corresponding to sub-paragraph (f) is formulated as an exception to an exception, its application has caused no difficulty.

Another Government [Sweden] replied that it was not aware of any difficulty in applying paragraph (f).

Paragraph 4 of the Commission's commentary on article 36

12. In its written comments, the secretariat of UNESCO stated the following:

In paragraph 4 of the commentary on article 36, the statement about UNESCO does not reflect quite accurately what was stated in the reply contained in my letter of 2 March 1965.*

* The relevant paragraph of the letter reads as follows:

"22. The taxation system applied to permanent delegations is in principle the same as that enjoyed by embassies.

"Delegations pay only the taxes for services (scavenging, sewerage, garbage collection) and real property tax (*contribution foncière*) when the permanent delegate is the owner of a building.

"Permanent delegates are exempt from tax on movable property (*contribution mobilière*) (a tax imposed on residents of France, according to the residential premises they rent or occupy) in respect of their principal residence but not of any secondary residence."

(b) *Observations of the Special Rapporteur*

13. As regards the suggestion reflected in paragraph 2 above, the Special Rapporteur is of the opinion that the present drafting, particularly in view of the use of the word "and" between "dues" and "taxes" and of a comma after the word "taxes", is sufficient to make it clear that the phrase "personal or real, national, regional or municipal" applies both to "dues" as well as to "taxes". In his view, if that phrase had been meant to apply only to taxes, another wording would have been more properly used than the present one.

14. With respect to the comment made by IAEA reflected in paragraph 3 above, the Special Rapporteur wishes to point out at the outset that sub-paragraphs (a) to (f) do not deal with "exemptions" as asserted by IAEA but rather with "exceptions" to the exemption provided for in the opening sentence of the article. Furthermore, he is unable to agree with the IAEA's contention that as regards sub-paragraphs (b) and (d) the alleged exemptions are "specifically those from dues and taxes of the 'host State'". The reference to the "host State" in those two sub-paragraphs is made not in relation to its "dues and taxes" but rather to the situs of the private immovable property and of the source of the private income. The convention of IAEA regarding specification would, therefore, be applicable only to sub-paragraph (c). In these circumstances, the question as raised by IAEA in the context of article 36 does not seem to require any further comment.

15. The Special Rapporteur takes the view that the provision of sub-paragraph (a), which is general in character, applies irrespective of the forms that may be used for recording the taxes referred to therein, making it

thus unnecessary to include in its text a specific reference to "whether [they are] invoiced separately or not" as suggested in the comment reflected in paragraph 4 above.

16. As regards the comment concerning sub-paragraph (b) of the article, reflected in paragraph 5 above, the Special Rapporteur wishes to point out that the "premises of the permanent mission" to which the exemption from taxation provided for in article 26 applies, have been defined in sub-paragraph (k) *bis* of article 1 on the use of terms in a manner corresponding in general to the expression in sub-paragraph (b) of article 36 which it is suggested to have replaced. In the view of the Special Rapporteur, this latter expression might even be thought to be more restrictive than that used in sub-paragraph (k) *bis* of article 1 in so far as it includes the words "on behalf of the sending State". The Special Rapporteur wishes also to recall that the provision of sub-paragraph (b) of article 36 reproduces, with the necessary drafting changes, the provision of article 34 of the Vienna Convention on Diplomatic Relations. In view of the existence in that Convention of provisions (article 1, sub-paragraph (i) and article 23) comparable to those of article 1, sub-paragraph (k) *bis*, and article 26 of the present draft, the adoption of the proposed change in this draft would not only give rise to serious problems of interpretation in the context of the Convention on Diplomatic Relations but would constitute an unwarranted departure from the Vienna diplomatic precedent.

17. With regard to the comment referred to in paragraph 6 above, concerning sub-paragraph (b) of the article, the Special Rapporteur observes that the provision of sub-paragraph (b) being general in character, the suggestion made, which relates to a very concrete situation, might be more appropriately reflected in the Commission's commentary to the final text of the article than in the text of the article itself.

18. With regard to the comment reflected in paragraph 7 above, concerning sub-paragraph (d) of the article, the Special Rapporteur wishes to point out that the complete text of the provision of sub-paragraph (d) as well as that of the corresponding article of the Convention on Diplomatic Relations (article 34) include also the phrase "dues and taxes on private income having its source in the host [receiving] State". Therefore, the differences between these texts and that of sub-paragraph (d) of article 49 of the Vienna Convention on Consular Relations consist in the use by the latter of the words "relating to" instead of "on" before "investments", and the addition of the words "including capital gains", and "or financial" after "private income", and "commercial", respectively. The Special Rapporteur does not consider that those terminological differences amount to a difference in substance between the two texts. In those circumstances, he sees no compelling reason to depart from the Vienna diplomatic precedent.

19. With regard to the comment concerning sub-paragraph (f) of the article, reflected in paragraph 9 above, the Special Rapporteur likewise finds that no reason other than preference is given in support of the suggested departure from the Vienna diplomatic precedent. The

Special Rapporteur's own preference, however, based on the Commission's general approach to the subject, is for the retention of the provision in its present form.

20. As the Governments which referred to the question indicated the existence of no practical difficulties in applying the provision of paragraph (f) of article 34 of the Convention on Diplomatic Relations, the Special Rapporteur takes the view that the final phrase of the corresponding provision (paragraph (f) of article 36) in the present draft should be maintained.

21. With regard to the comment of UNESCO reproduced in paragraph 12 above, the Special Rapporteur wishes to point out that the text of the Commission's commentary, which was largely based on the text of the Special Rapporteur's own commentary as included in his fourth report, has as its source the Study by the Secretariat.¹⁰⁸ Since the secretariat of UNESCO disagrees with the information given in that document as regards UNESCO, the Special Rapporteur considers that the comment made by UNESCO should be taken into account if and when it is decided to include the corresponding passage in the commentary to the final text of the article.

22. For the foregoing considerations the Special Rapporteur proposes that the article be retained in its present form. Article 36 would, therefore, read as follows:

Article 36. Exemption from dues and taxes

The permanent representative and the members of the diplomatic staff of the permanent mission shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) Indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) Dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the permanent mission;

(c) Estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 42;

(d) Dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State;

(e) Charges levied for specific services rendered;

(f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 26.

Article 37. Exemption from personal services

No comments were made by Governments or international organizations concerning article 37. As for himself, the Special Rapporteur has no observations to make on the text of the article. He, therefore, proposes that the article be retained in its present form. Article 37 would then read as follows:

Article 37. Exemption from personal services

The host State shall exempt the permanent representative and the members of the diplomatic staff of the permanent mission from all personal services, from all public service of any kind whatsoever, and

¹⁰⁸ See foot-note 47 above.

from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 38. Exemption from customs duties and inspection

(a) *Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 38 related to paragraphs 1, sub-paragraph (b), and 2 of the article, and paragraph 5 of the Commission's commentary on the article.

Paragraph 1, sub-paragraph (b)

2. Two Governments and the Secretariat of the United Nations commented on the use of the word "his". In its editorial suggestions (A/CN.4/L.162/Rev.1, section B), the Secretariat of the United Nations expressed the view that

It is by no means clear that the words "or members of his family forming part of his household" apply to "the permanent representative"; they may easily be taken as applying only to "a member of the diplomatic staff". This difficulty does not arise in the corresponding article 36, paragraph 1 (b), of the Convention on Diplomatic Relations, because only one person and his family are mentioned.

The Secretariat of the United Nations took the view that

The text could be amended to read "... or of members of the family of such representative or member forming part of his household, including articles intended for his establishment".

One Government [Canada] indicated its presumption that "the word 'his' refers both to the permanent representative and to any member of the diplomatic staff". Another Government [Israel] suggested that "'their families' be substituted for 'his family', 'their households' for 'his household' and 'their establishments' for 'his establishment'".

Paragraph 2

3. In its editorial suggestions (A/CN.4/L.162/Rev.1, section B), the Secretariat of the United Nations expressed the view that

In the first sentence of paragraph 2, the words "or a member" should be replaced by "and of the members"; the baggage is exempt in both cases, not in one case or the other. See article 103, paragraph 2. [Also that] at the beginning of the last sentence, the word "Such" should be deleted; it has no proper antecedent, since what is referred to in the previous sentence is not inspection, but exemption from inspection. The sentence should begin "In such cases, inspection shall be ..." as in article 103, paragraph 2.

The Secretariat noted that the word "Such" appears in the corresponding provision of the Convention on Diplomatic Relations (article 36, para. 2), but that the Convention on Special Missions uses the expression "In such cases" (article 35, para. 2).

Paragraph 5 of the Commission's commentary on article 38

4. In its written comments, the secretariat of UNESCO stated the following:

In paragraph 5 of the commentary on article 38, the last sentence should state that "other delegates or members of delegations may import . . ." and should add that they may also temporarily import motor-cars free of duty, under customs certificates without deposits (see my letter of 2 March 1965).*

* The relevant paragraph of this letter reads as follows:

"23. Only permanent delegates accredited to the Organization with the rank of ambassador or minister plenipotentiary are assimilated to heads of diplomatic missions (article 18, para. 3, of the Headquarters Agreement). In this capacity they may import goods for their official use and for that of the delegation free of duty.

"Other delegates or members of delegations are assimilated to members of a diplomatic mission accredited to the French Government; they may import free of duty their furniture and personal effects at the time of their installation in France and may temporarily import motor-cars free of duty, under customs certificates without deposits (article 22, sub-paragraphs (g) and (h), of the Headquarters Agreement)."

(b) *Observations of the Special Rapporteur*

5. As regards the drafting suggestions concerning sub-paragraph (b) of paragraph 1 referred to in paragraph 2 above, the Special Rapporteur having in mind the information given in paragraphs 3 and 4 of the Commission's commentary to the article, wishes to draw attention to the provision of paragraph 1 of article 40 of the present draft according to which "the members of the family [. . .] enjoy the privileges and immunities specified in articles 30 to 38". He wishes also to point out that as regards these latter articles (30 to 38) only the last (article 38) makes specific reference to "members of the family". In these circumstances he takes the view that the phrase "or members of his family forming part of his household" in sub-paragraph (b) of paragraph 1 of article 38 is unnecessary and could with profit be deleted, a modification which would dispose of the drafting problems referred to in paragraph 2 above.

6. With respect to the editorial suggestions made by the Secretariat of the United Nations concerning paragraph 2, the Special Rapporteur is unable to agree with the Secretariat's contention that, as presently drafted the first sentence reads to the effect that the baggage is exempt "in one case or the other". In his view, that sentence reads rather to the effect that the baggage is exempt, whether it is that of the permanent representative or that of the member of the diplomatic staff. The Secretariat's amended version may give the impression that only that baggage is exempt which is at the same time "of the permanent representative and of the members of the diplomatic staff".

7. As regards the Secretariat's suggested replacement of the word "Such" by "In such cases" in the second sentence of paragraph 2, the Special Rapporteur considers that the use of the words "In such cases" at the beginning of that sentence would make the phrase more elegant and in conformity with the text of the corresponding provision of the Convention on Special Missions, arrived at after thorough discussion. He therefore agrees to its inclusion.

8. With respect to the comment made by UNESCO concerning paragraph 5 of the Commission's commentary to the article, the Special Rapporteur refers to his observations on a similar comment made by UNESCO in connexion with article 36. The comments of UNESCO should be taken into account if and when it is decided to

include the corresponding passage in the commentary to the final text of the article.

9. In the light of the foregoing considerations the Special Rapporteur proposes that the article be retained in its present form, with the changes referred to in paragraphs 5 and 7 above. Article 38 would, therefore, read as follows:

Article 38. Exemption from customs duties and inspection

1. The host State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

(a) Articles for the official use of the permanent mission;

(b) Articles for the personal use of the permanent representative or a member of the diplomatic staff of the permanent mission, including articles intended for his establishment.

2. The personal baggage of the permanent representative or a member of the diplomatic staff of the permanent mission shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. In such cases, inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

Article 39. Exemption from laws concerning acquisition of nationality

(a) *Observations of Governments and international organizations*

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

the subject-matter of article 39 should be dealt with in the draft articles themselves and not be relegated to an optional protocol. Some representatives supported the provisions of the article as useful and as marking a real advance in the definition of the legal status of permanent missions. Other representatives considered, however, that the article required further refinement and expressed doubts as to whether it was compatible with legislation which allowed persons to avoid the application of nationality laws by an act of personal will (option or repudiation).¹⁰⁹

2. In their written comments, three Governments addressed themselves to the question whether the provision of article 39 should be dealt with in the draft articles or in an optional protocol. One Government [Israel] referred to the remarks of its representative at the 1106th meeting of the Sixth Committee. Those remarks are reflected in the first sentence of the summary of the debate held in the Sixth Committee on article 39, included in the preceding paragraph. The remaining two Governments took a different position on the question.

3. The Government of Switzerland stated that it cannot agree with the views of the International Law Commission on article 39. Switzerland approves *per se* of the rule that the child of a

¹⁰⁹ *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 49.*

member of the permanent mission may not acquire the nationality of the host State by the operation of *jus soli*. However, the rule laid down in article 39 is wider in scope: it covers all provisions for the automatic acquisition of the nationality of the host State, whether or not they make such acquisition dependent on residence in that State.

For the reasons which guided the Vienna Conferences of 1961 and 1963, the Swiss Government recommends that this provision should be dealt with in a separate protocol.

Another Government [United Kingdom] pointed out that certain States, including its own,

have not ratified the Optional Protocol concerning Acquisition of Nationality adopted with the Vienna Convention on Diplomatic Relations in 1961. It would be preferable once again to include this provision in an optional protocol.

4. In its editorial suggestions (A/CN.4/L.162/Rev.1, section B), the Secretariat of the United Nations expressed the view that

The first line should be amended to read "Members of the permanent mission *who are not* nationals . . .", which is the simplest and clearest way of expressing this idea in English, and is closer to the French and Spanish texts. The words "not being nationals" may suggest the meaning "because they are not nationals" which is not intended here.

(b) *Observations of the Special Rapporteur*

5. As regards the question whether the provision of article 39 should form an integral part of the draft articles themselves or be dealt with rather in a separate protocol, the Special Rapporteur notes the arguments advanced by two Governments in favour of the latter alternative. However, he remains convinced of the soundness of the Commission's approach, as reflected in paragraph 3 of its commentary to the article.

6. The Special Rapporteur is in agreement with the editorial suggestion of the United Nations Secretariat reproduced in paragraph 4 above.

7. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, subject to the change in drafting referred to in the preceding paragraph. Article 39 would, therefore, read as follows:

Article 39. Exemption from laws concerning acquisition of nationality

Members of the permanent mission who are not nationals of the host State, and members of their families forming part of their household, shall not, solely by the operation of the law of the host State, acquire the nationality of that State.

Article 40. Privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff

(a) *Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 40 related

to the article as a whole and to the concrete provisions of the four paragraphs of the article.

Article as a whole

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

it was desirable to state that the privileges and immunities granted must be used for the sole purpose of assisting the persons enjoying them in the performance of their duties, and that any possibility of using such privileges or immunities for lucrative or other purposes extraneous to the requirements of the mission as such should be excluded.¹¹⁰

Paragraph 1

3. In its written comments, one Government [Canada] noted that in paragraph 1 of the article "the phrase 'or permanently resident in the host State' does not appear". In its opinion, the words "or permanently resident in" should be inserted after the words "if they are not nationals of".

Paragraphs 2 and 3

4. One Government [United Kingdom] stated that it "was not convinced of the justification for the privileges and immunities conferred by paragraph 2".

5. The secretariat of UNESCO stated the following:

[...] in article 40, paragraphs 2 and 3 [...] persons who are permanently resident in the host State are placed on the same footing as nationals of that State, which means that they are deprived of the essentials of diplomatic status. [...]

These provisions are regrettable. Such assimilation will enable States to refuse, or even to withdraw, privileges and immunities which have hitherto been granted. Moreover, permanent residence is not a concept which has a uniform interpretation (length of stay before taking up the post, conditions of stay, activity carried on, etc.); States might consider that a previous stay of one year, for example, could confer the status of permanent resident, within the meaning and for the purposes of the application of these provisions.

The Headquarters Agreement between France and UNESCO, dated 2 July 1954, has no clause of this nature; only the possession of French nationality places a restriction on certain privileges and immunities. Nevertheless, the French authorities, basing themselves on the provisions of the Vienna Convention on Diplomatic Relations (articles 37 and 38, which correspond to draft articles 40 and 41), did show a desire to place UNESCO officials who were considered to be permanent residents (one year's previous residence was sufficient for this) on the same footing as their French colleagues.

6. In its editorial suggestions the Secretariat of the United Nations took the view that, at the end of paragraph 3, the word "contained" should be replaced by "provided for". The Secretariat explained that this change would bring the wording into line with paragraph 2 of article 35 to which paragraph 3 of article 40 refers (A/CN.4/L.162/Rev.1, section B).

Paragraph 4

7. One Government [United Kingdom] held the view that "the private staff" referred to in paragraph 4 should not be accorded tax exemption.

¹¹⁰ *Ibid.*, para. 50.

8. As regards the expression "private staff", the Government of Switzerland referred to its comment concerning article 35.¹¹¹

(b) *Observations of the Special Rapporteur*

9. The Special Rapporteur notes that in the comment made in the Sixth Committee which is summarized above in paragraph 2 the expression "in the performance of their duties" is used. He therefore assumes that the comment referred exclusively to the members of the administrative and technical staff, to the members of the service staff and to the private staff, dealt with in paragraphs 2, 3 and 4 of article 40 and that it did not concern the members of the family dealt with in paragraphs 1 and 2. If that assumption is correct, he believes that the text of article 40 to a great extent meets the point made in the Sixth Committee. In effect paragraph 2 expressly states that the immunity of the members of the administrative and technical staff from the civil and administrative jurisdiction of the host State "shall not extend to acts performed outside the course of their duties". The immunity granted to the service staff in paragraph 3 is limited to acts "performed in the course of their duties". Under paragraph 4 the host State is only obliged to grant to the private staff exemption from dues and taxes on the emoluments they receive by reason of their employment.

10. The Special Rapporteur is of the opinion that the adoption of the suggestion reflected in paragraph 3 above would constitute a serious departure from the corresponding provision of the Vienna Convention on Diplomatic Relations and that such a departure has not been justified in the present case.

11. As regards the comments made by one Government and by UNESCO concerning paragraphs 2 and 3, reflected in paragraphs 4 and 5 above, the Special Rapporteur observes that in so far as they imply deletion of the provision, in the first case, or expansion of its scope, in the second case, both are also at variance with the corresponding provisions of the Convention on Diplomatic Relations. Moreover, the position of UNESCO under the Headquarters Agreement with France is entirely safeguarded by article 4 of the present draft articles.

12. The Special Rapporteur is in agreement with the editorial suggestion of the United Nations Secretariat reproduced in paragraph 6 above.

13. With respect to the view reflected in paragraph 7 above, concerning paragraph 4 of the article, the Special Rapporteur, while pointing out that the text of paragraph 4 refers to "private staff" and not to "private servants", is of the view that such a suggestion constitutes an unwarranted departure from the corresponding provision of the Vienna diplomatic precedent. As regards the comment referred to in paragraph 8 above, the Special Rapporteur recalls his observations thereon in the context of article 35.¹¹²

14. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, subject to the drafting change referred to in paragraph 12 above. Article 40 would, therefore, read as follows:

Article 40. Privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff

1. The members of the family of the permanent representative forming part of his household and the members of the family of a member of the diplomatic staff of the permanent mission forming part of his household shall, if they are not nationals of the host State, enjoy the privileges and immunities specified in articles 30 to 38.

2. Members of the administrative and technical staff of the permanent mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 30 to 37, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 32 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1 of article 38, in respect of articles imported at the time of first installation.

3. Members of the service staff of the permanent mission who are not nationals of or permanently resident in the host State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption provided for in article 35.

4. Private staff of members of the permanent mission shall, if they are not nationals of or permanently resident in the host State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the permanent mission.

Article 41. Nationals of the host State and persons permanently resident in the host State

(a) *Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 41 related to expressions common to both paragraphs of the article, and to each of those paragraphs.

2. The secretariat of UNESCO expressed concern at the expression "permanently resident in" appearing in paragraphs 1 and 2 of article 41. Its comments on the matter have been reproduced under article 40.¹¹³

Paragraph 1

3. In the course of the debate in the Sixth Committee it was pointed out that

paragraph 1 of article 41 contained a drafting mistake which had appeared in the French text of the 1961 Vienna Convention on Diplomatic Relations, but had been corrected in the 1963 Vienna Convention on Consular Relations. It should be stated in the French

¹¹¹ See above, Article 35, para. 5 of the observations.

¹¹² *Ibid.*, para. 13.

¹¹³ See above, Article 40, para. 5 of the observations.

text that the persons concerned “*ne bénéficient que de l’immunité de juridiction et de l’inviolabilité pour les actes officiels accomplis dans l’exercice de leurs fonctions*”.¹¹⁴

4. In their written comments two Governments made similar remarks concerning the text of paragraph 1. Those remarks were as follows:

The word “only” should be replaced after “shall enjoy” instead of before “in respect” (cf. the English text of article 38 of the Vienna Convention on Diplomatic Relations and article 40 of the Convention on Special Missions) [United Kingdom].

Article 41, paragraph 1, perpetuates a drafting error which occurred in the French text of that Convention [on Diplomatic Relations] but which was corrected in article 71 of the Convention on Consular Relations; the paragraph in question should accordingly read: “[. . .] shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts [. . .]” [Belgium].

5. In its editorial suggestions, the Secretariat of the United Nations included the following passage concerning paragraph 1:

In the fourth line the words “who are nationals” should be replaced by “if they are nationals”. The corresponding passage of the Convention on Diplomatic Relations (article 38, para. 1) reads “a diplomatic agent who is a national . . .” which makes it clear that all diplomatic agents are not (A/CN.4/L.162/Rev.1, section B).

Paragraph 2

6. The Government of Switzerland referred to the comments it made in the context of article 35 concerning the expression “private staff”.¹¹⁵

(b) Observations of the Special Rapporteur

7. As regards the comments of the secretariat of UNESCO referred to in paragraph 2 above, the Special Rapporteur wishes to recall his observations thereon in the context of article 40.¹¹⁶

8. The Special Rapporteur considers that the comments reflected in paragraphs 3 and 4 above, concerning paragraph 1 of the article, are well founded. Indeed, there is a serious lacuna in the present drafting of paragraph 1. The paragraph deals only with the immunity from jurisdiction and the inviolability of the persons referred to therein and does not state whether those persons enjoy any other privileges and immunities. No such lacuna exists in the English texts of the corresponding provisions of the Vienna Convention on Diplomatic Relations (article 38, para. 1), the Vienna Convention on Consular Relations (article 71, para. 1) and the Convention on Special Missions (article 40, para. 1), since, in those provisions, the word “only” is placed after “shall enjoy”. He therefore proposes that it be so placed in the English text of paragraph 1 of article 41 of the present draft and that the corresponding changes should be made in the French, Spanish and Russian texts of the paragraph.

9. With respect to the editorial suggestion of the United Nations Secretariat reproduced in paragraph 5 above, the

¹¹⁴ *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 51.*

¹¹⁵ See above, Article 35, para. 5 of the observations.

¹¹⁶ See above, Article 40, para. 11 of the observations.

Special Rapporteur fails to understand why if, as asserted by the Secretariat, the words “who is a national” used in the singular in paragraph 1 of article 38 of the Convention on Diplomatic Relations make it “clear that all diplomatic agents are not”, the words “who are nationals” used in the plural in paragraph 1 of article 41 of the present draft should not lead to the same conclusion. In this connexion the Special Rapporteur wishes to note that the proposed replacement of the words “who are nationals” by “if they are nationals” has been made in reference to paragraph 1 of the present article only, even though the words “who are nationals” also appear in paragraph 2 of both the present article and article 38 of the Convention on Diplomatic Relations. In these circumstances and having in mind that the use of the words “who are nationals” in paragraph 1 of article 41 is due to the plurality of subjects to which they refer, unlike the case of paragraph 1 of article 38 of the Vienna Convention, the Special Rapporteur does not find enough justification to make him support the suggested change.

10. As regards the comments of the Government of Switzerland referred to in paragraph 6 above, the Special Rapporteur recalls his observations thereon in the context of article 35.¹¹⁷

11. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, subject to the drafting changes referred to in paragraph 8 above. Article 41 would, therefore, read as follows:

Article 41. Nationals of the host State and persons permanently resident in the host State

1. Except in so far as additional privileges and immunities may be granted by the host State, the permanent representative and any member of the diplomatic staff of the permanent mission who are nationals of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of their functions.

2. Other members of the staff of the permanent mission and persons on the private staff who are nationals of or permanently resident in the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those members and persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 42. Duration of privileges and immunities

(a) Observations of Governments and international organizations

1. The comments made by Governments and international organizations in connexion with article 42 related to all the paragraphs of the article and to the question raised in paragraph 2 of the Commission’s commentary on the article.

Paragraph 1

2. One Government [Israel] noted in its written comments that:

¹¹⁷ See above, Article 35, para. 13 of the observations.

The Vienna Convention on Diplomatic Relations [article 39, paragraph 1] reads: "from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed". On the other hand the present text reads: "from the moment when his appointment is notified to the host State". No reason for this change is given in the commentary, and [that Government] feels that the earlier text is preferable as being more precise.

3. Another Government [Canada] suggested that:

Article 42, paragraph 1 should be amended; according to the present text, a person could be entitled to privileges and immunities from the moment his appointment is notified to the host State by either the organization or the sending State. This paragraph creates an artificial relationship between the host State and the sending State. Consequently, we consider that only notification by the organization should be relevant.

4. In its editorial suggestions the Secretariat of the United Nations expressed the view that in the fourth line of paragraph 1 it would be better to say "if *he is* already in its territory" instead of "if already in its territory" (A/CN.4/L.162/Rev.1, section B).

Paragraph 2

5. With respect to the omission in paragraph 2 of the expression "but shall subsist until that time, even in case of armed conflict", which appears in paragraph 2 of article 39 of the Vienna Convention on Diplomatic Relations, one Government [Yugoslavia] expressed the following view in its written comments:

As regards the duration of privileges and immunities, the incorporation in their entirety of the basic provisions of article 39 of the Convention on Diplomatic Relations would be justified. The reason is that, as experience has shown, representatives of States, especially those accredited to international organizations, occasionally find themselves in a situation where they cannot perform their normal functions, not only in the case of armed conflict, but also in the case of a grave deterioration in international relations.

6. The Secretariat of the United Nations made the following editorial suggestions concerning paragraph 2 of article 42:

At the end of the first sentence of paragraph 2, it would be better to say "or on the expiry". See paragraph 3 of this article. In the last line of paragraph 2 the words "continue to" are redundant and should be deleted. These words are taken from paragraph 2 of article 39 of the Convention on Diplomatic Relations. Their *raison d'être* there is the phrase "but shall subsist until that time, even in case of armed conflict", which appears at the end of the first sentence of the paragraph. That phrase is not reproduced in paragraph 2 of article 42 (A/CN.4/L.162/Rev.1, section B).

Paragraphs 2 and 3

7. In the course of the debate in the Sixth Committee, the use of the expression "a reasonable period" in paragraph 2 of article 42 "was criticized on the basis that it was not clear what interpretation should be given to it".¹¹⁸ A similar view was expressed by a Government [Madagascar] in its written comments.

8. The Secretariat of the United Nations noted in its editorial suggestions that

Although the expression "the country" in paragraphs 2 and 3 is taken from article 39 of the Vienna Convention [on Diplomatic Relations], it would be preferable to replace it by "the territory of the host State" which appears in article 108 [of the present draft] (A/CN.4/L.162/Rev.1, section B).

Paragraph 4

9. One Government [Canada] stated in its written comments that

It is understood that the movable property of a member of the permanent mission or a member of his family referred to in paragraph 4 does not include "property of an investment nature".

10. The Secretariat of the United Nations made the following editorial suggestion:

For the sake of uniformity and conciseness the last sentence of paragraph 4 should be amended to bring it into line with article 109, paragraph 2. It would then read "Estate, succession and inheritance duties shall not be levied on movable property *which is in the host State solely because* of the presence there of the deceased as a member of the permanent mission or of the family of a member of the permanent mission".

The Secretariat noted that

As presently drafted, that sentence is taken from the corresponding provision of the Convention on Diplomatic Relations (article 39, para. 4). On the other hand, the Convention on Special Missions uses the formula "which is in the receiving State solely because" (article 44, para. 2). (A/CN.4/L.162/Rev.1, section B.)

The question raised in paragraph 2 of the Commission's commentary on article 42

11. In paragraph 2 of its commentary on article 42 the Commission noted that paragraphs 1 and 2 of the article relate to persons who enjoy privileges and immunities in their official capacity. It added:

For those who do not enjoy privileges and immunities in their official capacity other dates may apply, viz. the dates of commencement and termination of the relationship which constitutes the grounds for the entitlement. The Commission noted that the Vienna Convention on Diplomatic Relations did not contain any specific provisions on the question, whereas the Vienna Convention on Consular Relations did so in article 53. The Commission wished to invite the views of governments as to whether it was desirable to include a provision on these lines.

12. Four Governments responded to the Commission's invitation. One Government [Sweden] considered that,

Prima facie it would seem preferable to have a special provision on the matter. The fact that the more recent of the two [Vienna] Conventions contains such a provision might perhaps also be taken as an indication that experience has shown it to be desirable.

Another Government [Finland] took the view that

It would perhaps be well-founded to include also provisions regarding the commencement and termination of privileges and immunities received on other grounds than the official post, for example, through family membership, in the same way as has been done in the Convention on Consular Relations.

Two other Governments [Madagascar and Netherlands] likewise expressed support for the inclusion of such a provision.

¹¹⁸ Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 52.

(b) *Observations of the Special Rapporteur*

13. With respect to the comments quoted in paragraph 2 above, the Special Rapporteur observes that the expression “notified to the Ministry of Foreign Affairs [of the receiving State] or such other ministry as may be agreed” is used in article 39 of the Vienna Convention on Diplomatic Relations because the same expression appears in article 10 of that Convention, relating to notifications. Since that expression does not appear in the article on notifications in the present draft—article 17—it would not seem logical to use it in article 42.

14. With respect to the comments quoted in paragraph 3 above, the Special Rapporteur believes that the present text is in conformity with the provisions of paragraphs 3 and 4 of article 17 of the present draft. In this connexion, the Special Rapporteur wishes to point out that as regards notifications under article 17 the obligation of the sending State is in relation to the organization; with respect to the host State, the sending State is granted a right. Further, that the organization has the obligation to transmit to the host State the notifications provided for in the article, received from the sending State. It is clear, therefore, that under article 17, the host State is, in all cases, the ultimate recipient of the notifications emanating from the sending State. In these circumstances, the provision of paragraph 1 of article 42, in so far as it specifically covers the right of the receiving State to make the notification of appointment directly to the host State, would ensure that the enjoyment of privileges and immunities would not be affected by delays in the transmission to the host State, by the organization, of the notification in question.

15. The Special Rapporteur is in agreement with the editorial suggestion of the United Nations Secretariat reflected in paragraph 4 above.

16. The comments quoted in paragraph 5 above relate to the question of the possible effects of exceptional situations¹¹⁹—a question which is dealt with elsewhere in the present report.¹²⁰

17. The Special Rapporteur is in agreement with the editorial suggestions of the United Nations Secretariat reproduced in paragraph 6 above.

18. As regards the criticism of the use of the expression “a reasonable period”, recorded in paragraph 7 above, the Special Rapporteur considers that the observations he made in the context of article 23¹²¹ are equally applicable in the case of expressions such as “reasonable” or “normally”, the latter found also in paragraph 2 of the article. The Special Rapporteur wishes also to recall that similar expressions are found in article 39 of the Convention on Diplomatic Relations; however, no comments were made by Governments drawing attention to difficulties encountered by them in practice as regards the

application of the provision of the Vienna Diplomatic precedent.

19. The Special Rapporteur expresses his agreement with the editorial suggestion of the United Nations Secretariat reflected in paragraph 8 above to replace the expression “the country” by “the territory of the host State” in paragraphs 2 and 3 of the article. However, he wishes to point out that the expression “the country” appears also in paragraph 4 of the article. The Special Rapporteur appreciates the shades of meaning of that expression as it is used in paragraph 4 and both in paragraphs 2 and 3, and understands, therefore, why the Secretariat refrained from making its suggestion applicable also to paragraph 4. Nevertheless, for the sake of consistency and uniformity particularly as regards paragraphs of the same article, the Special Rapporteur considers that the expression “the country” in paragraph 4 should likewise be replaced. As the expression “host State” appears already three times in paragraph 4, he is of the view that the words “its territory” be substituted for “the country” in that paragraph.

20. With respect to the comment referred to in paragraph 9 above, the Special Rapporteur observes that no indication was given as to what is meant by the expression “property of an investment nature”. He is, therefore, not in a position to give a reply in the abstract to the question whether such property is “movable property” in the sense of paragraph 4 of the article.

21. The Special Rapporteur notes the explanation of the United Nations Secretariat that its suggested formula for paragraph 4 of the article, quoted in paragraph 10 above, is, with the requisite adaptation, the same used in article 44, paragraph 2 of the Convention on Special Missions. In this connexion, the Special Rapporteur wishes to indicate that he appreciates the difficulties created by the wording of the second sentence of paragraph 4 of article 39 of the Vienna Convention on Diplomatic Relations, on which article 42 of the present draft is based, which prompted the use of a different formula in the corresponding provision of the Convention on Special Missions. However, he is not entirely convinced that the use of this latter formula would render the meaning of paragraph 4 of article 42 any clearer than it is as presently drafted. He therefore submits for the consideration of the Commission, the following wording for the second sentence of paragraph 4 of the article:

Estate, succession and inheritance duties shall not be levied on movable property which, at the time of the death of a member of the permanent mission or of a member of the family of a member of the permanent mission, was in the host State solely because of the presence there of the deceased.

22. In view of the comments reflected above in paragraph 12, the Special Rapporteur has deemed it appropriate to submit for the Commission’s consideration the text for a new provision on the question referred to by the Commission in paragraph 2 of its commentary on article 42, based on the corresponding provision (paragraph 2 of article 53) of the Vienna Convention on Consular Relations. The new provision has been inserted as paragraph 2 of the text proposed below by the Special

¹¹⁹ *Yearbook of the International Law Commission, 1969*, vol. II, p. 206, document A/7610/Rev.1, para. 18.

¹²⁰ See above, p. 15, document A/CN.4/241 and Add.1 and 2, paras. 30-31.

¹²¹ See above, Article 23, para. 8 of the observations.

Rapporteur for article 42. As a result of that insertion the provisions of the first sentence of the former paragraph 2 of article 42 have been redrafted in the light of paragraph 3 of article 53 of the Vienna Convention and constitute the new paragraph 3 of the text of article 42. The provisions of the second sentence of the former paragraph 2 form the new paragraph 4. For the sake of clarity and in order to follow the wording of article 53 of the Convention on Consular Relations, the Special Rapporteur suggests that, in those latter provisions the words "from jurisdiction" should be added after "immunity" and the words "without limitation of time" after "shall subsist". These suggestions are included between brackets in the text proposed below. The former paragraphs 3 and 4 of article 42 have been renumbered 5 and 6 in the text proposed below. Finally, the word "person" in paragraph 1 of the article has been replaced by "member of the permanent mission".

23. In view of the foregoing the Special Rapporteur proposes the following text for article 42:

Article 42. Duration of privileges and immunities

1. Every member of the permanent mission entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State on proceeding to take up his post or, if he is already in its territory, from the moment when his appointment is notified to the host State by the Organization or by the sending State.

2. Members of the family of a member of the permanent mission forming part of his household and members of his private staff shall receive the privileges and immunities to which they are entitled from the date from which he enjoys privileges and immunities in accordance with paragraph 1 of this article or from the date of their entry into the territory of the host State or from the date of their becoming a member of such family or private staff, whichever is the latest.

3. When the functions of a member of the permanent mission have come to an end, his privileges and immunities and those of a member of his family forming part of his household or a member of his private staff shall normally cease at the moment when the person concerned leaves the territory of the host State or on the expiry of a reasonable period in which to do so, whichever is sooner. In the case of the persons referred to in paragraph 2 of this article, their privileges and immunities shall come to an end when they cease to belong to the household or to the private staff of a member of the permanent mission provided, however, that if such persons intend leaving the territory of the host State within a reasonable period thereafter, their privileges and immunities shall subsist until the time of their departure.

4. However, with respect to acts performed by a member of the permanent mission in the exercise of his functions, immunity [from jurisdiction] shall subsist [without limitation of time].

5. In case of the death of a member of the permanent mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the territory of the host State.

6. In the event of the death of a member of the permanent mission not a national of or permanently resident in the host State or of a member of his family forming part of his household, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in its territory, the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property which, at the time of the death of a member of the permanent mission or of a member of the family of a member of the permanent mission, was in the host State solely because of the presence there of the deceased.

Article 43. Transit through the territory of a third State

(a) Observations by Governments and international organizations

1. The comments made by Governments and international organizations in connexion with article 43 related to the article as a whole and specifically to paragraphs 1, 2 and 4 of the article.

Article as a whole

2. In its written comments, one Government [Sweden] observed that

The immunities to be accorded by a third State under this article are made dependent on the condition that the person enjoying them was granted by that State, "a passport visa if such visa was necessary". During the discussion in the Commission the question was raised of deleting that condition, and arguments were presented for and against the requirement of a visa. A case could be made for the omission of the said requirement, in the cases where the transit country is a member of the organization. It is questionable, however, whether this would be realistic. States may not wish to dispense with their option of requiring transit visa as a condition for an obligation to guarantee unimpeded and inviolable transit.

Paragraph 1

3. One Government [Israel] suggested that the last sentence of paragraph 1 of the article be reworded as follows:

The same shall apply only in the case of any members of the family of the permanent representative or members of the diplomatic staff of the permanent mission enjoying privileges and immunities who are accompanying them or travelling separately to join them or to return to their own country.

In its view "the substitution of 'any members' for 'the members' would bring the text into line with that of article 40 of the Vienna Convention on Diplomatic Relations".

Paragraph 2

4. In its editorial suggestions, the Secretariat of the United Nations expressed the view that

The words "and of members" should be replaced by "or of members" since the sentence is negative. As it stands, the paragraph means that third States may not hinder both the members and their families, which implies that they may hinder either one of them without the other.

The Secretariat pointed out that the expression "and of members" is taken from the Convention on Diplomatic Relations (article 40, para. 2). The expression "or of members" appears in the Convention on Special Missions (article 42, para.2). (A/CN.4/L.162/Rev.1, section B).

Paragraph 4

5. The Secretariat of the United Nations also suggested that in paragraph 4 "the words 'whose presence' should be replaced by 'when their presence' since the presence of the persons and objects mentioned is not always due to *force majeure*". The Secretariat observed that "the expres-

sion 'whose presence' appears in the Convention on Diplomatic Relations (article 40, para. 4). The Convention on Special Missions uses the expression 'when the use of the territory' (article 42, para. 5)" (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

6. As regards the comments reflected in paragraph 2 above, the Special Rapporteur recalls the view he expressed during the discussion in the Commission to the effect that

There was perhaps a case in positive international law, by virtue of Articles 104 and 105 of the United Nations Charter, for imposing on third States the obligation to permit transit. Since the question belonged to the progressive development of international law, it was for the Commission to decide whether a positive obligation existed, or whether international law did not yet impose it.¹²²

As the commission's position on the question has been reflected in the text of the article as presently drafted, in the light of the explanations given in paragraph 4 of its commentary to the article, the Special Rapporteur defers to the Commission's decision, also in so far as it relates to the exceptional situation of members of the permanent mission who are nationals of a land-locked State, with which the comments referred to in paragraph 2 above generally concur.

7. With respect to the suggested rewording of the last sentence of paragraph 1, reflected in paragraph 3, above, the Special Rapporteur agrees with the contention that "the substitution of 'any members' for 'the members' would bring the text into line with that of article 40 of the Vienna Convention on Diplomatic Relations". However, he is of the view that such contention supports only the change to which it relates and not the remaining changes which the suggested rewording introduces to the Vienna diplomatic precedent. The Special Rapporteur wishes to point out that with the exception of the word "the" the last sentence of paragraph 1 of article 43 textually reproduces, with the requisite adaptations, the provisions of the corresponding article (article 40) of the Convention on Diplomatic Relations. Also, that paragraph 1 of article 42 of the Convention on Special Missions follows the Vienna diplomatic precedent as regards the placing of the members of the phrase constituting the last sentence. In the opinion of the Special Rapporteur the suggested rewording may give the impression that the requirement of "enjoying privileges and immunities" concerns the members of the diplomatic staff and not the members of the family. Also, the use of the word "them" instead of "his" may be interpreted as implying that the members of the family must accompany, or travel separately to join, both the permanent representative and the members of the diplomatic staff in order to be covered by the provision of article 43. The Special Rapporteur recognizes that as presently drafted, the last sentence of paragraph 1 may not be the most felicitous text. Nevertheless, he believes that it brings forth the meaning intended in more clear and unambiguous terms than does the suggested reword-

ing. He would, however, have no objection to the replacement of the present text by one corresponding to the text used in the last sentence of paragraph 1 of article 42 of the Convention on Special Missions, substituting "one of the persons" for "the person".

8. The Special Rapporteur finds merit in the editorial suggestions of the United Nations Secretariat concerning paragraphs 2 and 4 of the article, reflected in paragraphs 4 and 5 above.

9. In the light of the foregoing, the Special Rapporteur proposes the following amended text for article 43:

Article 43. Transit through the territory of a third State

1. If the permanent representative or a member of the diplomatic staff of the permanent mission passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying one of the persons referred to in this paragraph, whether travelling with him or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the passage of members of the administrative and technical or service staff of the permanent mission, or of members of their families through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the host State. They shall accord to the couriers of the permanent mission who have been granted a passport visa if such visa was necessary, and to the bags of the permanent mission in transit the same inviolability and protection as the host State is bound to accord.

4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to the official communications and bags of the permanent mission, when their presence in the territory of the third State is due to *force majeure*.

Article 44. Non-discrimination

(a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee a number of representatives agreed that article 44

should be removed to the end of the whole draft. Some representatives supported the provisions of the article and the view expressed in paragraph 4 of the Commission's commentary that the privileges and immunities granted should not be subject to particular conditions imposed, on a basis of reciprocity, upon the diplomatic missions of particular States. Other representatives, however, considered that, in examining certain exceptional circumstances, such as the participation in an organization of States that were not recognized, it would be found that the rule had sometimes been varied on grounds of the lack of reciprocity.¹²³

2. In its written comments, one Government [Yugoslavia] indicated that it regarded

¹²² *Yearbook of the International Law Commission, 1969*, vol. I, p. 36, 997th meeting, para. 15.

¹²³ *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b)*, document A/7746, para. 53.

the introduction of the principle of non-discrimination as being of vital importance for the draft articles as a whole. To ensure the scrupulous application of the principle in practice, the draft should provide for the protection of the State sending the permanent mission against discrimination by the host State such as could result, for example, from the absence of diplomatic relations.

In this connexion, it pointed out that

The host State has already been given special protection in draft article 45, and there is no reason for making the observance of the principle of non-discrimination subject to special conditions.

3. Another Government [Belgium], however, considered that this article on non-discrimination was "unacceptable", unless provision was made for the principle of reciprocity. In its view, it was

hardly admissible that the permanent mission of a sending State should be able to enjoy a more favourable status than the same State's diplomatic mission although, of course, the advantages deriving from the status of representative of a State under the statutory rules of the organization must in any event be safeguarded. However, while the status of representative of a State as such must be determined in accordance with those rules, diplomatic status is a matter involving relations between the host State and the sending State.

4. In the course of the debate in the Sixth Committee a rewording of the text was suggested, as follows: "In the application of the provisions of the present articles, there shall be no discrimination against any State".¹²⁴

5. The same rewording as suggested in the Sixth Committee was proposed by one Government [Netherlands] in its written comments on the article.

6. Another Government [Israel] noted that article 44 is worded in the passive: "no discrimination shall be made". The corresponding passage in article 47, paragraph 1, of the Vienna Convention on Diplomatic Relations is worded in the active: "the receiving State shall not discriminate". Paragraph 6 of the commentary explains this difference by the fact that in the case of the present articles the obligation applies not merely to the host State, but also to the Organization. The Government [. . .] considers that it would be better if this were made explicit, and suggests redrafting the article along the following lines: "In the application of the provisions of the present articles, no discrimination shall be made as between States by the host State or the Organization."

(b) *Observations of the Special Rapporteur*

7. As regards the question of the placement of the article mentioned during the debate in the Sixth Committee, the Special Rapporteur wishes to refer to his observations on the contents and title of part I.¹²⁵

8. With respect to the question of reciprocity the Special Rapporteur wishes merely to refer to the Commission's commentary on article 44 (paras. 4 and 5). That commentary clearly explains why the rules on reciprocity applicable to bilateral diplomacy have no relevancy in multilateral diplomacy.

9. The observations (quoted in para. 2 above) on the necessity to protect the sending State against discrimina-

tion resulting from the absence of diplomatic relations concern the question of the possible effects of exceptional situations, which is examined elsewhere in the present report.¹²⁶

10. As regards the suggestion for a change in the text, made in the comments referred to in paragraph 6 above, the Special Rapporteur observes that the amended version would not cover third States. He wishes to recall in this connexion that the Commission pointed out in paragraph 6 of its commentary on the article that the article is formulated in such broad terms as to make its field of application cover all the obligations provided for in the draft, whether assumed by the host State, the Organization or third States.¹²⁷

11. There appears to be no substantial difference between the present text of article 44 and the rewording suggested in the Sixth Committee. The Special Rapporteur notes, however, that the present text uses the language appearing in paragraph 1 of article 49 of the Convention on Special Missions. In order to facilitate the task of those who will be called upon to interpret both that Convention and the instrument embodying the present articles, the Special Rapporteur suggests that no rewording should be made of the text of article 44.

12. In view of the foregoing, the Special Rapporteur proposes the retention of the article in its present form. Article 44 would, therefore, read as follows:

Article 44. Non-discrimination

In the application of the provisions of the present articles, no discrimination shall be made as between States.

SECTION 3. CONDUCT OF THE PERMANENT MISSION
AND ITS MEMBERS

**Article 45. Respect for the laws
and regulations of the host State**

(a) *Observations of Governments
and international organizations*

1. The comments made by Governments and international organizations in connexion with article 45 related to the article as a whole and to each of the three paragraphs of the article.

Article as a whole

2. In the course of the debate in the Sixth Committee it was pointed out in general that article 45 "was the result of a compromise and had the merits and defects of a compromise".¹²⁸

Paragraph 1

3. Also in the course of the debate in the Sixth Committee the opinion was expressed that

¹²⁴ *Ibid.*

¹²⁷ Italics supplied by the Special Rapporteur.

¹²⁸ *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b), document A/7746, para. 54.*

¹²⁴ *Ibid.*

¹²⁵ See above, p. 15, document A/CN.4/241 and Add.1 and 2, paras. 30-31.

The rule in paragraph 1 might be misinterpreted to mean that failure by a member of the permanent mission to respect the laws and regulations of the host State would absolve that State from the obligation to respect the immunity which he enjoyed.¹²⁹

Paragraph 2

4. In the course of the debate in the Sixth Committee the question was raised whether, in the absence of the *persona non grata* procedure, and since the functions of a representative to an international organization were defined to a large extent by the draft articles themselves, the sending State ought not to be obliged to recall a representative in case of a gross breach on his part of the obligations imposed on him by the draft articles.¹³⁰

Surprise was voiced that the draft articles

did not contain a provision for the possible expulsion of persons enjoying immunity, several examples of which could be found in existing agreements. The suggestion was also made that a careful search be made for another formula to replace the adjective "manifest" which might be the subject of a real dispute.¹³¹

5. In its written comments the Government of Switzerland indicated that it appreciated "the intention of the Commission in inserting in article 45 a paragraph on the recall of members of the permanent mission". Another Government [Israel] also stated that it appreciated "the problems with which the International Law Commission is endeavouring to grapple" and considered that

there is no objection in principle to recognizing that under the circumstances envisaged the host State should have the right to request the sending State to take appropriate steps. Any dispute arising out of such a request would be dealt with under the provisions of article 50.

6. In the opinion of one Government [Sweden] it was "open to doubt whether the paragraph would fulfil" the expectation referred to in paragraph 3 of the commentary to the article. In its view several questions might be raised such as:

What happens if the host State asserts and the sending State denies that the person has committed a "grave and manifest violation of the criminal law of the host State"? Does the person have to leave or could he stay? Is it reasonable to provide that only in case of grave and manifest violation of the criminal law the host State is entitled to demand his recall? What will happen if the person concerned, in violation of paragraph 1 of article 45, makes political propaganda involving the host State or, in violation of article 46, exercises a professional or commercial activity? Are these provisions without a sanction?

Similarly, another Government [Australia], after pointing out that the draft articles contain no provision for the declaration by the host State of an unwelcome representative to the international organization as *persona non grata*, observed that

This omission is apparently intended to safeguard the independent exercise of their functions by representatives to the international organizations and to isolate them from the exercise of pressures by the host State. This, of course, must be a primary object: but the ambit of the functions of a representative to an international organization is defined to a large extent by the terms of the draft

articles themselves and a question arises whether the sending State ought not be obliged to recall a representative (or whether indeed a host State, after consultation with the organization, should not have the right to expel a representative) in the case of a gross breach by the representative of the obligations imposed on him by the articles—for example, in the case of breach by a representative to an international organization of his duty not to interfere in the internal affairs of the host State. The draft articles do not adopt this approach but oblige the sending State to recall a representative or otherwise deal with him only in the case of a grave and manifest violation of the criminal law of the host State. Furthermore, what is a grave violation of the criminal law may be the subject of general agreement; but whether in any particular case, a violation of that law is manifest may be the subject of real dispute. Accordingly, if this provision is to be retained, perhaps some other formula should be chosen.

7. One Government [United Kingdom] took the view that "when possible, Governments should be encouraged to waive immunity rather than simply recall the person concerned". Another Government [Belgium], considering that paragraph 2 of the article did not "go far enough", took the view that "the host State should be able to declare [the person enjoying privileges and immunities] *persona non grata*". Another Government [Netherlands], considering that the position of the host State was insufficiently guaranteed in the draft, concluded that, *inter alia*, the provision of paragraph 2

would have to apply not only in case of grave and manifest violation of the *criminal law* of the host State but also in case of grave and manifest violation of the obligations laid down in paragraph 1 of that article.

8. The Government of Switzerland expressed the view that

The obligation laid upon the sending State depends upon its goodwill and upon its interpretation of the violations. When, as has in fact occurred, the violation consists of an infringement of the security of the host State, the sending State can hardly be expected to recall the offender spontaneously. Yet recall is absolutely necessary in such cases.

It therefore suggested "two possible ways of replacing article 45, paragraph 2, by a more satisfactory provision": one would consist in the inclusion of

(a) A general provision on the protection of the security of the host State, such as those included in several headquarters agreements; this could read as follows:

"Nothing in these articles shall affect the right of the host State to take the necessary precautions in the interest of its security. In taking the necessary measures, which should be proportionate to the needs, the host State shall take due account of the interests of the organization and of the sending State. It shall enter into contact with them, as soon as circumstances permit, with a view to reaching agreement on appropriate measures to ensure the protection of those interests."

(b) For the second suggestion see paragraph 11 below.

9. Another Government [Israel] considered that on the basis of its general comments (see para. 5 above) "a more satisfactory formulation" of article 45 could read:

"If the host State has strong grounds for believing that a criminal offence involving ignominy has been committed against its laws by any person enjoying immunity from criminal jurisdiction, then it may notify the sending State of this, and the latter shall in that case either waive the aforesaid person's immunity, recall him, terminate his functions with the mission or secure his departure, as appropriate."

¹²⁹ *Ibid.*, para. 55.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, para. 56.

The Government indicated that the phrase "a criminal offence involving ignominy" had been explained in its observations on article 10 and observed that

Should the suggestions made for that article find expression in the Commission's final text, it is believed that article 45 should be coordinated with it.

10. The Secretariat of the United Nations observed that

Under the present formulation of the draft articles, if there was a serious abuse of the privilege of residence which does not constitute a grave and manifest violation of criminal law—for example, conspicuous interference in the internal political affairs of the host State, or running an extensive private business without permission, or even a long series of minor offences showing contempt for the local law—the only thing the host State could do to stop the abuse would be to consult with the sending State and the organization under article 50. If, however, duties are imposed only on the individuals concerned (as under the present article 45, paragraph 1, and article 46) and not on the sending State, the latter would have no legal obligation to take action, and the consultation might not be fruitful.

The United Nations Secretariat therefore suggested that the obligation laid down in paragraph 2 "be broadened to bring it into line with the corresponding provision of the Headquarters Agreement of the United Nations" (section 13, para. (b)) where the language is "in case of abuse of such privileges of residence by any such person in activities in the United States outside his official capacity". The Secretariat pointed out that this language had been followed in other headquarters agreements and conference agreements. In its view, therefore, the practice in the wording of agreements supported a broader formulation than that in the present draft. The Secretariat further observed that

There have also been cases of abuse of the privilege of residence, for example by engaging in commercial activity in the host State without that State's permission, which have led a sending State to recall the persons involved after protest by the host State.

The Secretariat considered that the incorporation of its suggestion would make the provision

cover any serious abuse of the privilege of residence, whether or not it constitutes a grave and manifest violation of criminal law, subject only to the proviso already included in the last sentence of paragraph 2.

11. The Government of Switzerland also considered that one of the two possible ways of replacing paragraph 2 would be to include

a provision on the procedure to be followed in the event of expulsion, such as that contained in section 13 of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations.

12. With reference in particular to the second sentence of paragraph 2, in the course of the debate in the Sixth Committee it was considered that

the provisions of paragraph 2 did not fully guarantee to members of permanent missions the free performance of their functions, since they did not always perform their functions on the premises of the organization or the permanent mission.¹³⁹

13. In its written comments the Government of Switzerland explained that one of the reasons why it regarded

paragraph 2 inadequate was that it excluded "offences committed within the premises of the mission, which implies that such offences do not fall within the jurisdiction of the host State". Another Government [Belgium] considered that "the last sentence of paragraph 2 reintroduces the principle of extritoriality, although this had been dropped in the Convention on Diplomatic Relations". Referring also to the second sentence of paragraph 2, one Government [Sweden] questioned the desirability of the provision contained therein. In its view,

It was one thing that the person concerned should not be prosecuted, but it [was] another matter whether there should not be the sanction of recall. It can hardly be in the interest of the organization concerned that a person who has committed a serious crime in exercising his functions—if such a situation is at all conceivable—should continue to serve as a member of a permanent mission. It is difficult, moreover, to imagine that the activities of the mission would be seriously disturbed by such a person being recalled.

14. In this connexion, the secretariat of UNESCO expressed the view that

It is normal that the obligations it lays down should not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission within the organization but it is not normal that this non-application should also cover an act performed "within [...] the premises of a permanent mission". The important point was that the act should have been performed in carrying out the functions in question, but it does not matter where the act—official or private—has been performed. If an act had only to be performed on the premises of a permanent mission in order to escape the applicability of the obligations set forth in article 45, the result would be a partial revival of the notion of extritoriality, which, however, is nowadays rejected both by the courts and by writers on legal topics.

15. In its editorial suggestions the Secretariat of the United Nations took the view that the word "either" before "the Organization" should be deleted and the word "on" should be inserted before "the premises": it pointed out that the word "either" was unnecessary here and that "on the premises" was a recognized expression frequently used in legal documents. (A/CN.4/L.162/Rev.1, section B.)

Paragraph 3

16. In the course of the debate in the Sixth Committee it was considered that

The inclusion of the phrase "as laid down in the present Convention" would lessen the risk of arbitrary interpretations by the authorities of the host State, particularly in view of the general reservation contained in article 4 of the draft articles; its omission would imply the prevalence of the headquarters agreements concluded between the host State and the organization.¹³⁹

17. In its written comments, one Government [Israel] took the view that "the words 'the exercise of', which do not appear in the corresponding provisions of the Vienna Convention on Diplomatic Relations (article 41) seem superfluous". Another Government [Netherlands] proposed to insert the words "and means of transport" after the word "premises".

¹³⁹ *Ibid.*

¹³⁹ *Ibid.*, para. 57.

(b) *Observations of the Special Rapporteur*

18. The Special Rapporteur wishes to stress at the outset that, as was pointed out in the Sixth Committee (see para. 2 above), article 45 is the result of a painstaking compromise arrived at in the Commission, which has "the merits and defects of a compromise". For the purposes of the present report, and in the light of the inconclusive comments of Governments and international organizations on the question as systematically presented in the preceding section, he does not deem it appropriate to jeopardize the delicate balance achieved in the Commission after a lengthy debate by introducing at this stage any substantial change in the general economy of the article which he is to submit to the Commission for its consideration and final decision.

19. As regards the views expressed in the Sixth Committee concerning paragraph 1 of the article (see para. 3 above), the Special Rapporteur wishes to point out that that paragraph is based on article 41, paragraph 1, of the Vienna Convention on Diplomatic Relations and on article 48, paragraph 1, on the Convention on Special Missions. The Special Rapporteur wishes also to recall that in his fourth report, he expressly stated in the commentary to the article¹³⁴ that the failure by a member of the permanent mission who enjoys immunity from jurisdiction to fulfil his obligations does not absolve the host State from its duty to respect the member's immunity. He remains of the same opinion.

20. As regards paragraph 2, to which most of the comments made on article 45 by Governments and international organizations referred, the Special Rapporteur notes that those comments are but the reflection of basic positions ranging from that which would favour the introduction of the *persona non grata* procedure in the context of the present draft to those favouring the retention of the substance of the provision, implied in suggestions of a more limited terminological character. The Special Rapporteur is of the view that some of those comments might suggest ways which the Commission could usefully explore, were it decided to alter the approach reflected in the present text. Once the Commission is agreed on the substance of the text, the Special Rapporteur would submit for its consideration an appropriate text, having in mind the comments made by Governments and international organizations mentioned above. The Special Rapporteur, nevertheless wishes to point out that it has been widely admitted that the *persona non grata* procedure is not applicable in the context of relations between States and international organizations and that paragraph 2 provides a substitute to that procedure in order to ensure the protection of the host State. While recognizing the necessity to protect adequately the interests of the host State, the Special Rapporteur points out that it is equally necessary to safeguard the independent exercise of their functions by representatives to international organizations. He believes that the present text of paragraph 2 gives due recognition to these two requirements and therefore does not propose

to introduce substantive changes to that paragraph as it is to be included in the texts he is to submit for article 45 in the present report.

21. With respect to the drafting point raised by the Secretariat of the United Nations referred to in paragraph 15 above, the Special Rapporteur feels unable to accept it; he wishes to recall in this connexion that a similar suggestion made by a member of the Commission during its discussion of the article failed to gain the approval of the Commission.¹³⁵

22. With respect to the comment recorded in paragraph 16 above concerning paragraph 3 of the article, the Special Rapporteur wishes to point out that during the Commission's discussion it was decided to drop the phrase "as laid down in the present articles . . .", which appears *mutatis mutandis* in the corresponding provisions of the Convention on Diplomatic Relations (article 41, para. 3) and the Convention on Special Missions (article 47, para. 2).¹³⁶ That phrase was deemed unnecessary, particularly in the light of article 4 of the present draft. In that respect, the Special Rapporteur wishes to point out that the Commission has already agreed that the draft articles are without prejudice to different rules which may be laid down in headquarters agreements (paragraph 2 of the commentary to article 4). The prevalence of the headquarters agreements is therefore an established fact and the inclusion of the phrase in question would serve no useful purpose.

23. As regards the comment reflected in paragraph 17 above concerning the words "the exercise of" the Special Rapporteur wishes to recall that in this particular instance, the Commission decided to use as a model not article 41, paragraph 3, of the Convention on Diplomatic Relations, but article 55, paragraph 2, of the Convention on Consular Relations.¹³⁷

24. As to the comment reflected also in paragraph 17 above suggesting the insertion of the words "and means of transport" after the word "premises", the Special Rapporteur deems it pertinent to point out that, as it is indicated in paragraph 3 of the Commission's commentary to the article, the second sentence of paragraph 2 excerpts from the application of the rule laid down in the first sentence of that paragraph "any act [. . .] performed in carrying out the functions" which is performed within the organization or the premises of permanent missions. The inclusion of the suggested words in paragraph 3 would appear to constitute a departure from the corresponding provisions of the two Vienna Conventions, which has not been justified.

25. In view of the foregoing, the Special Rapporteur submits for the Commission's consideration the text of article 45 as it was adopted by the Commission for submission to Governments and international organizations. Article 45 would therefore read as follows:

¹³⁴ *Ibid.*, vol. I, pp. 218 *et seq.*, 1032nd meeting, paras. 26 *et seq.*

¹³⁶ *Ibid.*, p. 178, 1024th meeting, para. 90.

¹³⁷ *Ibid.*, p. 176, 1024th meeting, paras. 54 *et seq.*

¹³⁴ Article 44. See *Yearbook of the International Law Commission, 1969*, vol. II, p. 18, document A/CN.4/218 and Add.1, chap. II.

Article 45. Respect for the laws and regulations of the host State

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the host State. They also have a duty not to interfere in the internal affairs of that State.

2. In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from criminal jurisdiction, the sending State shall, unless it waives this immunity, recall the person concerned, terminate his functions with the mission or secure his departure, as appropriate. This provision shall not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission within either the Organization or the premises of a permanent mission.

3. The premises of the permanent mission shall not be used in any manner incompatible with the exercise of the functions of the permanent mission.

Article 46. Professional activity

(a) Observations of governments and international organizations

1. In the course of the debate in the Sixth Committee, it was considered that

The prohibition established in article 46 should be extended to the administrative and technical staff of the permanent mission as well, though an exception might be made in the case of teaching activities.¹³⁸

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

The title [of article 46] should be amended to read like the title of article 48 of the Convention on Special Missions: "Professional or commercial activity". There seems to be no reason why one of the two activities mentioned in the article should be included in the title and the other omitted (A/CN.4/L.162/Rev.1, section B).

(b) Observations of the Special Rapporteur

3. With regard to the comment referred to in paragraph 1 above, the Special Rapporteur wishes to point out that the present article is based on the provisions of article 42 of the Vienna Convention on Diplomatic Relations and article 48 of the Convention on Special Missions. In his view, the reasons which prompted the inclusion of such provisions in the manner reflected in the two Vienna Conventions apply equally in the context of the present draft articles. He therefore sees no reason to depart from the two above-mentioned Conventions on this point.

4. As to the suggestion of the Secretariat of the United Nations reflected in paragraph 2, above, the Special Rapporteur considers it well taken. He therefore proposes that the words "or commercial" be inserted in the title of the article, subject to his observations in the context of article 23.¹³⁹

5. In view of the foregoing, the Special Rapporteur proposes that the article be retained in its present form,

subject to the change in its title referred to in the preceding paragraph. Article 46 would, therefore read as follows:

Article 46. Professional or commercial activity

The permanent representative and the members of the diplomatic staff of the permanent mission shall not practise for personal profit any professional or commercial activity in the host State.

SECTION 4. END OF FUNCTIONS

Article 47. End of the functions of the permanent representative or of a member of the diplomatic staff

(a) Observations of governments and international organizations

1. In the course of the debate in the Sixth Committee the suggestion was made that a new sub-paragraph (c) be added, reading "in case of death".¹⁴⁰

2. In its written comments, the secretariat of IAEA noted that

Article 47 regulates the *end* of "the functions of the permanent representative" despite the fact that the draft articles do not regulate the *presence* of the permanent representative, or the *nature* or *commencement* of these functions, as was done in the case of the functions of "permanent missions".

3. The Secretariat of the United Nations made two editorial suggestions in connexion with article 47: first, it pointed out that, while article 47 states that "The functions . . . come to an end", the corresponding provision of article 114 in part IV uses the expression: "The functions . . . shall come to an end". Secondly it observed that as the expression "to this effect" in sub-paragraph (a) was "not very precise" and was not used in the corresponding and more specific article 43 (a) of the Vienna Convention on Diplomatic Relations, it should be replaced by the words "of their ending" or "of their termination". The Secretariat also drew attention to an obvious misprint at the end of the introductory sentence, which should read "come to an end, *inter alia*" (A/CN.4/L.162/Rev.1, section B).

(b) Observations of the Special Rapporteur

4. The Special Rapporteur does not deem it necessary to add a sub-paragraph (c) reading "in case of death" as it was suggested during the debate in the Sixth Committee (see para. 1 above). In his view, it is self-evident that the functions of the permanent representative or of a member of the diplomatic staff come to an end on death; besides, article 47 is not limitative as is shown by the use of the words *inter alia*.

5. With respect to the comment made by the secretariat of IAEA reflected in paragraph 2 above, the Special Rapporteur is unable to agree with the contention that

¹³⁸ *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 58.

¹³⁹ See above, Article 23, para. 7 of the observations.

¹⁴⁰ *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 59.

the draft articles do not regulate the presence, nature or commencement of their functions as regards the permanent representative. Those aspects are at worst inherent or implied in several of the substantive provisions of the first forty-seven articles of the draft. In the view of the Special Rapporteur the question raised in the comment of IAEA appears to be rather one of consistency: shouldn't article 47 refer also to the permanent mission? The Special Rapporteur would assume that the question is not being raised by the IAEA whether article 47 should *only* refer to the permanent mission, as it should be clear that the end of the functions of the permanent representative or of a member of the diplomatic staff does not necessarily imply the end of the functions of the mission and, further, that there is need, particularly in the light of article 42 on the duration of privileges and immunities, to provide for when the functions of a member of the permanent mission enjoying privileges and immunities have come to an end. In this connexion, the Special Rapporteur wishes to recall that during the Commission's discussion on the article, a proposal of the Drafting Committee that section 4 be entitled "End of the functions of the permanent mission or of its members" was eventually not adopted.¹⁴¹ The Special Rapporteur defers to the Commission's decision as reflected in the present text of article 47.

6. With regard to the editorial suggestions of the United Nations Secretariat, the Special Rapporteur agrees that for the sake of consistency the phrase "the functions . . . come to an end" should be replaced by "the functions . . . shall come to an end". He also agrees that the expression "to that effect" in sub-paragraph (a) is not very precise and suggests replacing it by "of their termination".

7. In view of the foregoing, the Special Rapporteur proposes that the text of the article be retained in its present form, subject to the drafting changes referred to in paragraph 6 above. Article 47 would, therefore, read as follows:

Article 47. End of the functions of the permanent representative or of a member of the diplomatic staff

The functions of the permanent representative or of a member of the diplomatic staff of the permanent mission shall come to an end, *inter alia*:

- (a) On notification of their termination by the sending State to the Organization;
- (b) If the permanent mission is finally or temporarily recalled.

Article 48. Facilities for departure

(a) Observations of Governments and international organizations

1. The comments made by governments and international organizations in connexion with article 48 related to each of the two sentences of the article.

¹⁴¹ *Yearbook of the International Law Commission, 1969*, vol. I, pp. 178-185, 1025th meeting, paras. 4-84, and *ibid.*, pp. 224-227, 1034th meeting, paras. 1-47.

First sentence

2. One Government [Israel] noted that the words "to leave its territory" at the end of the sentence have been substituted for the words "to leave at the earliest possible moment" which appear in the corresponding article of the Vienna Convention on Diplomatic Relation (article 44); it stated that it saw no reason for this change and therefore suggested reverting to the earlier text.

3. Another Government [Japan] took the view that the insertion of the words "whenever requested" was likely to be interpreted as placing a greater responsibility on the host State than the provision of article 44 of the Convention on Diplomatic Relations does on the receiving State. It suggested replacing the expression "whenever requested" by the expression "in case of need".

4. In its editorial suggestions, the Secretariat of the United Nations took the view that the words "in order" should be deleted in the second line. It pointed out that "the sentence specifies the kind of facilities to be granted and these are 'facilities to enable persons . . . to leave' not 'facilities in order to enable persons . . . to leave'". Better still, in the opinion of the Secretariat, would be to say "facilities *for* persons . . . and *for* members of the families of such persons . . . to leave its territory". The Secretariat pointed out that "the words 'in order' appear in the corresponding provision of the Convention on Diplomatic Relations (article 44). The Convention on Special Missions uses the expression 'facilities *to* enable' (article 45, para. 1)." (A/CN.4/L.162/Rev.1, section B.)

Second sentence

5. One Government [Canada] stated that

The last sentence of article 48 by requiring the host State to place at the disposal of persons enjoying privileges and immunities the necessary means of transport for their property would appear to be imposing an unrealistic duty on the host State.

It therefore suggested replacing that last sentence by the following:

It shall, in case of emergency, facilitate in every possible way the obtaining of means of transport for them and for such of their personal effects as is reasonable under the circumstances.

6. Another Government [Japan] stated that the wording "in case of emergency" was ambiguous with respect to multilateral relations. In its view, since the bilateral relationship between a sending State and the host State was not directly connected with the withdrawal of a permanent mission to an international organization, it was not clear what other cases of emergency existed.

(b) Observations of the Special Rapporteur

7. With respect to the comment reflected in paragraph 2 above, the Special Rapporteur wishes to recall that the Commission's decision to substitute the words "to leave its territory" by the words "at the earliest possible moment" which appeared in the text originally submitted

by him,¹⁴² was made in support of the Drafting Committee's contention that the latter words "were inappropriate" with reference to permanent missions to international organizations. Furthermore, the words "its territory" were inserted in order to bring the English text into line with the French text. In these circumstances, the Special Rapporteur does not deem it necessary to revert to the formulation in article 44 of the Vienna Convention on Diplomatic Relations.

8. With regard to the comments reflected in paragraph 3 above, the Special Rapporteur wishes also to recall that the use of the words "whenever requested" was consequential upon the Commission's decision to omit all reference in the article to the "case of armed conflict" and to make the text deliberately general in character. The Special Rapporteur does not agree that those words could be interpreted as placing a greater responsibility on the host State than article 44 of the Vienna Convention on Diplomatic Relations does on the receiving State. He considers that in fact, with the addition of those words, the obligation laid down in the present article could be considered as less onerous than that stated in article 44 of the Vienna Convention, which is drafted in more general terms. Besides, the phrase "in case of need", which in the Vienna Convention appears only in the second sentence of the article, if used as a substitute for the phrase "whenever requested" would likewise widen the scope of the obligation of the host State.

9. In view of the fact that, as rightly pointed out by the United Nations Secretariat, the words "in order" do not appear in the corresponding provision of the Convention on Special Missions (article 45, para. 1), the special Rapporteur agrees to their deletion.

10. As regards the comment reproduced in paragraph 5 above, concerning the question whether the requirement that the host State place at the disposal of persons enjoying privileges and immunities the necessary means of transport for their property would not impose an unrealistic duty on the host State, the Special Rapporteur is of the view that the suggestion quoted in paragraph 5 above is too restrictive. He wishes to point out that by replacing the words "in particular, in case of need" which appear in article 44 of the Vienna Convention by the words "in case of emergency", the Commission has already substantially alleviated the burden of the host State in that respect; in his view, there is no reason to depart further from the corresponding provision in the Vienna Convention.

11. With respect to the comment reflected in paragraph 6 above, the Special Rapporteur, in addition to what is said in the preceding paragraph, wishes to refer to paragraph 1 of the Commission's commentary to the article which explains the meaning which the Commission attaches to the expression in question.

12. In view of the foregoing considerations, the Special Rapporteur proposes that the article be retained in its present form. Subject to the drafting change referred to in paragraph 9 above, article 48 would, therefore, read as follows:

¹⁴² *Ibid.*, vol. II, p. 20, document A/CN.4/218 and Add.1, chap. II, article 47.

Article 48. Facilities for departure

The host State shall, whenever requested, grant facilities to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave its territory. It shall, in case of emergency, place at their disposal the necessary means of transport for themselves and their property.

Article 49. Protection of premises and archives

(a) Observations of governments and international organizations

1. In its written comments, one Government [Israel] made the following remarks:

... according to paragraph 2 of the commentary, the intention is that in the event of the sending State failing to comply within a reasonable time with the obligations imposed upon it under the second sentence of paragraph 1, the host State shall no longer be bound by the provisions of the first sentence of paragraph 1 but only by "any obligations which may be imposed upon it by its municipal law, by general international law or by special agreements" as regards the property, archives and premises. It is believed that this should be made more explicit in the text in order to avoid ambiguity. The addition of a phrase such as "after which time the obligations of the host State under this paragraph shall cease" could achieve this.

The same Government added that "the difference between the 'special' protection and protection of property, archives and premises under international law is not altogether clear".

2. Another Government [Japan] stated that "the second sentence is reasonable and should be retained".

3. The Government of Switzerland noted that since, according to the commentary, the second sentence of paragraph 1 also covered the designation of a third State as protector of the property of the mission,

It would seem preferable, while retaining the general formula, to mention this possibility expressly, as was done in article 45, subparagraph (b) of the [Vienna] Convention on Diplomatic Relations.

A similar view expressed by the secretariat of UNESCO in the following terms:

Article 49 [. . .] should have been based more on article 45 of the Vienna Convention [on Diplomatic Relations], in particular subparagraph (b). Provision should have been made for the mission which had been recalled to entrust the custody of its property and archives to the permanent mission of another State or to the diplomatic mission of another State. The idea expressed in paragraph 2 of the commentary ("The sending State is free to discharge that obligation in various ways, for instance, by removing its property and archives from the territory of the host State or by entrusting them to its diplomatic mission or to the diplomatic mission of another State") should have been made a provision of the convention.

4. Two editorial questions were raised in the written comments of governments and international organizations: one Government [Israel] proposed that the word "must" wherever it appears in paragraph 1 be replaced by "shall". The Secretariat of the United Nations suggested that the title be amended to read "Protection of premises, property and archives" as, in its opinion, "there seems to

be no reason for omitting one of the three items enumerated in the text and including the other two". (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

5. With respect to the comments quoted in paragraph 1 above, the Special Rapporteur does not agree that as presently drafted the second sentence of paragraph 1 does not clearly convey the intention of the Commission as expressed in paragraph 2 of its commentary on the article.

6. As regards the reference to the lack of clarity of "the difference between the 'special' protection and protection of property, archives and premises under general international law", the Special Rapporteur wishes to point out that in the text of the article the word "special" refers not to "protection" but to "duty"; the "duty" to project is "special" in that it relates to property, archives and premises. In the opinion of the Special Rapporteur the Commission was correct in explaining in its commentary to the article that the termination of that special duty after the expiry of a reasonable period is without prejudice to the obligations which derive for the host State from the rules or norms of municipal and international law or from special agreements, as these may concern for example, the protection of the property of foreign States in general.

7. As to the views reflected in paragraph 3 above, the Special Rapporteur agrees that, in addition to the general formula, an express reference should be made to one of the ways in which the sending State may discharge its obligation under the article, namely, entrusting the premises, property and archives of the permanent mission to the custody of a third State, in order to conform to the Vienna Diplomatic precedent. He therefore proposes that the following be added as a third sentence to paragraph 1 of the article:

In the discharge of its obligations under the present paragraph, the sending State may entrust the custody of the premises, property and archives of the permanent mission to a third State.

The Special Rapporteur wishes to stress that the insertion, for the sake of consistency, of such express reference cannot be interpreted as excluding for the sending State the possibility to discharge its obligation in any other way, such as those referred to in the Commission's commentary and in the comments of UNESCO. In his view a detailed mention of those other ways in the article is not advisable as it would be, of necessity, incomplete and would make the text cumbersome.

8. The Special Rapporteur agrees that the word "must", wherever it appears in paragraph 1, should more appropriately be replaced by "shall". He also agrees that the title should be replaced by "Protection of premises, property and archives", subject to his observations in the context of article 23.¹⁴³

9. In view of the foregoing, the Special Rapporteur proposes to retain the text of the article in its present form, subject to the additions and terminological changes

referred to in paragraphs 7 and 8 above. Article 49 would, therefore, read as follows:

Article 49. Protection of premises, property and archives

1. When the permanent mission is temporarily or finally recalled, the host State shall respect and protect the premises as well as the property and archives of the permanent mission. The sending State shall take all appropriate measures to terminate this special duty of the host State within a reasonable time. In the discharge of its obligations under the present paragraph, the sending State may entrust the custody of the premises, property and archives of the permanent mission to a third State.

2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and archives of the permanent mission from the territory of the host State.

Article 50. Consultations between the sending State, the host State and the Organization

(a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee in 1969

A number of representatives supported the text of article 50. In the opinion of some, tripartite consultations were the most appropriate method of solving any disputes which might arise. For others, such consultations would make it possible to dispose of many types of disputes very simply. A number of representatives, however, expressed reservations on the article. Certain representatives considered that article 50 did not specify how questions concerning the interpretation of the draft articles were to be resolved; moreover, in cases involving either the application or the interpretation of the draft articles, legal disputes on well-defined rules might arise. It therefore seemed necessary to provide for impartial third-party settlement. It was also said that the provisions of article 50 might not be adequate to resolve cases in which the host State was not willing to grant all the privileges and immunities specified in the draft articles, especially when they were very far-reaching. Further, it was stated that article 50 might prejudice the reply to the question as to which organ of the organization would be responsible for ensuring respect for the privileges and immunities granted. One outcome of the provisions of the article might be that the secretariat of the organization concerned might find itself invested with authority that could not rightly be acquired except in virtue of the organization's constitutional instruments.¹⁴⁴

2. In 1970, article 50 was referred to again in the course of the debate in the Sixth Committee:

If any question arose between the sending State and the host State concerning the implementation of the draft articles, some representatives expressly supported the Commission's intention that article 50, on consultations among the sending State, the host State and an organization, which was now included at the end of part II, should be transformed into a general provision applicable also to parts III and IV of the draft. In that connexion, it was said that the scope of the article should not be limited to questions arising between the sending State and the host State, and it was suggested that the existing text should be amended so that the article would begin with the words: "If any question arises among the sending State, the host State and the Organization. . .".

¹⁴³ See above, Article 23, para. 7 of the observations.

¹⁴⁴ *Official Records of the General Assembly, Twenty-fourth Session Annexes*, agenda items 86 and 94 (b), document A/7746, para. 60.

Other representatives said that the Commission should seek formulas which, while guaranteeing the interests of the sending State and the independence of the organization concerned, should also adequately protect the host State against possible abuses by persons enjoying a privileged position under the provisions of the draft. Even the protection of the host State in cases of criminal acts did not seem to be sufficiently guaranteed by the draft. Those representatives considered that provisions such as those contained in article 50 or articles 45, 76 and 112 were inadequate.¹⁴⁵

3. In its written comments, one Government [Yugoslavia] expressed the view that

The principle of trilateral consultations between interested States and international organizations is of special importance for the whole system embodied in the draft articles. Such consultations could not only help to settle any difficulties that might arise between the States and the organization, but would in general make for efficient co-operation between them.

4. Another Government [Canada] proposed the same drafting amendment as had been suggested in the Sixth Committee in 1970, namely, the substitution in the first phrase of article 50 of the words "If any question arises among a sending State, the host State and the Organization . . ." for "If any question arises between a sending State and the host State . ..". The Government explained that:

In this way, all possible questions that may arise will be covered by article 50. As it is presently drafted, only questions arising between the host State and a sending State can be the subject of consultations under article 50.

5. Two Governments expressed the view that article 50 was inadequate and a more effective procedure should be found to protect the interests of the sending States and the host State. They did not, however, make any concrete suggestion to that effect. In this connexion, one of the two Governments [Japan] stated that it was

not entirely convinced that the provision of this article is enough to cope with the difficulties which may arise as a result of the non-applicability between States members of the organization and the host State of the rules regarding *agrément* and *persona non grata*. For example, a situation might arise where a member of a permanent diplomatic mission declared *persona non grata* or a private person accused of violating the law of the host State, would be appointed as member of the permanent mission to an international organization seated in the host State.

In the view of the second Government [United Kingdom], although it was

true that the concept of *persona non grata* is not appropriate in relation to representatives to international organizations [. . .] some means must be found to deal with the case where the host State cannot tolerate, for reasons of public order or national security, the presence on its territory of a particular representative.

6. In the opinion of one Government [Yugoslavia]

The Commission's views on the possibility of inserting at the end of the draft articles provisions concerning settlement of disputes arising out of the application of the future convention deserve particular attention.

In this connexion one Government [Belgium], considering the article to be "imperfect", suggested that it "should be incorporated in a more detailed provision or in a

protocol on the settlement of disputes, as may be appropriate". Another Government [Netherlands] considered "a provision for the settlement of disputes concerning the interpretation and application of the Convention essential".

7. The Government of Switzerland considered that "the consultations provided for are insufficient for the application of a codification convention". It reiterated its view that

The corollary to the codification of international law must be the jurisdiction of international tribunals, preferably existing tribunals and in particular the International Court of Justice. It [i.e. the Government] will make a proposal in that sense in due course.

The Government of Switzerland further observed that

The special nature of the relations between the sending State and the host State require for certain specific questions the establishment of a tripartite body capable of coming to a decision in a very short time. This could be made responsible for handling, through a conciliation procedure, the objections of the host State to a member of a permanent mission (article 10) or to the size of the permanent mission (article 16).

It added that the conciliation machinery could operate in accordance with the following text:

"Within six months after the Convention enters into force with regard to the Organization, the latter shall establish a Conciliation Commission based on the following principles:

"1. The Commission shall be composed of three members: one representative of the Organization, one representative of the sending State and one representative of the host State.

"2. The representatives shall be designated in advance and their names shall be included in a list maintained by the Organization.

"3. Matters may be brought to the cognizance of the Commission by the Organization, the sending State or the host State.

"4. The absence of a representative shall not prevent the Commission from taking a decision.

"5. The Commission shall take its decisions by majority vote; it may make recommendations to the parties."

8. The observations submitted by the secretariat of the ILO read as follows:

This general provision envisages tripartite consultations between the sending State, the host State and the organization concerning the application of the convention. It thus imposes on the organizations the obligation to provide for the diplomatic protection, as it were, of the sending State. It seems to us that it would be very difficult for an organization to play the role of conciliator, perhaps even arbitrator, in connexion with problems not directly related to its own interests, such as respect for exemption from customs duties or the extent and content of immunity from jurisdiction. While there is no question that an organization can and should intervene if the host State hinders the functioning of the organization by, for example, prohibiting the entry into its territory of representatives of member States, it does not seem to us that questions relating rather to diplomatic usage and the comity of nations can usefully be made the subject of intervention by the organization. They are matters touching solely on the relations between two States and having nothing to do with the organization.

(b) Observations of the Special Rapporteur

9. The Special Rapporteur will first examine the drafting amendment referred to in paragraph 4 above and the written comments of the secretariat of the ILO. He will

¹⁴⁵ *Ibid.*, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, paras. 22-23.

next turn to the other comments submitted in connexion with article 50. These related to the following main points: the question of the organ competent to conduct on behalf of the organization the consultations provided for in article 50, the conciliation machinery proposed by the Swiss Government, and the question of the inclusion in the draft articles of provisions on the settlement of disputes.

The drafting amendment

10. The Government which proposed the drafting amendment referred to above in paragraph 4 explained that its intention was that article 50 should cover "all possible questions that may arise". The Special Rapporteur believes that the amendment runs counter to that intention. Indeed, with the amendment the article could be interpreted as applying only in those cases where the questions arising involved the three parties, namely: a sending State, the host State and the organization. The Special Rapporteur prefers the present text of article 50, which authorizes the organization to initiate consultations when a question arises only between a sending State and the host State.

Observations of the ILO

11. The main contention of the observations of the secretariat of the ILO (see para. 8 above) appears to be that matters such as "respect for exemption from customs duties or the extent and content of immunity from jurisdiction" constitute "problems not directly related to the [Organization's] own interests". The Special Rapporteur cannot agree with that contention. Suffice it to mention that article 24 imposes upon the organization the obligation to assist the sending State, the permanent missions and their members "in securing the enjoyment of the privileges and immunities provided for by the present articles".

12. The Secretariat of the ILO also maintains that the matters in question relate "to diplomatic usage and the comity of nations". This may be true but the main point surely is that those matters are of concern to international law and that one of the purposes of the draft articles is to formulate the rules of law governing them.

The question of the organ competent to conduct on behalf of the organization the consultations provided for in article 50

13. As was indicated above in paragraph 1, it was argued in the Sixth Committee that

One outcome of the provisions of the article might be that the secretariat of the organization concerned might find itself invested with authority that could not rightly be acquired except in virtue of the organization's constitutional instruments.

The Special Rapporteur would like to observe that what must be taken into account here is not only the organization's constitutional instrument but also its other "relevant rules"—to use the language of article 3. The problem referred to in the Sixth Committee will arise only when, under those "relevant rules", there is no organ which is in

a position to conduct the consultations provided for in article 50. It is clear that in such cases those consultations would have to be entrusted to the secretariat.

14. Referring specifically to the United Nations, its Legal Counsel pointed out at the Commission's 998th meeting that, in the provision which subsequently became article 50, the term "organization could only mean the Secretary-General; otherwise it would have to be the General Assembly, and no one would think of bringing a case concerning the behaviour of an individual diplomat before the Assembly".¹⁴⁶

At the same meeting, the Special Rapporteur expressed a similar view observing that:

Only the Secretary-General could conduct the sort of unobtrusive diplomacy which was necessary if the organization was to play its role of liaison between the host State and the sending State in dealing with practical matters which did not amount to a formal dispute.¹⁴⁷

The conciliation machinery proposed by the Government of Switzerland

15. It will be recalled that the conciliation commission proposed by the Swiss Government (see para. 7 above) would be empowered "to take its *decisions*¹⁴⁸ by a majority vote". It would be "composed of three members: one representative of the Organization, one representative of the sending State and one representative of the host State". It is clear that in those circumstances, the decisive role would be played in most cases by the representative of the organization. The Special Rapporteur does not believe that it would be desirable to grant to the organization such sweeping powers in matters where the prestige of its members is at stake. Neither does he believe that such a proposal would be acceptable to a great number of member States.

The question of the inclusion in the draft articles of provisions on the settlement of disputes

16. As was noted by one Government [Netherlands] in its written observations, the Commission stated in paragraph 5 of its commentary on article 50 that it

reserved the possibility of including at the end of the draft articles a provision concerning the settlement of disputes which might arise from the application of the articles.

Three Governments expressed themselves in favour of the inclusion in the draft of such a provision and a fourth stated that the matter deserved "particular attention" (see paras. 6 and 7 above). If the Commission decides that the draft should include provisions on the settlement of disputes, the Special Rapporteur will prepare a text for its consideration.

Text of article 50 proposed by the Special Rapporteur

17. Several Governments expressed the view that article 50 was "inadequate". The Special Rapporteur does

¹⁴⁶ *Yearbook of the International Law Commission, 1969*, vol. I, p. 45, 998th meeting, para. 64.

¹⁴⁷ *Ibid.*, p. 46, para. 75.

¹⁴⁸ Italics supplied by the Special Rapporteur.

not claim that it is a panacea. He still believes that the article could play a useful role, even if the Commission included in its draft articles provisions on the settlement of disputes. He therefore suggests that the article should be retained in its present form. Article 50 would, therefore, read as follows:

Article 50. Consultations between the sending State, the host State and the Organization

If any question arises between a sending State and the host State concerning the application of the present articles, consultations between the host State, the sending State and the Organization shall be held upon the request of either State or the Organization itself.

* * *

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

NOTE

The present addendum is based on the comments of Governments and international organizations referred to in the introduction to the report¹⁴⁹ and on the additional comments received by the Special Rapporteur before 31 March 1971, namely, those from Finland, Hungary, Japan, the Netherlands and the United Kingdom of Great Britain and Northern Ireland, and from UNESCO and IAEA. It is arranged along the same lines as explained in the introduction.¹⁵⁰

Part III. Permanent observer missions to international organizations

PART III IN GENERAL

(a) Observations of Governments and international organizations

1. In the introduction to the present report, the Special Rapporteur has already made reference, in the context of his preliminary considerations on the scope and title of the draft articles, to the comments of Governments¹⁵¹—available to him at the time of the preparation of that part of the report—regarding the Commission's decision to include in its draft a set of articles dealing with permanent observer missions. The present section gives an account of the debates held in the Sixth Committee,¹⁵² and of the written comments submitted by Governments and

international organizations,¹⁵³ following the preparation of the introduction, which concern that question as well as other questions on part III of the draft in general.

2. In the course of the debate in the Sixth Committee at the twenty-fourth session of the General Assembly several representatives endorsed the Commission's decision to include in the draft articles provisions dealing with permanent observers of non-member States to international organizations. In this connexion, the view was expressed that

any such provisions should take into account the legitimate interests of the host State, and not only the invitation of the organization concerned. In certain cases the host State might not even be a member of the international organization in question and would therefore have no say in deciding whether or not observers of a State which it did not recognize should be admitted. On the other hand, it was considered that conditions such as the agreement of the host State were unacceptable, since they restricted the independence of international organizations. The opinion was further expressed that the scope of provisions on the subject should be determined in accordance with the principles of universality and non-discrimination.¹⁵⁴

3. In the course of the debate in the Sixth Committee at the twenty-fifth session of the General Assembly, several representatives noted

that the formulation of rules concerning the legal status and the facilities, privileges and immunities of permanent observer missions in the context of the draft articles on representatives of States to international organizations would fill a gap which existed at present in general international law.

Certain representatives expressed doubt about the need for a general codification of the status of permanent observer missions, believing that existing practice and international courtesy resolved the question satisfactorily in each specific case. However, many representatives who took part in the debate stressed the particular importance of that codification. The need for it was demonstrated by the very fact that the Charter of the United Nations, General Assembly resolution 169 (II) on the Headquarters Agreement and General Assembly resolution 257 (III) on permanent missions to the United Nations contained no provisions on permanent observer missions of non-member States. In that connexion it was recalled that the Secretary-General had stated in the introduction to his annual report on the work of the Organization covering the period 16 June 1965 to 15 June 1966 that "all countries should be encouraged and enabled, if they wish to do so, to follow the work of the Organization more closely".¹⁵⁵ In the opinion of the latter representatives, the codification of the legal status of permanent observer missions would promote international co-operation, ensure a more efficient functioning of international organizations and might be useful to solve some of the problems posed by the "micro-States". Similarly it was pointed out by other representatives that the formulation of rules concerning permanent observer missions was consistent with the principle of universality and represented an important step towards the elimination of certain discriminatory practices. Pointing out that the Charter was based on universality or that universality was one of the primary objectives of the United Nations, those representatives stated that the establishment of a suitable legal status for permanent observer missions would promote the achievement of the principles and purposes of the Organization. In that connexion, other representatives rejected the unqualified

¹⁴⁹ See above, p. 10, document A/CN.4/241 and Add.1 and 2, paras. 5-7.

¹⁵⁰ *Ibid.*, p. 11, para. 8.

¹⁵¹ *Ibid.*, pp. 14 and 15, paras. 24, 25 and 27.

¹⁵² For all references to the Sixth Committee's discussion of the draft articles, see foot-note 39 above.

¹⁵³ See foot-note 12 above.

¹⁵⁴ *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 20.

¹⁵⁵ *Ibid.*, *Twenty-first Session, Supplement No. 1 A (A/6301/Add.1)*, p. 14.

statement that the Charter was based on the principle of universality; universality was a goal that should be attained through the fulfilment of the criteria and requirements laid down in Article 4 of the Charter.¹⁵⁶

4. In its written comments, the Government of Switzerland stated that "it has been greatly interested in the results of the work of the International Law Commission on permanent observer missions to international organizations" and added that it

attaches the greatest importance to this matter, both as the host State for the European headquarters of the United Nations and for many other international organizations and also as a non-member State of the United Nations which is represented in New York by an observer.

5. One Government [Israel] expressed in general its agreement with the proposed draft articles. Another Government [Finland] noted with satisfaction the articles concerning permanent observer missions and considered them to be "a valuable basis for the preparation of a convention on the subject".

6. One Government [Netherlands] expressed the view that

the question may legitimately be asked whether the institution of the observer mission—at least in the case of missions to world-wide organizations—is not in principle open to criticism, being in contradiction with the universal character of the organization. Apart from certain exceptional cases—accounted for by political reasons—as regards the membership of the United Nations, States which are interested in the work of an organization ought to become members of that organization. It does not appear desirable to normalize the basically not normal institution of the observer mission—particularly not on the same footing as the permanent missions, which are a normal element in the structure of international relationships.

One argument put forward by the Commission in favour of this normalization is that it would help to solve the problem of the "micro-States" within the United Nations (see para. 8 of the "general comments" on section 1 of part III). It is striking that this aspect is not further mentioned in the commentary on the individual articles.

Inasmuch as the draft articles will also apply to other than world-wide organizations, the institution of the observer mission becomes more acceptable.

7. One Government [Canada] indicated that it appreciated

that these articles must of necessity contain new elements of international law as opposed to the codification of existing rules. However, since observer missions do not, as such, represent, but observe, a permanent observer mission should not be placed on the same footing as that of a permanent mission.

8. Another Government [United Kingdom] expressed the view that, although

the Commission has rightly drawn attention [...] to the fact that there is at present no clear treaty basis for the status, privileges and immunities of permanent missions sent by non-member States to certain international organizations [...] the Commission has not referred to any evidence to suggest that this situation causes any appreciable difficulty in practice. Nor is it at all clear that the best way to remedy the situation would be by creating a new general international legal entity to be known as a "permanent observer

mission" whose status, privileges and immunities would be largely the same as those of permanent missions of Member States.

The concept of a permanent observer mission in the draft articles appears to involve granting to representatives of States which have no obligations under the constitutional instruments of the organization concerned, and possibly to representatives of entities which are not recognized as States or Governments by the host country, a status and functions which they are not entitled to have under the constitutional instruments of the organization. Due regard must be had to the position and interests of the host country and in the case of those organizations where there is not constitutional provision for observer missions and no settled practices, their establishment should be a matter for arrangement between the sending State, the organization and the host country, taking into account the special circumstances of each case. It is not at all clear that there would be any advantage in removing the flexibility which the present situation allows.

It added that it was

not convinced of the necessity or desirability of including in the proposed convention articles such as those in Part III of the draft articles. The articles are in any case drafted largely by reference back to Part II. It would be better to leave organizations in the future to decide for themselves whether and, if so, to what extent they should seek to accord the Part II status to observer missions.

9. One Government [Israel] indicated that its comments on the first and second groups of draft articles applied generally and in principle to the present group of draft articles. The secretariats of the United Nations, the ILO and IMF likewise indicated that their comments on the first and second groups of draft articles applied to the third group.

10. The secretariat of IMF expressed the view that

As mentioned in the Study by the Secretariat,¹⁵⁷ questions relating to permanent representatives or member delegations to international organizations are not applicable to the Fund. The structure of the Fund precludes the application of the draft articles to the Fund. It might be useful, therefore, to make it clear that the draft is not applicable to the Fund.

11. The secretariat of IAEA indicated that

Although there has never been any permanent observer accredited to IAEA, there have been instances of agreements involving non-member States and the problem is certainly one of interest to the Agency.

12. The Secretariat of WHO stated the following:

There are in practice two general categories of observers from non-member States to WHO, the main distinction being whether they are temporary or permanent. The first category covers certain situations where States which are not members but which are on the point of becoming members attend the World Health Assembly as observers, pending a decision by the Assembly on their application for membership. Provision for this is contained in rule 3 of the rules of procedure of the Assembly, which stipulates that the Director-General may invite States which have made application for membership or territories on whose behalf an application for associate membership has been made to send observers to sessions of the Assembly. Again, situations of this type have arisen in the case of associate members which have acceded to independence on a date which, under the rules, did not allow them to submit their application for membership in the organization. Such States were nevertheless invited as observers and the rules of procedure of the

¹⁵⁶ *Ibid.*, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, paras. 25-27.

¹⁵⁷ Study by the Secretariat, op. cit. (see foot-note 47), p. 206, paras. 76-78.

Assembly were changed later, after the adoption of appropriate resolutions by the Executive Board and Health Assembly.¹⁵⁸

Aside from these temporary situations, there are others where quasi-permanent observers participate regularly in the work of the Health Assembly. Permanent observers from non-member States of WHO are in a special situation, which is similar to, yet different from, the situation in the United Nations. The similarity lies in the fact that the status of the permanent observers from non-member States is not established in any special provision and is not mentioned in the Constitution, the headquarters agreement or the resolutions adopted by the Executive Board or the Assembly. It exists solely as a result of the practice followed by the organization. However, the situation is different because such permanent observer missions to WHO are few in number and also because the legal bodies in question are of a very special character. In the United Nations, the establishment of permanent observer missions is justified because a number of States are not members of the Organization. On the other hand, most of them are members of WHO. The Federal Republic of Germany, the Republic of Korea, Switzerland and the Republic of Viet-Nam are cases in point, so that at present there are only three examples of permanent observers. In addition, these are very special situations in the context of international law, since they involve the Holy See, San Marino and the Order of Malta.

The relations established in these three cases are derived solely from practice and have no foundation in any written text. San Marino applied for membership in WHO in 1948, but the First Health Assembly declared the application inadmissible for procedural reasons. The application was submitted again in 1949, but it was accompanied by a reservation concerning San Marino's financial contribution.¹⁵⁹ The reservation was not accepted by the Assembly,¹⁶⁰ and, since that time, San Marino has been invited to each Health Assembly as an observer. Relations have been maintained on that basis ever since. Moreover, San Marino has in Geneva a permanent observer mission to the United Nations and other international organizations.

Relations with the Holy See also date back to the same period. The Holy See did not participate in the First Health Assembly. However, when the Second Assembly was convened at Rome in 1949, it was decided to invite the Vatican to participate in the work of the Assembly as an observer. Since that time, the Holy See has been invited regularly to the sessions of the Health Assembly. Like San Marino, it has a permanent observer mission to the United Nations Office and the specialized agencies at Geneva.

WHO's relations with the Order of Malta have an unusual origin, and were established much more recently. In 1950, the Order of Malta applied for admission to WHO, but consideration of the application was deferred. In 1952, a new application was submitted to the Assembly and included in its agenda. However, it was withdrawn, on the initiative of the Order itself. Ten years went by and in 1962 the Order of Malta asked, not for admission, but to be invited to attend WHO meetings as an observer. The Director-General decided that he would invite the Order to participate in the Assembly as an observer whenever the agenda included items which might be of interest to it. In fact, since that time the Order has regularly been invited to attend the Assemblies and has moreover established a permanent delegation to international organizations at Geneva.

The present status of permanent observers is in fact no different from that of the other observers covered by the WHO regulations. When these three observer missions were established, WHO was informed and it received a notification. They are invited to each

¹⁵⁸ Resolution EB27.R25 (*Official Records of the World Health Organization*, 108, 10), resolution WHA14.45 (*ibid.*, 110, 19). This happened, for example, in the case of Togo in 1960 (*ibid.*, 103, 21).

¹⁵⁹ *Official Records of the World Health Organization*, No. 21, p. 312.

¹⁶⁰ Resolution WHA2.98 (*ibid.*, p. 54).

Health Assembly and the names of the observers are communicated to the Director-General. They are granted the facilities laid down in the regulations for observers in general. Rule 19 of the rules of procedure of the Health Assembly stipulates that, unless the Assembly decides otherwise, plenary meetings are open to them. In addition, under rule 46 of the rules of procedure, they may participate in any public meeting of the main committees of the Assembly and, upon the invitation of the Chairman or with the consent of the Assembly or committee make a statement on the subject under discussion. Moreover, such observers have access to non-confidential documents and to such other documents as the Director-General may see fit to make available. They may also submit memoranda to the Director-General, who determines the nature and the scope of their circulation.

13. The Secretariat of ITU stated the following:

With regard to permanent observer missions (draft articles 51-77), I wish to state that under article 27 of the International Telecommunication Convention (Montreux, 1965),¹⁶¹ each Member of the Union reserves the right to fix the conditions under which it admits telecommunications exchanged with a State not party to the Convention. The Convention makes no other provision for relations between the ITU and non-Member States, which are not admitted to conferences of the Union. The relationship between the General Secretariat of the Union and such States is regulated by resolution No. 88 of the Administrative Council of the Union.¹⁶²

14. In the course of the debate in the Sixth Committee, a number of delegations stressed that

At the second reading, the Commission should harmonize the various provisions of the draft and try to formulate them as stringently and precisely as possible. In particular, it was stated that the present number of articles was excessive and should be reduced through appropriate use of the technique of "drafting by reference". It was also suggested that, despite the differences between the two categories of missions, some of the provisions relating to permanent missions and to permanent observer missions could perhaps be combined, in order to simplify the general form of the draft.¹⁶³

15. In its written comments, one Government [Israel] considered that

As the four parts of draft articles will form an integral part of the diplomatic law [. . .] in the final text of the draft articles, all those provisions relating to matters susceptible of uniform treatment should be redrafted and amalgamated in the fewest possible articles.

16. Another Government [Switzerland] suggested that

The references to earlier articles in the draft—those in articles 66 to 77 for example—should be grouped together in one or more articles. Moreover, this suggestion seems to meet the concern expressed by some members of the Commission itself.

(b) *Observations of the Special Rapporteur*

17. The Special Rapporteur notes that, with one exception, the comments of Governments referred to in the preceding section confirm in general his observations¹⁶⁴

¹⁶¹ United Nations, *Juridical Yearbook*, 1965 (United Nations publication, Sales No. 67.V.3), p. 173.

¹⁶² ITU, Supplement No. 2 (August 1967) to the *Volume of Resolutions and Decisions of the Administrative Council of ITU*. [The text of Administrative Council resolution No. 88 (amended) is reproduced in annex 1 to the observations of ITU. See below, p. 424, document A/8410/Rev.1, annex I, C, 11.]

¹⁶³ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 18.

¹⁶⁴ See above, pp. 14 and 15, document A/CN.4/241 and Add.1 and 2, paras. 24 and 27.

as regards the reaction of Governments on the Commission's decision to include a set of articles on permanent observer missions in its draft on representatives of States to international organizations.

18. The Special Rapporteur takes note of the information given by the secretariats of international organizations regarding their rules and practice on the subject. In this respect, he wishes to refer to the provisions of articles 3 and 4, which are intended to apply generally to part III of the draft.

19. As regards the comment of the secretariat of IMF reflected in paragraph 10 above, the Special Rapporteur wishes to refer to his observation on a similar comment made in the context of articles 3 to 5.¹⁶⁵

20. In connexion with the comments concerning the structure of the draft, reflected in paragraphs 14 to 16 above, the Special Rapporteur wishes to point out that he has arranged the present document on an article by article basis in order to facilitate the discussion by the Commission of the contents of each and all of the provisions included in part III of the draft, in view of the comments made by Governments and international organizations, which referred specifically to most of those provisions. This arrangement is, of course, without prejudice to the decision which the Commission, and in particular its Drafting Committee, may reach on the consolidation of some articles in the light of the substantive discussion to be held thereon.

SECTION 1. PERMANENT OBSERVER MISSIONS IN GENERAL

General comments

(a) *Observations of Governments and international organizations*

1. The Secretariat of UNESCO stated the following:

In section 1 of part III of the draft, under the heading "General comments", it is stated in paragraph 1 that "Permanent observer missions have [...] been sent [...] on some occasions to the United Nations Educational, Scientific and Cultural Organization". Actually the Holy See maintains a permanent mission to the organization, and has done so for a long time. The Executive Board of UNESCO took a decision regarding permanent observers—with particular reference to the permanent observer of the Holy See—as far back as 1951, at its twenty-sixth session. The text should therefore be amended along the following lines:

"... for instance, by the Holy See to the Food and Agriculture Organization of the United Nations and the United Nations Educational, Scientific and Cultural Organization, and by San Marino ...".

(b) *Observations of the Special Rapporteur*

2. With respect to the comment of the secretariat of UNESCO reflected in the preceding paragraph, the Special Rapporteur wishes to refer to his general observa-

tion on a similar comment made in the context of article 36.¹⁶⁶

Article 51. Use of Terms

(a) *Observations of Governments and international organizations*

1. The comments made by Governments and international organizations in connexion with article 51¹⁶⁷ concerned the article as a whole and more specifically sub-paragraphs (a), (b), (i) and (k) of the article.

Article as a whole

2. One Government [Canada] considered that the contents of article 51 were generally acceptable. However, it suggested that "the elimination of the overlapping of article 51 with article 1 should receive careful attention".

3. In its editorial suggestions the Secretariat of the United Nations expressed the view that, as in the case of article 1, the verb "to mean" should be used throughout, instead of "to be" (A/CN.4/L.162/Rev.1, section B).

Sub-paragraph (a)

4. In the course of the debate in the Sixth Committee stress was laid on the importance of the reference in sub-paragraph (a) to the "representative character" of permanent observer missions with regard to the

general structure of part III of the draft and, in particular, the determination of the scope of the facilities, privileges and immunities which should be accorded to permanent observer missions. In that connexion, certain representatives referred to paragraph 2 of the commentary on article 53, which stated that a permanent observer mission did not represent the sending State "in" the organization but "at" the organization.

Some representatives said that permanent observer missions did indeed have a "representative character" and that the reference to it should therefore be retained. Others considered that that reference should be deleted, since an observer observed but did not represent.

It was also said that if the term "representation" was taken in the technical sense, it was clear that permanent observer missions were not representative, since in order to be representative in an international organization a State had to be a member of it. By definition, an observer did not participate in the organization's decisions and did not, in principle, have the right to take part in its debates. However, if the term "representation" was given the wider meaning which it had in ordinary usage and if emphasis was laid on the link which existed between the sending State and its permanent observer mission, it might be possible to speak of "representation", because the mission acted on behalf of the State which had appointed it. The sending State was not a member of the organization, but the permanent observer mission, in so far as it acted within the limits of its functions on behalf of the sending State, could be considered representative of that State.

Lastly, it was pointed out that in article 51, in sub-paragraph (a), it would be useful to insert the words "as defined in article 1" after the words "international organization", in view of the considerations outlined in paragraph 1 of the commentary on that article.¹⁶⁸

¹⁶⁶ See above, p. 21, document A/CN.4/241/Add.3, Article 36, para. 21 of the observations.

¹⁶⁷ See foot-note 34 above.

¹⁶⁸ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 36-39.

¹⁶⁵ *Ibid.*, p. 25, paras. 100 and 103.

5. In its written comments, one Government [Australia] expressed the view that the phrase "representative character" was

accurate to the extent that a permanent observer mission is "representative of" the sending State, but [. . .] not accurate to the extent that the mission "represents" the sending State in the organization itself.

Another Government [Canada] expressed the opinion that "the definition of the permanent observer mission should make it clear that the function of this type of mission is to 'observe' not 'represent'".

6. One Government [Israel] pointed out that the introductory words to article 51 dealing with the use of terms "indicate that those terms would specifically apply to part III of the draft articles"; that sub-paragraph (a) "defines the term 'permanent observer mission' as a mission sent to an 'international organization'"; and that paragraph 1 of the commentary to article 51 "explains that the latter term is used in the same sense as in draft article 1". In the light of the foregoing, it considered that

in view of the opening words to draft article 51, it might be desirable to include the words "as defined in article 1" after the words "international organization", unless the Commission should decide to amalgamate articles 1 and 51.

7. The secretariat of the ILO expressed the view that sub-paragraph (a)

does not indicate whether, to benefit from the convention, a non-member State has to be a party to the convention or whether it is enough if the State in whose territory the organization has its seat has ratified it. Probably both States have to be parties to the convention, but it might be preferable to say so specifically.

8. In its editorial suggestions, the Secretariat of the United Nations expressed the view that, as in the case of article 1, in sub-paragraph (a) the indefinite article should be inserted in the phrases "of a representative and permanent character" and "not a member of that organization" (A/CN.4/L.162/Rev.1, section B).

Sub-paragraph (b)

9. One Government [Canada] considered that, as sub-paragraph (a) should make it clear that the function of a permanent observer mission "is to 'observe' not 'represent' [. . .] therefore the role of the 'permanent observer' referred to in sub-paragraph (b) would clearly be to 'observe' not 'represent'".

Sub-paragraph (i)

10. The secretariat of the ILO considered that the term "office" in paragraph (i) did not seem very clear. In its view, it might refer to

offices with a general field of activity, such as the United Nations Office at Geneva, as well as the regional offices of the Organization, which are designed only to meet the needs of their particular region. If the latter meaning is intended, it would appear that the host State would have to allow the establishment of missions in its territory by non-member States of the organization which are not situated in the region covered by the office to which the mission would be accredited.

It expressed, however, doubts that "this was the intention of the authors of the draft". It observed that

The fact that article 52 refers to the rules or practice of the organization does not seem to be a completely satisfactory solution in this case, since some organizations, such as the ILO, have no practice or rules relating to this matter.

Sub-paragraph (k)

11. In its editorial suggestions, the secretariat of the United Nations expressed the view that, as in the case of article 1, sub-paragraph (m), sub-paragraph (k) should be amended to read ". . . a principal or subsidiary organ, or any commission, committee or sub-group of any such organ" (A/CN.4/L.162/Rev.1, section B).

(b) Observations of the Special Rapporteur

12. As regards the comment reflected in paragraph 2 above, the Special Rapporteur wishes to refer to his observation on a similar comment made in the context of article 1.¹⁶⁹

13. With respect to the suggestion reflected in paragraph 3 above, the Special Rapporteur wishes to refer to his observation on a similar suggestion made in the context of article 1.¹⁷⁰

14. As regards the comments reflected in paragraphs 4, 5 and 9 above, contrary to the inclusion of the phrase "representative character" in sub-paragraph (a), the Special Rapporteur, while recalling his observation on a comment made in the context of sub-paragraph (d) of article 1,¹⁷¹ considers that in so far as those comments refer to "representation" as a function of the permanent observer mission, they belong more appropriately in the context of the provision of article 53. The Special Rapporteur is of the view that, in the context of the provision of article 51 on the use of terms, the reference to the "representative character" should be maintained as that element is of the essence of the concept of mission; permanent observer missions are representative in character simply because they are invested by the sending State with authority to represent it in the performance of functions.

15. As regards the comments reflected in the last sentence of paragraph 4 and in paragraph 6 above, the Special Rapporteur wishes to refer to his observation on the question of the possible amalgamation of articles 1 and 51.¹⁷² In the light of that observation he does not deem it opportune to express a view on the suggestion made pending the Commission's decision on that question.

16. As regards the comment reflected in paragraph 7 above, the Special Rapporteur considers that the question thus raised belongs more appropriately to the field of the

¹⁶⁹ See above, p. 16, document A/CN.4/241 and Add.1 and 2, paras. 34 and 37.

¹⁷⁰ *Ibid.*, p. 16, paras. 35 and 38.

¹⁷¹ *Ibid.*, p. 19, paras. 59 and 63.

¹⁷² *Ibid.*, p. 16, para. 37.

law of treaties than that of the present draft, and that it finds its answer in the corresponding provisions of the Vienna Convention on the Law of Treaties.¹⁷³

17. As regards the suggestion reflected in paragraph 8 above, the Special Rapporteur wishes to refer to his observation on a similar comment made in the context of article 1, sub-paragraphs (b) and (d).¹⁷⁴

18. With respect to the comment reflected in paragraph 10 above, the Special Rapporteur wishes to refer to his observation on a comment made in the context of sub-paragraph (l) of article 1.¹⁷⁵

19. As regards the suggestion reflected in paragraph 11 above, the Special Rapporteur wishes to refer to his observation on a similar suggestion made in the context of sub-paragraph (m) of article 1.¹⁷⁶

20. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, subject to the drafting changes referred to in paragraphs 13, 17 and 19 above. Article 51 would therefore read as follows:

Article 51. Use of Terms

For the purposes of the present part:

(a) A "permanent observer mission" means a mission of a representative and permanent character sent to an international organization by a State not a member of that organization;

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

(c) The "members of the permanent observer mission" mean the permanent observer and the members of the staff of the permanent observer mission;

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

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

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

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

(h) The "private staff" means persons employed exclusively in the private service of the members of the permanent observer mission;

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

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

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

Article 52. Establishment of permanent observer missions

(a) Observations of Governments and international organizations

1. In the course of the debate in the Sixth Committee

The provisions of the article, as well as the principles on which they were based, were interpreted in different ways. In the light of those interpretations, some representatives thought that the provisions should be retained unchanged, others considered they should be redrafted in order to eliminate the existing ambiguity, and others proposed to amend the article, while a fourth group stated that, perhaps the best course might be to consider deleting it altogether.¹⁷⁷

2. Several representatives considered that the article should be retained as drafted by the Commission,

because it recognized the need to enable States which were not members of international organizations to follow their work which was of interest to the international community as a whole, while safeguarding the essential autonomy of those organizations and respect for their rules and practice. Those representatives felt that non-member States did not have an unconditional and absolute right to establish permanent observer missions, for that right was subject to and conditioned by the rules of practice of the organization concerned. The will of the organization could not be ignored. Some of them added that if the organization had no relevant rules or practice, the establishment of such missions would be regulated by the provisions of the future convention to be drawn up on the basis of the draft articles. Certain representatives thought that it would be advisable for paragraph 2 of the commentary on the article to specify that the rule provided for in the article presupposed that the organization concerned was of universal character.¹⁷⁸

3. Other representatives stressed that

The establishment of a permanent observer mission by a non-member State was a question whose practical solution should continue to depend on the rules and general practice of the organization concerned or on specific agreements concluded for that purpose. Principles such as the sovereign equality of States or universality could not prevail over the rules and practice of international organizations in that sphere. If no such rules and practices existed, the establishment of permanent observer missions should remain subject to an agreement between the sending State and the host State or the international organization concerned. The future convention was not the proper instrument to grant non-member States an absolute and unreserved right to establish permanent observer missions. Since the article in its entire form had been interpreted in other ways, those representatives considered that the Commission should redraft it, bearing in mind the considerations they had mentioned. It was also suggested that paragraph 3 of the commentary should be redrafted in order to bring it into line with the text of the article.¹⁷⁹

4. Other representatives considered that

The Commission should give the article a broader legal basis more in keeping with the principles of sovereign equality of States and universality. They proposed that the phrase "in accordance with the

¹⁷³ See foot-note 36 above.

¹⁷⁴ See above, pp. 18, 19 and 20, document A/CN.4/241 and Add.1 and 2, paras. 48, 54, 61 and 65.

¹⁷⁵ *Ibid.*, p. 22, paras. 78 and 81.

¹⁷⁶ *Ibid.*, p. 22, paras. 82 and 83.

¹⁷⁷ *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 40.*

¹⁷⁸ *Ibid.*, para. 41.

¹⁷⁹ *Ibid.*, para. 42.

rules or practice of the Organization" should be deleted from the article. In their view, the article should state clearly that non-member States had the right to establish permanent observer missions in order to perform the functions mentioned in article 53 of the draft. The existing wording was unduly restrictive, created the possibility of discrimination between States in contradiction with the other provisions of the draft, did not take fully into account the considerations formulated in the commentary on the article, did not facilitate the implementation of the principle of universality or, generally speaking, the purposes and principles of international organizations of universal character, and was inconsistent with the [. . .] statement of the Secretary-General. ^[180] It was also pointed out that in any case the "rules or practice" referred to in the article could not be considered valid unless they conformed to the general principles of the Charter of the United Nations. Reference to them would merely create difficulties in the interpretation of the provisions of the article.

It was also said that the existing wording of the article was unsatisfactory because the phrase "in accordance with the rules or practice of the Organization" could give rise to interpretations which assimilated the requirements for the establishment of permanent observer missions to the conditions and procedures provided for in Article 4 of the Charter for the admission of States to the United Nations. Since the main purpose of permanent observer missions was precisely to enable non-member States to follow closely the work of organizations of universal character, a restrictive interpretation of that kind should be precluded by redrafting the article in a more suitable way.

The view was also expressed that the Commission was not supposed to deal with the question of the "right" of non-member States to follow closely the activities of international organizations of universal character in the context of its draft articles on representatives of States to international organizations. The situation of permanent observer missions could only be improved through a better interpretation of the statutes of international organizations. ¹⁸¹

5. Lastly, some representatives questioned the need for the article and said that the Commission should re-examine the question of retaining it. In their view

the deletion of the article would affect neither the symmetry nor the legal content of the rest of the draft. In that connexion, it was also pointed out that the wording of the article raised the difficult question of determining what entities were entitled to be regarded as States. It was also suggested that the main point at issue was the right of States members of an organization to maintain control over the establishment of permanent observer missions; the efficacy of and the need for the article should be considered from that standpoint. ¹⁸²

6. In its written comments one Government [Canada] expressed the view that the article was generally acceptable. Another Government [Finland] indicated that the wording of article 52 seems to be quite appropriate. Given the character of international organizations, granting States an unreserved and unconditional right to establish a permanent observer mission to any international organization whatsoever would be inappropriate. On the other hand, requiring the consent of every Member State would perhaps be too strict.

7. One Government [Israel] considered that

The sending of observer missions to an international organization by non-member States can only be done in conformity with the rules and practice of the organization. In that connexion it is doubtful if

¹⁸⁰ *Ibid.*, Twenty-first Session, Supplement No. 1 A (A/6301/Add.1), p. 14.

¹⁸¹ *Ibid.*, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, paras. 43-45.

¹⁸² *Ibid.*, para. 46.

relatively generalized concepts such as "principles of sovereign equality of States and of universality" (para. 3 of the commentary) could prevail over the rules and practice of the organization in question.

Another Government [Canada] expressed its understanding that the article did not give "an automatic right to establish a permanent observer mission". A third Government [Japan] stressed that the Commission had rightly made the right of non-member States to establish permanent observer missions conditional on the relevant rules or practice of the organization.

In the view of two Governments, when such rules or practice did not provide for the establishment of permanent observer missions, "it would be a matter for arrangement between the sending State, the organization and the host State" [Canada] and "[. . .] a non-member State should be allowed to send an observer mission to an organization only if the host State and the organization agreed to receive such a mission" [Japan].

8. One Government [Netherlands], subscribing to the view that no State may derive from the article the right to establish an observer mission with an organization unless the rules or customary practice of the organization itself provide for such a possibility, considered that from such point of view the article was "too broadly formulated"; it recommended "a more precise formulation" on the lines it had suggested earlier for article 6. ¹⁸³

9. The Government of Switzerland expressed the view that

The words "in accordance with the rules or practice of the Organization" should be replaced by "with the agreement of the Organization and in accordance with its rules or practice", which would come at the beginning of the sentence, for it is felt that the organizations should be empowered to grant or refuse permission to establish a permanent observer mission. The present reference to the rules or practice of the Organization seems to signify that permanent observer missions may be established if the general practice of the organization admits of their existence. On the other hand, it does not seem to permit a separate decision to be taken in each case.

10. The secretariat of the IAEA noted that

the phrase "in accordance with the rules or practice of the Organization" would appear to be somewhat repetitious as article 3 of the draft articles provides that "the application of the present articles is without prejudice to any relevant rules of the Organization". On the other hand, we assume that the intent is to emphasize this point and to bring into play, in this particular context, the concept of "practice".

11. Two Governments [Poland and Hungary, respectively] considered that

the principle expressed in article 52 of the draft, according to which any non-member State may establish a permanent observer mission to an international organization of universal character, should be applied equally to all non-member States.

This article ought to lay down that all non-member States may establish permanent observer missions to the international organizations of universal character.

In the view of one of these Governments [Hungary], the present wording of the provision, more specifically the expression

¹⁸³ See above, p. 26, document A/CN.4/241 and Add.1 and 2, para. 108.

“in accordance with the rules or practice of the Organization”, is contrary to the principle of the sovereign equality of States and to the principle of universality. It is also inconsistent with draft article 75, which forbids discrimination between States.

In the view of the other Government [Poland]

it should be made absolutely clear that the rules or practice applied in an organization cannot lead to any discrimination whatsoever in the treatment of individual States.

The opinion was expressed [Hungary] that there was a contradiction between article 52 and the attached commentary. Namely, it is rightly stated in paragraph 2 of the commentary that it is of vital interest to non-member States to be able to follow the work of international organizations, and that the association of non-member States with international organizations is of benefit to the organizations and conducive to the fulfilment of their principles and purposes. In view of the foregoing, the right solution would be for the present wording of article 52 to be replaced by the text of article 51 proposed by the Special Rapporteur in his fifth report.¹⁸⁴

12. In the opinion of two Governments [Australia, United Kingdom], the drafting of the article might suggest, as evidenced by the comments of the Commission and of States indicating that it had already been so construed, that a non-member State was in some way being granted the right to establish a permanent observer mission to an international organization if it considered that it could do so in accordance with the rules or practice of the organization. In their view, international practice had not established such right. And the objection would indeed be strengthened if there were any question of the word “practice” being intended to cover the mere fact that other non-members already had observer missions to the organization. A non-member State was, by definition, not a party to the constitution of the organization in question and it was only by agreement or decision of the members that a non-member State could become entitled to send an observer mission. The members of an organization maintained control over the establishment of observer missions. Moreover, in the absence of any provision in the constitution or otherwise binding on the host State, the establishment of observer missions in its territory must require its consent. How this should be codified was a matter which should be given further consideration by the Commission; but it was essential that the Commission should examine from this standpoint both the efficacy of, and indeed the need for article 52.

If it was felt that any provision was required on the question of the establishment of permanent observer missions, it would be preferable to provide simply that the establishment of permanent observer missions to an organization was regulated by the member States of the organization in accordance with the relevant constitutional documents and decisions of the organization and subject to the consent of the host State. But the problems presented by the drafting of this article illustrated the general difficulty of trying to lay down uniform rules relating to observer missions given that the cases which arose in practice were naturally so heterogeneous.

13. The secretariat of UPU, while noting that the article “leaves the way open for the establishment of permanent

observer missions to international organizations by non-member States”, indicated that the practice of UPU does not correspond to the general scope of this provision, because there is a certain reticence towards non-member countries. It further noted that “the right is not unconditional but is dependent on the rules or practice of the organization”. For these reasons, it reiterated “the need to settle the question of the establishment of the legal relationship between the proposed convention and international organizations”.

14. In its editorial observations, the Secretariat of the United Nations expressed the view that, as it had suggested in the case of article 6, “in the last line, the words ‘set forth’ should be replaced by the words ‘provided for’”. (A/CN.4/L.162/Rev.1, section B.)

(b) *Observations of the Special Rapporteur*

15. The Special Rapporteur notes that the comments made by Governments both during the debates in the Sixth Committee and in writing, as systematically presented in the preceding section, are but the expression of basically different positions reflected in the four alternative approaches described in paragraph 1 above. The arguments advanced in support of each approach reproduce, in general, those which were made in the course of the discussion in the Commission, some of which are reflected in paragraph 3 of the Commission’s commentary to the article. In these circumstances, the Special Rapporteur cannot but record that the comments of Governments are not sufficient in themselves to give to the Commission any clear directive as to the manner in which the question might be resolved. As for himself, he wishes to point out that in paragraphs 1 and 2 of its commentary to the article the Commission endorsed the view expressed by the Special Rapporteur in his own commentary to the then draft article 51 in the fifth report he submitted on the topic that the article lays down a “general rule”.

Underlying such a general rule is the assumption that the organization is one of universal character. [...] Given the central position which such international organizations [of universal character] occupy in the present-day international order and the world-wide character of their activities and responsibilities, it becomes of vital interest to non-member States to be able to follow the work of those organizations more closely. It could also be of benefit to the organizations as a whole and conducive to the fulfilment of their principles and purposes.¹⁸⁵

The Special Rapporteur wishes further to note that article 52 is subject to the provisions of article 75 on non-discrimination. The Special Rapporteur, therefore, does not consider it necessary, for the purposes of the present report, to introduce in the text which he is to submit to the Commission for its consideration and final decision any substantive change which would alter the balance achieved in the provision of the article as presently drafted.

16. In the light of the general considerations made in the preceding paragraph, the Special Rapporteur is unable to agree with the concrete drafting suggestions reflected in paragraphs 4, 8, 9 and 11 above. Furthermore, as regards

¹⁸⁴ *Yearbook of the International Law Commission, 1970*, vol. II, p. 1, document A/CN.4/227 and Add.1 and 2.

¹⁸⁵ *Ibid.*, p. 7, document A/CN.4/227 and Add.1 and 2, chap. II.

the suggestion reflected in paragraph 8 above, he wishes to refer to his observation on a comment made in the context of article 6.¹⁸⁶ As to the suggestion reflected in paragraph 9 above, he wishes to point out that the establishment of permanent observer missions is to be effected "in accordance with the rules or practice of the Organization".

17. As regards the comment reflected in paragraph 13 above, the Special Rapporteur wishes to refer to his observations on comments made in the context of article 22.¹⁸⁷

18. With respect to the editorial suggestion reflected in paragraph 14 above, the Special Rapporteur wishes to recall his proposal in the context of article 6 that "no change should be made in the text" of that article.¹⁸⁸ Therefore, for the sake of uniformity in the presentation of the text of the articles included in this report, he does not propose to replace the words "set forth" in article 52. The editorial suggestion made should be taken into consideration by the Drafting Committee.

19. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 52 would, therefore, read as follows:

Article 52. Establishment of permanent observer missions

Non-member States may, in accordance with the rules or practice of the Organization, establish permanent observer missions for the performance of the functions set forth in article 53.

Article 53. Functions of a permanent observer mission

(a) Observations of Governments and international organizations

1. In the course of the debate in the Sixth Committee certain representatives

questioned the desirability of attempting an enumeration of the functions of a permanent observer mission. Each observer mission constituted a special case and it would therefore be inadvisable to lay down guidelines which would inevitably tend to introduce an element of rigidity in practice. Certain representatives observed that permanent observer missions maintained the necessary liaison between the sending State and the organization but did not represent that State in the organization. Representatives of non-member States could sometimes be invited to participate in meetings of organs or conferences on an equal footing with member States, but in such cases the representatives of non-member States fell into the category of "delegations to organs and to conferences" and not into that of "permanent observer missions". It was also observed that, strictly speaking, "negotiation" was not one of the functions of an observer.¹⁸⁹

¹⁸⁶ See above, pp. 26 and 27, document A/CN.4/241 and Add.1 and 2, paras. 108 and 113.

¹⁸⁷ See above, pp. 43 and 45, document A/CN.4/241/Add.3, Article 22, paras. 12-19 and 26 of the observations.

¹⁸⁸ See above, p. 27, document A/CN.4/241 and Add.1 and 2, para. 116.

¹⁸⁹ *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 47.*

2. In its written comments, one Government [United Kingdom] expressed the view that

the functions listed are broader than those which might be performed by some observer missions. In other cases, the functions of such a mission could be wider than those listed. Here again, it would be preferable to leave this matter to be dealt with case by case in the future.

3. Another Government [Finland] considered it unnecessary

to mention the promotion of co-operation between the sending State and the organization in the enumeration of the functions of a permanent observer mission.

4. Most of the Governments which commented on the article addressed themselves to the phrase "negotiating with the Organization when required and representing the sending State at the Organization". In that connexion one Government [Australia] observed that the provisions regarding permanent observer missions had evidently been based on the premise that these missions "perform functions virtually identical to the functions performed by permanent missions" and had "therefore been accorded similar status, privileges and immunities". In its view that premise was not valid and the description of a permanent observer mission in articles 51 and 53 did not "accurately reflect the role of a permanent observer mission". The function of an observer mission was "to observe and maintain liaison with the organization"; it did not, "in the active sense, 'represent' the sending State". Another Government [Canada], agreeing with the foregoing view, suggested that the phrase be "rephrased or deleted in order to make it clear that an observer mission does not represent". A third government [Japan] favoured also the deletion of the phrase. In this connexion it stated that

occasions may arise where a non-member State negotiates with the organization, or such a State must be represented at the organization. For example, parties to the Statute of the International Court of Justice that are not Members of the United Nations participate in the procedure for effecting amendments to the Statute in the United Nations. Since a non-member State has the discretion to decide by whom it shall be represented, a permanent observer may be designated to negotiate with the organization or to represent it at the organization. From this it does not necessarily follow that representing at or negotiating with the organization constitute proper functions of a permanent observer mission as such.

In its view the deletion of the phrase would "in no way preclude a permanent observer mission from performing such functions".

5. The Government of Switzerland expressed

some misgivings about the views in paragraph 2 of the commentary contrasting permanent missions and observers. In its view, the permanent observer does specifically represent his Government in (*auprès*) the Organization. Moreover, it may be noted that, in French, this is the term used in describing such missions. For example, the Swiss observer mission in New York is officially called the "Office of the Permanent Observer of Switzerland to (*auprès*) the United Nations" and the Swiss representative at Geneva is called the "Observer of the Federal Political Department to (*auprès*) the United Nations in Geneva and Permanent Representative to (*auprès*) the other International Organizations".

It considered that

precisely because the sending State is not a member of the organization, the position of the mission is very similar to that of an

embassy to a foreign Government. In the same way as an embassy represents the sending State in (*auprès*) the receiving State, the observer mission represents it in (*auprès*) the organization, and participation in the internal work of the organization, which is one of the fundamental tasks of a Member State's permanent mission, is, in principle, clearly impossible in the case of observers, just as of course there is no equivalent in international relations. Like the ambassador, the observer therefore ensures representation between two entities which are exterior to each other. Accordingly, it is not a Member State's permanent mission which should be equated with a diplomatic mission (while the observer is accorded a lower degree of competence) but rather the observer who should be equated with the embassy, since the permanent mission, which participates in the internal work of the organization, has an important extra degree of competence for which there is no analogy in inter-State relations.

This similarity between observer missions and diplomatic missions has certain practical consequences relating to their status which should be taken up again at a later stage.

6. The Secretariat of IAEA considered that

The distinction made between representing the State *at* the organization, as opposed to the concept of representing the State *in* the organization seems to be an extremely fine one and might even lead to a certain confusion. Moreover, the concept of representing the State at the organization might be felt to prejudice the distinction between missions of Member States and non-member States. Perhaps this could be clarified by replacing the word "at" by the following words: "in its relations with".

7. The Government of Switzerland also expressed the view that

as to the text of the draft article, the words "representing its Government at sessions of organs of the Organization at which it has been invited to participate" should be added to the text. This formulation is based on the wording used in the United Nations Legal Counsel's memorandum dated 22 August 1962.¹⁹⁰

It further stated that

an organization sometimes invites non-member States to participate in some of its work and, occasionally, it is obliged to do so. In that connexion, it is possible to cite Switzerland's participation in the elections in the International Court of Justice and in the revisions of the Statute of the Court. Such participation is one of the normal responsibilities of observer missions.

The Swiss Government, in addition, suggested that "in the penultimate line of the article the words 'with the organization' should be changed to 'with or in the Organization', the phrase used in article 7 (c)".

8. The secretariat of UPU explained that

The International Bureau deals directly with the Postal Administrations of member countries and only exceptionally with the permanent missions of member States. This is because of the nature of the activities of UPU and the regulations in force, which make the International Bureau serve the Postal Administrations (article 20 of the Constitution).

(b) Observations of the Special Rapporteur

9. As regards the comments reflected in paragraphs 1 and 2 above concerning the enumeration of functions in article 53, the Special Rapporteur is of the view that the required flexibility is achieved in the provision of the article by the use of the words *inter alia*.

10. As regards the comment reflected in paragraph 3 above, the Special Rapporteur takes the view that the express reference to the promotion of co-operation which has been included in the text of article 7 is even more warranted in the context of article 53 in view of the nature and purpose of the relationship between a sending State and the organization implicit in the notion of permanent observer mission, as stressed in the passage from the Secretary-General of the United Nations quoted in paragraph 1 of the Commission's commentary to article 53.

11. As regards the comments reflected in paragraphs 1 and 4 above regarding the function of negotiation, the Special Rapporteur, while observing that that function flows directly from the representative character of the mission, wishes to draw attention to the distinction introduced between the provisions of articles 7 and 53 by the use in the latter article of the words "where required" after the words "negotiating with the Organization", emphasized by the Commission in paragraph 2 of its commentary to the article.

12. The Special Rapporteur is unable to agree with the criticisms concerning the inclusion of "representation" among the functions of the permanent observer mission. In his view, as already pointed out,¹⁹¹ representation is inherent in the very nature of a mission and it is in this sense that the notion has been reflected in article 7 of the draft. In this connexion, the Special Rapporteur wishes to draw attention to the comments made by the Government of Switzerland, reflected in paragraph 5 above.

13. As regards the comments reflected in paragraphs 5 and 6 above concerning the use of the expression "at", the Special Rapporteur wishes to refer to paragraph 2 of the Commission's commentary on the article which in his view correctly explains the use of that expression instead of the word "in" used in article 7 in order to emphasize the fact that permanent observers, being representatives of States non-members of the organization, do not perform functions identical with those of permanent missions of member States. In these circumstances, the Special Rapporteur is unable to agree with the second drafting suggestion reflected in paragraph 7 above.

14. As regards the first drafting suggestion reflected in paragraph 7 above, the Special Rapporteur is of the view that it concerns observer delegations, a matter on which he submitted a working paper¹⁹² at the Commission's twenty-second session but which the Commission considered that it should not take up at this time.¹⁹³

15. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 53, would therefore read as follows:

Article 53. Functions of a permanent observer mission

The functions of a permanent observer mission consist *inter alia* in maintaining liaison and promoting co-operation between the sending

¹⁹¹ See above, Article 51, para. 14 of the observations.

¹⁹² A/CN.4/L.151.

¹⁹³ *Yearbook of the International Law Commission, 1970*, vol. II, pp. 274-275, document A/8010/Rev.1, para. 14.

¹⁹⁰ Reproduced in *Yearbook of the International Law Commission, 1967*, vol. II, p. 190, document A/CN.4/L.118 and Add.1 and 2, part one, A, para. 169.

State and the Organization, ascertaining activities and developments in the Organization and reporting thereon to the Government of the sending State, negotiating with the Organization when required and representing the sending State at the Organization.

Article 54. Accreditation to two or more international organizations or assignment to two or more permanent observer missions

(a) Observations of Governments and international organizations

1. One Government [Finland] expressed the view that

Among other reasons, regulating the status and rights of permanent observer missions is of importance because the possibility to establish such missions as described in these articles [54 and 56] could constitute a suitable solution to the problems of the representation of small States including so-called micro-States. Consequently, States should have the right [. . .] to be represented at two or more organizations or organs by the same representative. The provisions should therefore be flexible enough in this respect.

2. The Government of Switzerland observed that

In addition to plurality of functions as observer to two or more international organizations, it is indeed useful to provide for the possibility of accrediting the head or a member of a permanent mission to one organization as an observer to another organization. This is advantageous to States which are members of only one or some of the organizations established at a given place and which want observer status in other organizations. It may be noted [. . .] that at Geneva the same person acts as permanent representative to the specialized agencies of which Switzerland is a member and as observer to the United Nations. His title, which was quoted in connexion with article 53, [194] mentions both these functions.

In its view, however, the present wording of the article was not perhaps absolutely clear and it might be amended as follows:

"The sending State may accredit the same person as permanent observer to two or more international organizations or *simultaneously as a member of its permanent mission to one or more international organizations and as permanent observer to one or more other organizations.*"

3. One Government [United Kingdom] considered that the article dealt "with matters on which it is not necessary or desirable to seek to lay down uniformity in the proposed convention". In its view "the matters in question should be dealt with as a matter of practice in each organization or in the rules of procedure of the organization".

4. In its editorial observations (A/CN.4/L.162/Rev.1, section B), the Secretariat of the United Nations stated that if the suggestions it had made concerning article 8 were accepted,¹⁹⁵ article 54 could be amended to read:

"Article 54. Accreditation to two or more international organizations or appointment to two or more permanent observer missions

"1. The same person may be:

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

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

¹⁹⁴ See above, Article 53, para. 5 of the observations.

¹⁹⁵ See above, p. 29, document A/CN.4/241 and Add.1 and 2, para. 136.

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

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

5. In relation to article 54, one Government [Netherlands] observed that

While this article repeats the provisions of article 8 in respect of permanent missions, a provision analogous to that laid down in article 9 has not been included either here or in a subsequent article. In his fifth report, the Special Rapporteur did make a proposal for the latter.¹⁹⁶

Although the commentary makes it clear why this proposal was not adopted, its exclusion suggests that the Commission deems any provision concerning the compatibility of representative functions to be superfluous for two reasons, namely, that this compatibility is not disputed in practice by any State (a practice sufficiently well established in the Vienna Conventions of 1961 and 1963) and, secondly, that this compatibility also follows from article 59, paragraph 2.

That Government indicated that it too considered "any provision analogous to article 9 superfluous".

(b) Observations of the Special Rapporteur

6. The Special Rapporteur is of the view that the change suggested in the comment reflected in paragraph 2 above is not simply one of wording but one that extends the scope of the provision of article 54 as presently drafted by including a reference to *permanent missions*, thereby also breaking the symmetry which exists between the provisions of articles 8 and 54. The Special Rapporteur wishes also to observe that as correctly pointed out in the comment reflected in paragraph 5 above, part III does not contain a provision analogous to that of article 9. In these circumstances, he believes that the situation referred to in the suggested amended version might more appropriately find its place in the context of article 9.

7. As regards the suggested text reflected in paragraph 4 above, the Special Rapporteur wishes to refer to his observations on a similar suggestion made in the context of article 8.¹⁹⁷

8. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 54 would, therefore read as follows:

Article 54. Accreditation to two or more international organizations or assignment to two or more permanent observer missions

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

¹⁹⁶ Yearbook of the International Law Commission, 1970, vol. II, p. 8, document A/CN.4/227 and Add.1 and 2, chap. II, "Note on assignment to two or more international organizations or to functions unrelated to permanent missions".

¹⁹⁷ See above, pp. 29 and 30, document A/CN.4/241 and Add.1 and 2, paras. 136 and 142.

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

Article 55. Appointment of the members of the permanent observer mission

Subject to the provisions of articles 56 and 60, the sending State may freely appoint the members of the permanent observer mission.

Article 55. Appointment of the members of the permanent observer mission

(a) Observations of Governments and international organizations

1. In the course of the debate in the Sixth Committee certain representatives

agreed with the principle of the freedom of choice by the sending State of the members of the permanent observer mission. Others took the view that the article did not give adequate protection to the host State.¹⁹⁸

2. The Government of Switzerland referred to its comments on article 10¹⁹⁹ and added:

The host State should be empowered to formulate objections to the presence of a given individual in its territory as a member of an observer mission. Without prejudice to the conciliation commission which it has been suggested should be set up,²⁰⁰ it should be empowered to refuse to grant all or some of the immunities to the person concerned.

3. Another Government [Netherlands], referring also to its comments on the first series of draft articles ("General remarks" and comments on article 10) and to its comments on the second series,²⁰¹ indicated that it

would like to see the position of the host State invested with further guarantees. It should be borne in mind that the principle of reciprocity entertained in bilateral diplomatic relations can hardly ever be applied in the regulation of the quasi-diplomatic status of representatives to organizations. A partial remedy may be found in the inclusion of a provision to the effect that a host State shall have the right to require that a member of a diplomatic or consular mission, declared *persona non grata* by the host State, may not return as a member of a permanent mission, an observer mission or a delegation.

(b) Observations of the Special Rapporteur

4. As regards the comments reflected in the three preceding paragraphs, the Special Rapporteur wishes to refer to his observations on comments made in the context of article 10²⁰² which he considers equally applicable in the case of permanent observer missions.

5. In the light of the foregoing, the Special Rapporteur proposes that article 55 be retained in its present form. Article 55 would, therefore, read as follows:

¹⁹⁸ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 48.

¹⁹⁹ See above, p. 31, document A/CN.4/241 and Add.1 and 2, para. 147.

²⁰⁰ See above, p. 82, document A/CN.4/241/Add.3, Article 50, para. 7 of the observations.

²⁰¹ *Ibid.*, p. 75, Article 45, para. 7 of the observations.

²⁰² See above, p. 31, document A/CN.4/241 and Add.1 and 2, paras. 144-150.

Article 56. Nationality of the members of the permanent observer mission

(a) Observations of Governments and international organizations

1. One Government [Pakistan] expressed the opinion that

draft article 56 correctly recognizes the right of the sending State to choose the members of its permanent observer mission from among nationals of third States possessing the required training and experience. The highly technical character of some international organizations makes it desirable not to restrict unduly the freedom of choice of States, especially in the case of developing countries.

Another Government [Finland], considering that among other reasons, regulating the status and rights of permanent observer missions is of importance because the possibility to establish such missions as described in these articles could constitute a suitable solution to the problems of the representation of small States, including so-called micro-States,

took the view that the provisions of article 56 should therefore be flexible enough.

2. One Government [Canada] suggested that the last sentence of the article be redrafted to read:

They may be appointed from among persons having the nationality or persons being permanent residents of the host State, with the consent of that State which may be withdrawn at any time.

3. The secretariat of IBRD expressed the view that

The proposed rule in draft articles 11, 56 and 85 that a State should in principle be represented by its nationals appears to enter an area that might best be omitted from the proposed instrument. Whether a State, particularly one newly independent with perhaps still unsettled rules of nationality and probably a severe shortage of trained officials, is able to place sufficient trust in a non-national and whether it finds among its own nationals one it considers suitable to represent it and who can be spared from other, perhaps more urgent, assignments, would seem to be a question that each State should be able to resolve for itself, without extraneous considerations such as the preference that would be expressed by the proposed instrument. Similarly, whether a State permits one of its nationals to become an official or representative of another would also seem to be a matter in which it is not necessary to intervene. The Commission's obvious embarrassment with the proposed subject appears from the term, "in principle"—one most unusual in an instrument of this type and in practice incapable of interpretation and enforcement.

4. The secretariat of UNESCO, recalling its comments concerning article 11, considered that

the provision that the permanent observer and the members of the diplomatic staff of the observer mission "may not be appointed from among persons having the nationality of the host State, except with the consent of that State which may be withdrawn at any time" seems too restrictive. [. . .] Nationality should not be of any concern in the choice of a permanent observer and the diplomatic staff of the mission, and the host State should not be given a right of veto in the matter. [. . .] even the provision whereby the permanent observer and the members of the diplomatic staff of the mission "should in

principle be of the nationality of the sending State" is too restrictive, because, for reasons of another kind, the permanent representative and the permanent observer cannot be put on the same footing in that respect. The only restriction with regard to nationals of the host State which seems to be justified is that concerning privileges and immunities, [...] the host State should not be obliged to grant such persons all the privileges and immunities; those restrictions are explicitly laid down in articles 69 (by reference to the provisions of article 40) and 70 (by reference to the provisions of article 41), and it would be advisable to leave it at that.

(b) *Observations of the Special Rapporteur*

5. As regards the comments reflected in paragraphs 3 and 4 above, the Special Rapporteur wishes to draw attention to the explicit reference made by the Commission in paragraph 4 of its commentary to article 56 to the fact that the article reflects its decision, in dealing with the problem of nationality of the members of the permanent observer mission, to take a similar approach to that taken in the context of article 11. He wishes further to recall that he did not propose any change to the text of article 11.²⁰³ In these circumstances, he defers to the commission's decision.

6. As regards the suggested rewording of the last sentence of the article, reflected in paragraph 2 above, the Special Rapporteur considers that the addition of a reference to "persons being permanent residents of the host State" in so far as it may relate to nationals of the sending State, would unduly restrict the scope of the provision contained in the first sentence of the article, and in so far as it relates to nationals of a third State, would run counter to the Commission's decision as explained in paragraph 3 of its commentary to the article, with which he is in agreement.

7. In the light of the foregoing, the special Rapporteur proposes that the article be retained in its present form. Article 56 would, therefore, read as follows:

Article 56. Nationality of the members of the permanent observer mission

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

Article 57. Credentials of the permanent observer

(a) *Observations of Governments and international organizations*

1. The comments made by governments and international organizations in connexion with article 57 concerned the article as a whole and each of the two paragraphs of the article.

Article as a whole

2. The Government of Switzerland expressed support for the idea of issuing permanent observers with creden-

tials, as it resulted in "a welcome clarification of their status".

3. Some governments, however, expressed disagreement with the inclusion of the provision of article 57 in the draft. One Government [United Kingdom] considered that the article

dealt with matters on which it is not necessary or desirable to seek to lay down uniformity in the proposed convention. The matters in question should be dealt with as a matter of practice in each organization or in the rules of procedure of the organization.

The opinions were also expressed that "permanent observers, being representatives of non-member States, do not perform functions identical with those of permanent missions of member States. They do not perform as a general rule and on a standing basis the functions of permanent missions" [Pakistan]; that "a permanent observer does not represent the sending State in the organization" [Japan]; and that the formality of credentials "is not met with in practice" as regards permanent observers [Netherlands]. In the view of two Governments, the requirement of notification to the organization as provided for in article 61 would suffice for the purposes of the permanent observers [Japan, Netherlands]. It was also said that additional formality added nothing to the status of the permanent observer; the practice of the United Nations should be followed whereby permanent observers simply addressed a letter to the Secretary-General instead of presenting credentials [Japan, Pakistan].

4. One Government [Finland], making reference to article 87, expressed the view that in this article and in the commentary thereto, the presentation of credentials is described in varying terms. Terminology should be harmonized.

5. The secretariat of ITU pointed out that the Secretary-General of ITU is given no power to accept the accreditation of a permanent observer mission, nor the credentials of its permanent observer.

Paragraph 1

6. One Government [Canada] expressed the view that taking into account the position of an observer mission in comparison with that of a permanent mission, paragraph 1 of article 57 could be less rigid in its formulation and redrafted as follows: "The credentials of the permanent observer may be issued either by the Head of Government or the Minister for Foreign Affairs or by another competent minister . . .".

Paragraph 2

7. One Government [Netherlands] considered that in conformity with the terms used in other articles and in view of the definition in article 51 (a), the words "a non-member State" should be replaced by "the sending State".

8. Another Government [Canada] suggested that the phrase after the words "permanent observer" should read: "shall act as its observer in one or more organs of the Organization when such role is permitted".

(b) *Observations of the Special Rapporteur*

9. As regards the comments reflected in paragraph 3 above, contrary to the provision of the article, the Special

²⁰³ *Ibid.*, para. 156.

Rapporteur wishes to defer to the position taken by the majority of the members of the Commission, reflected in paragraph 3 of the Commission's commentary on the article to the effect that "it would be preferable to provide, in the draft articles, for the submission of credentials. Moreover, inclusion of such a provision would help make as complete as possible the legal regulation of the institution of permanent observers to international organizations" and with the Commission's belief, expressed in paragraph 4 of its commentary to the article that "permanent observers should be able to present credentials in substantially the same form as permanent representatives".

10. With regard to the comment reflected in paragraph 4 above, the Special Rapporteur wishes to point out that paragraph 1 of article 57 reproduces, with the requisite adaptations, the text of article 12 on permanent missions, on which both paragraphs of article 87 are also based. Further, that the replacement in article 87 of the word "minister" by "authority" has been explained by the Commission in paragraph 2 of its commentary to article 87. There remains, however, one difference consisting in the use in paragraph 1 of article 87 of the expression "transmitted to the Organization" instead of the expression "transmitted to the competent organ of the Organization" which is used in both articles 12 and 57. In this respect he wishes to refer to the observations in the context of article 87.²⁰⁴

11. As regards the comment reflected in paragraph 6 above, the Special Rapporteur notes that the suggested amended version appears to differ from the present text in that it excludes the reference to "the Head of State" and replaces the word "shall" by "may". He is, however, not sure whether the suggested amended version implies also the deletion of the phrase "if that is allowed by the practice followed in the Organization, and shall be transmitted to the competent organ of the Organization". Be it as it may, the Special Rapporteur, while drawing attention to paragraph 4 of the Commission's commentary on the article, wishes to express his belief that as presently drafted the article, in that it contains an enumeration which includes *inter alia* "the Head of State" and "another competent minister", and refers to "the practice followed in the Organization", preserves the necessary flexibility while safeguarding the legitimate interests of the organization.

12. The Special Rapporteur is in agreement with the suggestion made in the comment reflected in paragraph 7 above for the sake of consistency and uniformity.

13. The Special Rapporteur is unable to agree with the rephrasing suggested in the comment reflected in paragraph 8 above in so far as it amounts to deleting all reference to "representation", a subject on which he has already expressed his views.²⁰⁵

14. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form,

subject to the drafting change referred to in paragraph 12 above. Article 57 would, therefore, read as follows:

Article 57. Credentials of the permanent observer

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

2. A sending State may specify in the credentials submitted in accordance with paragraph 1 of this article that its permanent observer shall represent it as an observer in one or more organs of the Organization when such representation is permitted.

Article 58. Full powers to represent the State in the conclusion of treaties

(a) Observations of Governments and international organizations

1. The comments made by Governments and international organizations in connexion with article 58 related to the article as a whole, the title and paragraph 1 of the article.

Article as a whole

2. One Government [Israel], observing that the Vienna Convention on the Law of Treaties does not deal adequately with this aspect, agreed that articles 14 and 58 could be retained in the present set of draft articles, but it believes that, together with article 88, a single provision would be sufficient.

3. On the other hand, the Government of Switzerland recalled that in its earlier comments²⁰⁶ it had

suggested deleting article 14, whose place in the part concerning permanent missions is the same as that of article 58 in the part concerning observers. It expressed the view that this matter relates to the conclusion of treaties between States and international organizations, a field which should be codified separately.

Another Government [Japan] also considered that the article should be deleted

since the matter will be dealt with in connexion with "the question of treaties concluded between States and international organizations", a subject which is on the agenda of the Commission.

A third Government [United Kingdom] expressed the view that the article deals

with matters on which it is not necessary or desirable to seek to lay down uniformity in the proposed convention. The matters in question should be dealt with as a matter of practice in each organization or in the rules of procedure of the organization.

Title of the article

4. One Government [Netherlands] indicated that the observation made in its comments on the title of article 14²⁰⁷ also applied to the title of article 58.

²⁰⁴ See below, p. 120, document A/CN.4/241/Add.5.

²⁰⁵ See above, Article 51, para. 14 of the observations, and Article 53, para. 12 of the observations.

²⁰⁶ See above, p. 33, document A/CN.4/241 and Add.1 and 2, para. 172.

²⁰⁷ *Ibid.*, p. 34, para. 174.

5. Another Government [Canada] suggested that the title of the article should read: "Full powers with respect to the conclusion of treaties".

Paragraph 1

6. One Government [Finland] expressed the view that the wording of the paragraph is appropriate as it limits the powers of a permanent observer to adopt treaties in virtue of his functions to the treaties concluded between the sending State and the organization.

7. Another Government [Canada] stated that "in the context of the role of an observer mission, it is suggested that [...] the word 'representing' be deleted and replaced by the words 'being authorized by'".

8. The Government of Switzerland suggested that the word "adopting" [...] should be replaced by "negotiating", so as to avoid confusion with signing—dealt with in paragraph 2—and also to make allowance for the modern tendency to replace signing by a vote of adoption.

9. The secretariat of UNESCO, recalling its comment on article 14, expressed the view that

it does not seem [...] very apt to speak of "adopting the text of a treaty" in the case of a bilateral instrument. It would seem [...] more accurate and more in accordance with the facts to say that a permanent observer is considered as representing his State "for the purpose of negotiating and drawing up the text of a treaty . . .", or "for the purpose of negotiating a treaty and drawing up the text thereof . . .".

10. The secretariat of IAEA expressed the view that

the first paragraph and in particular the concept that a permanent observer might "adopt" the text of a treaty without the necessity of having full powers, seems also to blur the distinction between the competence of permanent representatives and that of permanent observers. Might it not be preferable to use the word "negotiate" which is used in article 53 and, in fact, repeated in the commentary to article 58 itself? The first paragraph of article 58 might then read as follows:

"A permanent observer in virtue of his functions and without having to produce full powers is recognized as being competent to negotiate the text of a treaty between his State and the international organization to which he is accredited."

(b) Observations of the Special Rapporteur

11. As regards the comment reflected in paragraph 2 above, the Special Rapporteur wishes to refer to his observation in the context of the general comments made on part III.²⁰⁸

12. With respect to the comments reflected in paragraph 3 above favouring the deletion of the article, the Special Rapporteur wishes to refer to his observation on a similar comment made in the context of article 14.²⁰⁹

13. As regards the comment concerning the title of the article reflected in paragraph 4 above, the Special Rapporteur

wishes to refer to his observation on a similar comment made in the context of article 14,²¹⁰ subject to his general observation made in the context of article 23.²¹¹

14. As regards the comment reflected in paragraph 5 above, the Special Rapporteur reiterates what has been mentioned in the preceding paragraph. In addition, he wishes to indicate that, as in the case of article 57,²¹² he would be unable to accept the suggested redrafting in so far as it deletes the reference to "representation", a subject on which he already expressed his views.²¹³ In the same manner, he is unable to agree to the replacement suggested in the comment reflected in paragraph 7 above.

15. As regards the comments reflected in paragraphs 8, 9 and 10 above concerning the use of the word "adopting", the Special Rapporteur is of the view that this word, which appears also in the text of article 14, is the most appropriate as it conforms with the provisions of the Vienna Convention on the Law of Treaties.

16. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, subject to the change referred to in paragraph 13 above. Article 58 would, therefore, read as follows:

Article 58. Representation of States in the conclusion of treaties with international organizations

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

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

Article 59. Composition of the permanent observer mission

(a) Observations of Governments and international organizations

1. The comments made by Governments in connexion with article 59 concerned each of the two paragraphs of the article.

Paragraph 1

2. One Government [Canada] expressed the view that paragraph 1

should include a provision to the effect that the "deputy or asso-

²¹⁰ *Ibid.*, p. 34, paras. 174 and 178.

²¹¹ See above, p. 46, document A/CN.4/241/Add.3, Article 23, para. 7 of the observations.

²¹² See above, Article 57, paras. 8 and 13 of the observations.

²¹³ See above, Article 51, para. 14 of the observations, and Article 53, para. 12 of the observations.

²⁰⁸ See above, "Part III in general", para. 20 of the observations.

²⁰⁹ See above, pp. 33 and 34, document A/CN.4/241 and Add.1 and 2, paras. 172 and 176.

ciate permanent observer” shall enjoy the status of permanent observer when the latter is absent.

Paragraph 2

3. As regards paragraph 2, one Government [Canada] expressed satisfaction “as to the recognition of the differences in privileges and immunities enjoyed by different types of delegates”.

4. Another Government [Netherlands] expressed the view that the provision of paragraph 2

could better be placed in section 2, in the same way as article 107 has been inserted in section 2 of Part IV.

In the last part of the provision the words used differ from those in the last part of paragraph 2 of article 9 of the 1969 Convention on Special Missions. [214] There seems to be no difference in intent, so it is recommended that the same wording be adopted.

(b) Observations of the Special Rapporteur

5. As regards the comment reflected in paragraph 2 above, the Special Rapporteur wishes to point out that terms such as “deputy or associate permanent observer” do not appear in the text of article 51 on the “use of terms” nor have they been referred to elsewhere in the draft.

6. The Special Rapporteur considers well taken the comment reflected in paragraph 4 above concerning the placing of the provision of paragraph 2 of the article, without thereby intending to prejudge the decision which the Commission may reach on the consolidation of some articles in the light of the substantive discussion to be held thereon. As regards the drafting suggestion referred to in the same comment the Special Rapporteur considers that the difference in wording between the texts of articles 59 (and 107) and paragraph 2 of article 9 of the Convention on Special Missions does not imply a difference in substance. In these circumstances, he prefers the wording of article 59 for its simplicity; to follow the language of the corresponding provision of the Convention on Special Missions would make the text of article 59 rather cumbersome, particularly in view of the additional reference in it to “a permanent mission”.

7. In the light of the foregoing and subject to the considerations stated in paragraph 6 above, the Special Rapporteur proposes for the purposes of this report to retain the article in its present form. Article 59 would, therefore, read as follows:

Article 59. Composition of the permanent observer mission

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

2. When members of a permanent diplomatic mission, a consular post or a permanent mission, in the host State, are included in a permanent observer mission, their privileges and immunities as members of their respective missions or consular post shall not be affected.

²¹⁴ See foot-note 41 above.

Article 60. Size of the permanent observer mission

(a) Observations of Governments and international organizations

1. The Government of Switzerland reiterated its comment on article 16 ²¹⁵ concerning the limiting of the size of the mission.

2. Another Government [Canada] stated that it “would welcome the relocation of the present article 50 so that it would apply to article 60 as well as to article 16, i.e. to a permanent observer mission as well as to a permanent mission”.

(b) Observations of the Special Rapporteur

3. As regards the comment reflected in paragraph 1 above, the Special Rapporteur wishes to refer to his observation on the corresponding comment made in the context of article 16. ²¹⁶

4. With respect to the comment reflected in paragraph 2 above, the Special Rapporteur wishes to refer to his observation in the context of the contents and title of part I. ²¹⁷

5. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 60 would, therefore, read as follows:

Article 60. Size of the permanent observer mission

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

Article 61. Notifications

(a) Observations of Governments and international organizations

1. The Government of Switzerland reiterated its comment on article 17, ²¹⁸ concerning notification of the host State by the observer and not by the organization, as an indispensable requirement for the granting of privileges. It also referred to its comments on articles 9 and 17 ²¹⁹ with regard to notification of double assignments (article 59, para. 2).

2. Another Government [Netherlands] expressed the view that

If article 62 were deleted, ^[220] it would suffice to add to article 61, paragraph 1, a sub-paragraph (b) reading as follows:

“the name of the person who will act as *chargé d'affaires ad*

²¹⁵ See above, p. 34, document A/CN.4/241 and Add.1 and 2, para. 185.

²¹⁶ *Ibid.*, p. 35, para. 187.

²¹⁷ *Ibid.*, p. 15, para. 30.

²¹⁸ *Ibid.*, p. 35, para. 189.

²¹⁹ *Ibid.*, pp. 29 and 35, paras. 134 and 189.

²²⁰ See below, Article 62, para. 1 of the observations.

interim, if the post of permanent observer is vacant or the permanent observer is unable to perform his functions, and if the sending State wishes to fill this vacancy”.

3. A third Government [United Kingdom] expressed the opinion that

Paragraphs 3 and 4 do not take sufficient account of the position of the host State. It is the host State which must accord the privileges and immunities to which the persons in question are to be entitled. There should at least be some requirement that the organization should transmit the notifications to the host State without delay.

4. In its editorial observations (A/CN.4/L.162/Rev.1, section B) the Secretariat of the United Nations indicated that the suggestions it had made with regard to article 17²²¹ applied also *mutatis mutandis* to article 61.

(b) *Observations of the Special Rapporteur*

5. As regards the comment reflected in paragraph 1 above, the Special Rapporteur wishes to recall his proposal that no substantial changes be made to the texts of articles 9 and 17.²²²

6. As regards the comment reflected in paragraph 2 above, the Special Rapporteur wishes to refer to his proposal that article 62 be retained in its present form.²²³

7. As regards the comment reflected in paragraph 3 above, the Special Rapporteur wishes to refer to his observation made in the context of article 42²²⁴ to the effect that the provision of paragraph 4 of the article safeguards against possible delays in the transmission of notifications to the host State by the organization.

8. With respect to the suggestions referred to in paragraph 4 above, the Special Rapporteur wishes to refer to his observation thereon in the context of article 17.²²⁵

9. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 61 would, therefore, read as follows:

Article 61. Notifications

1. The sending State shall notify the Organization of:

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

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

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

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

²²¹ See above, p. 35, document A/CN.4/241 and Add.1 and 2, para. 192.

²²² *Ibid.*, pp. 30 and 35, paras. 142, 193 and 195.

²²³ See below, Article 62, para. 7 of the observations.

²²⁴ See above, p. 71, document A/CN.4/241/Add.3, Article 42, para. 14 of the observations.

²²⁵ See above, p. 35, document A/CN.4/241 and Add.1 and 2, paras. 192 and 195.

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

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

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

Article 62. *Chargé d'affaires ad interim*

(a) *Observations of Governments and international organizations*

1. One Government [Netherlands] expressed agreement “with the Commission that the sending State should not be obliged to appoint a *chargé d'affaires ad interim* for an observer mission. Accordingly, any detailed regulation governing this institution seems ponderous”.²²⁶

2. Another Government [United Kingdom] expressed the view that

Although the title *Chargé d'affaires* may be appropriate in some cases, it would not be suitable in all. “Acting head of the permanent observer mission” or “acting permanent observer” would be more suitable in most cases. Here again, however, the flexibility of the present situation is preferable to any attempt to lay down a uniform rule. If anything, a slight amendment to article 51 (b) would be preferable to the inclusion of article 62.

3. One Government [Canada] observed that

In view of the fact that *Chargé d'affaires ad interim* is a well established title, its use here might be somewhat confusing. Accordingly, [it] would prefer the use of the words “Acting permanent observer” rather than *Chargé d'affaires ad interim* for the replacement of permanent observers.

4. In its editorial observations (A/CN.4/L.162/Rev.1, section B), the Secretariat of the United Nations, recalling its suggestion for article 18²²⁷ expressed the view that the words “in case” in the second sentence should be replaced by “if”.

(b) *Observations of the Special Rapporteur*

5. As regards the comments reproduced in paragraphs 1 to 3 above, the Special Rapporteur wishes to refer to the Commission’s views reflected in paragraphs 1 and 3 of its commentary to the article that “it was thought desirable [...] in order to make the regulation of the institution of permanent observers as complete as possible, to include a provision on this topic” and that “it was reasonable” to use the term “*chargé d'affaires ad interim*” in connexion with permanent observer missions “because of the representative functions performed by observers”. The Special Rapporteur defers to the Commission’s decision based on the above-mentioned views.

6. As regards the suggestion referred to in paragraph 4 above, the Special Rapporteur wishes to refer to his observation on a similar suggestion made in the context of article 18.²²⁸

²²⁶ See above, Article 61, para. 2 of the observations.

²²⁷ See above, p. 36, document A/CN.4/241 and Add.1 and 2, para. 198.

²²⁸ *Ibid.*, p. 36, paras. 198 and 201.

7. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 62 would, therefore, read as follows:

Article 62. Chargé d'affaires ad intérim

If the post of permanent observer is vacant, or if the permanent observer is unable to perform his functions, a *chargé d'affaires ad intérim* may act as head of the permanent observer mission. The name of the *chargé d'affaires ad intérim* shall be notified to the Organization either by the permanent observer or, in case he is unable to do so, by the Minister for Foreign Affairs or by another competent minister if that is allowed by the practice followed in the Organization.

Article 63. Offices of permanent observer missions

(a) Observations of Governments and international organizations

1. The comments made by Governments in connexion with article 63 related to the article as a whole and more specifically to paragraph 1 in the light of paragraph 2 of the Commission's commentary on the article, and to paragraph 2.

Article as a whole

2. The Government of Switzerland stated that it endorsed the principle set out in the article.

Paragraph 1

3. Three Governments [Madagascar, Netherlands, Switzerland] shared the view expressed by some members of the Commission, reflected in paragraph 2 of the Commission's commentary to the article, that the word "localities" should be replaced by "a locality". In that connexion, one Government [Madagascar] expressed the view that

It would hardly be reasonable to allow the premises of an observer mission to be dispersed over the territory of a host State, since such premises enjoy important immunities and tax exemptions (article 67).

Paragraph 2

4. In the course of the debate in the Sixth Committee, some doubts were expressed about paragraph 2 of the article. It was considered that

International practice had not yet crystallized sufficiently to warrant the inclusion of such provision in the draft articles. Certain representatives said that it was inadvisable to give the impression of encouraging States to establish offices of their permanent observer missions in the territory of a State other than the host State because such situations gave rise to problems, particularly where privileges and immunities were involved. On the other hand, it was argued that to make such establishment conditional on the prior consent of the host State might cause special difficulties for newly independent countries which still lacked an extensive network of embassies and missions.²²⁰

5. In its written comments, one Government [Pakistan] expressed the fear that the provision in paragraph 2 might "cause hardship to newly independent States".

²²⁰ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 49.

(b) Observations of the Special Rapporteur

6. As regards the comments reflected in paragraph 3 above, the Special Rapporteur wishes to refer to his observations on a comment made in the context of article 20.²³⁰

7. As regards the comments reflected in paragraphs 4 and 5 above concerning paragraph 2 of the article, the Special Rapporteur wishes to point out that that paragraph reproduces, with the requisite adaptations, the text of paragraph 2 of article 20. He wishes further to recall that, as stated in paragraph 1 of the Commission's commentary on article 20—reproduced in paragraph 1 of its commentary to article 63—paragraph 2 of the article deals "with the rare cases in which sending States wish to establish offices of their permanent missions outside the territory of the host State". The Special Rapporteur is not inclined to agree with the apprehensions to which the requirement of the prior consent of a third State has given rise, particularly when the requirement of the prior consent of the host State does not appear to have led to similar results.

8. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 63 would, therefore, read as follows:

Article 63. Offices of permanent observer missions

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

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

Article 64. Use of [flag and] emblem

(a) Observations of Governments and international organizations

1. In the course of the debate in the Sixth Committee

There were differences of opinion concerning the right of the permanent observer mission to use the flag of the sending State. Certain representatives took the view that reference to the use of the flag should be deleted because it sufficed to grant such missions the right to use the emblem. Others, however, suggested that the reference to the flag should be retained, on the ground that a permanent observer mission had the right to use both the emblem and the flag of the sending State.²³¹

2. In its written comments one Government [Madagascar] observed that "the right to use the flag is expressly recognized". Another Government [Finland] expressed the view that "the right to use the flag of the sending State is not necessary for a permanent observer mission but there is no reason to exclude it". The Government of Switzerland considered that

In view of the observations on the similarity between observer missions and diplomatic missions,^[232] it seems natural to grant the

²³⁰ See above, pp. 36 and 37, document A/CN.4/241 and Add. 1 and 2, paras. 208, 211 and 213.

²³¹ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 50.

²³² See above, Article 53, para. 5 of the observations.

mission the right to display the flag of the sending State on its premises and to extend that right to the observer's residence and the vehicle he uses.

A fourth Government [Netherlands] indicated that if the article was considered necessary, it seemed preferable to refer to the "flag and emblem".

3. Two Governments [Canada, Japan] favoured the deletion of the reference to the use of the flag.

4. One Government [Madagascar] expressed the view that "if diplomatic relations do not exist or are severed [...] use of the flag should be the subject of arrangements to be concluded between the sending State and the receiving State".

(b) *Observations of the Special Rapporteur*

5. The Special Rapporteur notes that the comments of governments as reflected in paragraphs 1 to 3 above confirm the division of views which took place in the Commission concerning the reference to "the flag". As for himself, the Special Rapporteur wishes to recall that the corresponding draft article (article 59) submitted by him in his fifth report on the topic²³³ included a reference to the flag. Nevertheless, in view of the inconclusive comments made by governments, he does not deem it appropriate for the purposes of the present report to introduce any changes in the text of the article which he is to submit to the Commission for its consideration and final decision.

6. As regards the comment reflected in paragraph 4 above, the Special Rapporteur wishes to indicate that the situation referred to concerns the question of the possible effects of exceptional situations, which is dealt with elsewhere in the present report.²³⁴

7. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Subject to the Commission's decision on the bracketed words, article 64 would, therefore, read as follows:

Article 64. Use of [flag and] emblem

1. The permanent observer mission shall have the right to use the [flag and] emblem of the sending State on its premises.

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

SECTION 2. FACILITIES, PRIVILEGES
AND IMMUNITIES OF PERMANENT
OBSERVER MISSIONS

General comments

(a) *Observations of Governments
and international organizations*

1. In the course of the debate in the Sixth Committee some representatives, emphasizing the need to ensure the

²³³ *Yearbook of the International Law Commission, 1970, vol. II, p. 11, document A/CN.4/227 and Add.1 and 2, chap. II.*

²³⁴ See above, p. 15, document A/CN.4/241 and Add.1 and 2, paras. 30-31.

effective performance of their functions by permanent observer missions, endorsed the solutions proposed by the Commission to determine the privileges and immunities of such missions. Those representatives considered that,

Even if they were established by non-member States, permanent observer missions were of a representative and permanent character and their privileges and immunities should therefore be generally the same as those accorded to permanent missions, subject to any minor changes which the special characteristics of the functions of permanent observer missions might make it advisable to introduce in individual provisions. [...] It was pointed out that the alternative suggested by some—the privileges and immunities would be limited to those which were strictly "necessary for the performance of the functions"—was not sufficiently precise, would lead to inequalities of treatment and would open the way to subjective interpretations of the relevant provisions. In the opinion of those representatives, the Commission had struck a proper balance between the preservation of the interests of the host State and the need to protect relations between permanent observer missions and organizations.²³⁵

2. Other representatives supported in principle the approach adopted by the Commission to the question of the privileges and immunities of permanent observer missions. They felt, however, that

The representative character of those missions and the functions which they performed justified granting them the full range of diplomatic immunities and privileges, without discrimination and irrespective of their [...] nature. In the view of those representatives, therefore, it would be advisable for the Commission to follow the Vienna Convention on Diplomatic Relations of 1961^[236] more closely and to remove from the draft articles any elements which did not conform to contemporary diplomatic law.²³⁷

3. Other representatives felt that

The objective criterion of functional necessity, embodied in Article 105 of the Charter of the United Nations, rather than theories based on the representative character or on unjustified parallels, should be the point of departure for delimiting the privileges and immunities of permanent observer missions [...]. There was no legal or historical basis for the view that every mission [...] was automatically entitled, because it was acting on behalf of a State, to the full range of diplomatic privileges and immunities. Permanent observer missions did not have the same representative capacity as "diplomatic missions" or the same functions and responsibilities as the permanent missions of Member States. [...]

Those representatives expressed reservations about the Commission's approach to the matter. In their opinion, the draft articles relating to the privileges and immunities of permanent observer missions [...] were based too closely on diplomatic law, tended without justification to identify permanent observer missions with permanent missions [...], and departed from contemporary practice and existing agreements. The Convention on the Privileges and Immunities of the United Nations^[238] and the Convention on the Privileges and Immunities of the Specialized Agencies^[239] should be regarded, as a general rule, as a maximum and no privileges and immunities which were not really necessary should be asked for. [...] Those representatives concluded by expressing the hope that the Commission would review the draft articles in question in the light of those observations, for it was essential to avoid the future convention being ratified by only a small number of States.

²³⁵ *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 28.*

²³⁶ See foot-note 38 above.

²³⁷ *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 29.*

²³⁸ See foot-note 20 above.

²³⁹ See foot-note 45 above.

In support of [these] observations, it was stated that limiting privileges and immunities was the best way of censuring their application in practice; that it was desirable to avoid imposing excessively heavy administrative burdens on the host State; that parliaments and public opinion were opposed to broadening the categories of persons enjoying privileged treatment; [. . .] and that an unnecessarily high level of privileges and immunities would make States reluctant to invite international organizations [. . .] to establish themselves [. . .] in their territory. In response to the latter argument, it was said that no State was obliged to permit an organization to establish its headquarters [. . .] in its territory, but if it did it should accept the obligation to accord the appropriate privileges and immunities to the missions [. . .] concerned.

It was also said that although the Commission based its draft as a whole on functional necessity, it departed from that criterion with regard to some specific provisions. Attention was drawn to the difference between multilateral diplomacy and bilateral diplomacy. In the case of the latter, the host State could protect itself by various measures such as the declaration of *persona non grata*, reciprocity, etc. The interests at stake were much more complex and much less complementary in multilateral diplomacy, where it could happen that the host State did not recognize the sending State.²⁴⁰

4. Certain representatives said they

had no objection to the scope of the privileges and immunities conferred in the draft articles, provided that they were applied only to organizations in the United Nations family and to others of similar importance. In their view, it was necessary to find a more precise definition of the term "international organization of universal character".²⁴¹

5. In its written comments, one Government [Finland] expressed the view that "in principle the permanent observer missions should have the same status as the permanent missions". The Government of Switzerland supported

the idea that the privileges and immunities of observer missions should be the same as those of permanent missions. In its view, a great deal could also be borrowed from the status of diplomatic missions, because of the similarity between the two types of missions.

Another Government [Israel] stated its inclination

towards a broad formulation of facilities, privileges and immunities for the official representatives of States; it considers that uniformity of treatment is preferable to the many ambiguities and obscurities now encountered. If, however, this view is not adopted, it is suggested that the Commission may wish to consider presenting the material in a series of separate instruments.

6. Some Governments [Australia, Japan, United Kingdom] considered that the draft articles virtually equated permanent observer missions with permanent missions for the purposes of determining the facilities, privileges and immunities to be accorded to them. In this connexion, one Government [United Kingdom] did not deem it "advisable to adopt articles which imply that this assimilation will be justifiable in all cases. The matter should be left to be dealt with in a flexible manner, case by case. Another Government [Canada] was of the opinion that the "reference made in draft articles 65 to 77 to the draft articles on permanent missions should be more restrictive". A third Government [Australia] expressed the view that the Commission should review the parallel it has drawn, taking into account the functions of permanent observer missions and the fact

that, since they do not belong to the organization, they are not subject to its rules. On the basis of a proper relationship between permanent missions and permanent observer missions the status, privileges and immunities of the latter would be considerably reduced from those shown in the present draft articles. They might appropriately be similar to those proposed [by that Government] for delegations to organs and conferences.^[242]

7. Other Governments likewise stressed the "functional necessity" element. One Government [Canada], while considering that "privileges and immunities granted to permanent observer missions should only be those which are essential to the execution of their functions" indicated that it

welcomes and supports the statement made by the Chairman of the International Law Commission in the Sixth Committee that "The Commission would [. . .] also bear in mind [. . .] the suggestion of various delegations that articles 65 to 75 should be reconsidered in the light of the functional theory of privileges and immunities".

Another Government [Japan] expressed the view that

Placing permanent observer missions on the same footing as permanent diplomatic missions or permanent missions is not necessary for the performance of these limited functions.

Privileges and immunities to be accorded to permanent observer missions should be such as to ensure efficient performance of their main and normal functions. The functions of permanent observer missions consist, in principle, in observing the activities of international organizations and, to a lesser degree, in maintaining the necessary liaison between sending States and organizations. Thus, their functions differ, both in extent and in nature, from those of permanent diplomatic missions or permanent missions, which functions lie essentially in representing the sending States respectively in the receiving State or in the organization. Occasions may sometimes arise in which permanent observer missions are entrusted by their sending States with functions of representation at or negotiation with organizations. These functions, however, as the commentary on article 53 indicates, are not regularly recurrent and not inherent in the nature of permanent observer missions.

Moreover, the Commission's approach to the matter is not supported by the practice of international organizations of the United Nations family. In granting privileges and immunities to permanent observer missions, one should not depart from the practice of international organizations.

The same Government suggested that

the draft articles on privileges and immunities of permanent observer mission be based on the Vienna Convention on Consular Relations.^[243]

8. The secretariat of WHO indicated that

The privileges and immunities which may be accorded [. . .] observers, regardless of privileges they may enjoy in other respects, are governed by the relevant provisions of the Headquarters Agreement^[244] when the meeting is held at Geneva or of other agreements, concluded either previously or for the occasion, when the meeting is held away from Headquarters.

9. In its editorial suggestions, the Secretariat of the United Nations noted that

The title of section 2 of part II reads simply "Facilities, privileges and immunities". Moreover, "mission" is in the singular in the titles of sections 3 of parts II and III. It is in the plural in the titles of sections 1 of parts II and III. "Delegation" is in the singular in the

²⁴⁰ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 30-33.

²⁴¹ *Ibid.*, para. 34.

²⁴² See below, p. 123, document A/CN.4/241/Add.6, Part IV, Section 2, General comments, para. 6.

²⁴³ See foot-note 50 above.

²⁴⁴ United Nations, *Treaty Series*, vol. 26, p. 331.

title of section 3 of part IV and is in the plural in the titles of sections 1 and 2 of that part (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

10. The Special Rapporteur notes that the comments of governments on the facilities, privileges and immunities of permanent observer missions to international organizations, as systematically presented in the preceding section, confirm the difference in attitude among members of the Commission, as reflected in paragraphs 5 and 6 of the Commission's general comments on section 2 of part III of the draft.²⁴⁵ The arguments advanced by governments in support of their positions reproduce in general those which were made during the discussion at the twenty-second session of the Commission, some of which are included in the above-mentioned paragraphs of the Commission's general comments. In these circumstances the Special Rapporteur cannot but record that the comments of Governments are not sufficient in themselves to give to the Commission any clear directive as to the manner in which the question might be resolved. As for himself, the Special Rapporteur wishes to point out that the view he expressed on the question in his own commentary to the then draft article 60 in the fifth report he submitted on the topic²⁴⁶ received the endorsement of the majority of the members of the Commission, as it is reflected in paragraph 6 of the above-mentioned general comments in the following terms:

[. . .] notwithstanding the fact that permanent observer missions to international organizations are established by non-member States while permanent missions are established by member States, they both have a representative and permanent character. This is reflected in article 51 (a), which defines a "permanent observer mission" as "a mission of representative and permanent character sent to an international organization by a State not a member of that organization". This definition is identical in substance with the definition of the permanent mission in article 1 (d), according to which a "permanent mission" is a "mission of representative and permanent character sent by a State member of an international organization to the Organization". Facilities, privileges and immunities are to be determined by reference not only to the functions of the permanent observer mission but also by reference to its representative character. On this view, the facilities, privileges and immunities to be accorded to permanent observer missions should be substantially the same as those accorded to permanent missions, with such differences as are dictated by differences in function.²⁴⁷

The Special Rapporteur remains of the same opinion. The Special Rapporteur wishes further to point out that, as stated in paragraph 7 of the Commission's general comments on section 2 of part III, it was on the basis of the view reflected in the passage quoted above that the Commission proceeded to draft the articles contained in section 2. The Special Rapporteur, therefore, does not consider it necessary, for the purposes of the present report, to alter the Commission's approach in the articles on facilities, privileges and immunities with which he is to furnish the Commission for consideration and final decision.

²⁴⁵ *Yearbook of the International Law Commission, 1970*, vol. II, p. 283, document A/8010/Rev.1, chap. II, B.

²⁴⁶ *Ibid.*, p. 12, document A/CN.4/227 and Add.1 and 2.

²⁴⁷ *Ibid.*, p. 283, document A/8010/Rev.1, chap. II, B.

11. As regards the view reflected in paragraph 4 above concerning the meaning of the term "international organization of universal character", the Special Rapporteur wishes to refer to his observations in the context of subparagraph (b) of article 1.²⁴⁸

12. With respect to the comment reflected in paragraph 9 above, the Special Rapporteur wishes to refer to his general observation made in the context of article 23.²⁴⁹

Article 65. General facilities

(a) *Observations of Governments and international organizations*

1. One Government [Japan] indicated that the comments it had made on article 22²⁵⁰ also applied to article 65.

2. Another Government [Netherlands] expressed the view that in accordance with its suggestion on article 22²⁵¹ article 65 should also mention: "... such facilities as are required for the performance . . .".

3. The secretariat of UNESCO, recalling its comment on article 22,²⁵² observed that "it is open to question" whether the clause contained in the second sentence "would not be out of place in such a convention".

(b) *Observations of the Special Rapporteur*

4. With respect to the comments reflected in paragraphs 1 to 3 above, the Special Rapporteur wishes to refer to his observations on comments made in the context of article 22.²⁵³

5. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 65 would, therefore, read as follows:

Article 65. General facilities

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

Article 66. Accommodation and assistance

(a) *Observations of Governments and international organizations*

1. One Government [Netherlands] indicated that its comment relating to article 93²⁵⁴ was

²⁴⁸ See above, p. 18, document A/CN.4/241 and Add.1 and 2, paras. 49-54.

²⁴⁹ See above, p. 46, document A/CN.4/241/Add.3, Article 23, para. 7 of the observations.

²⁵⁰ *Ibid.*, p. 43, Article 22, para. 5 of the observations.

²⁵¹ *Ibid.*, p. 43, para. 3.

²⁵² *Ibid.*, p. 43, para. 6.

²⁵³ *Ibid.*, p. 45, paras. 22 and 23, 20, and 23 respectively.

²⁵⁴ See below, p. 127, document A/CN.4/241/Add.6, Article 93, para. 1 of the observations.

also applicable to the accommodation of [. . .] permanent observer missions, albeit to a lesser extent, as providing for the accommodation of permanent representatives seems to require less strenuous efforts. It might, however, still be considered whether the distribution of duties in article [. . .] 66 too might not be reversed.

2. Another Government [Japan] stated that its comments on article 24²⁶⁵ also applied to article 66.

3. The secretariat of UNESCO expressed the opinion that "article 66 [. . .] calls for the same observations as we made concerning article 23, paragraph 2".^[266]

4. The Secretariat of the United Nations referred to its editorial suggestions concerning article 23,²⁶⁷ (A/CN.4/L.162/Rev.1, section B.)

(b) Observations of the Special Rapporteur

5. As regards the comment reflected in paragraph 1 above, the Special Rapporteur wishes to refer to his observation thereon in the context of article 93.²⁶⁸

6. As regards the comment referred to in paragraph 2 above, the Special Rapporteur wishes to recall his observation thereon in the context of article 24²⁶⁹ which he considers applicable in the context of the present article.

7. As regards the comment referred to in paragraph 3 above, the Special Rapporteur wishes to recall that he took the position that that comment called for no observation on his part in the context of article 23. He is of the same opinion in the context of the present article.

8. As regards the comment reflected in paragraph 4 above, the Special Rapporteur wishes to refer to his observation on the corresponding suggestions made in the context of article 23.²⁶⁰

9. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 66 would, therefore, read as follows:

Article 66. Accommodation and assistance

The provisions of articles 23 and 24 shall apply also in the case of permanent observer missions.

Article 67. Privileges and immunities of the permanent observer mission

(a) Observations of Governments and international organizations

1. In the course of the debate in the Sixth Committee, some representatives made the general comment that the privileges and immunities thus granted to permanent observer missions might

²⁶⁵ See above, p. 47, document A/CN.4/241/Add.3, Article 24, para. 4 of the observations.

²⁶⁶ *Ibid.*, p. 46, Article 23, para. 6 of the observations.

²⁶⁷ *Ibid.*, p. 46, para. 2.

²⁶⁸ See below, p. 128, document A/CN.4/241/Add.6, Article 93, para. 4 of the observations.

²⁶⁹ See above, p. 47, document A/CN.4/241/Add.3, Article 24, paras. 4 and 8 of the observations.

²⁶⁰ *Ibid.*, p. 46, Article 23, paras. 2 and 7 of the observations.

be too extensive, and suggested that the Commission should reconsider the question.²⁶¹

2. Other representatives emphasized that

The inviolability of the premises of the mission, as provided for in draft article 25, must be respected and ensured. These representatives criticized the present wording of paragraph 1 of the latter article and expressed the view that, even in case of disaster, no derogation from the inviolability of the premises should be allowed without the permission of the head of the mission concerned. A further comment was that the words at the end of article 25, paragraph 1—"and only in the event that it has not been possible to obtain the express consent of the permanent representative"—were too restrictive of the presumption of consent in case of fire or other disaster that seriously endangered public safety provided for in that paragraph; it was suggested those words should be replaced by a sentence based on the criterion of "the reasonableness of efforts to obtain the consent of the permanent representative".²⁶²

3. In its written comments, one Government [Canada] expressed the view that "since the task of an observer mission differs in certain aspects from that of a permanent mission, article 67 should be more explicit regarding this distinction". It suggested that

This article, instead of referring to articles 25, 26, 27, 29 and 38, paragraph 1 (a), of the present draft articles, should, *mutatis mutandis*, follow articles 31, 32, 33, 35 and 50, paragraph 1 (a) of the Vienna Convention on Consular Relations.

Entry into the host State

4. The Secretariat of the United Nations expressed its belief that "express provision should be made [. . .] to ensure to members of permanent observer missions [. . .] and to members of their families, the right of entry into and sojourn in the territory of the host State and the freedom of transit to and from the premises of the international organization". It added that

The reasons for the foregoing suggestions may be found in the Secretariat's observations on part II of the provisional draft, which are applicable, *mutatis mutandis*, to those on permanent observer missions.^[263]

5. The secretariat of the WHO indicated that "as a general rule", the headquarters or other relevant agreements

provide for a minimum of freedom of entry and sojourn for all persons irrespective of nationality, summoned by WHO, as is the case with observers to whom an official invitation has been extended.

(b) Observations of the Special Rapporteur

6. As regards the views reflected in paragraphs 1 and 2 above, the Special Rapporteur wishes to refer to his observations on similar comments made in the context of article 25.²⁶⁴

²⁶¹ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 51.

²⁶² *Ibid.*, para. 52. In connexion with the inviolability of premises, see also the comments made during the debate in the Sixth Committee concerning article 94 (*ibid.*, para. 68), reproduced below, p. 128, document A/CN.4/241/Add.6, Article 94, para. 1 of the observations.

²⁶³ See above, p. 52, document A/CN.4/241/Add.3, New article 27 *bis*, para. 5 of the observations.

²⁶⁴ *Ibid.*, pp. 48 and 49, Article 25, paras. 4-6, 9, 15 and 20 of the observations.

7. As regards the comment reflected in paragraph 3 above, the Special Rapporteur refers to his observation in the context of the general comments on section 2 of part III.²⁶⁵

8. As regards the comment reproduced in paragraph 4 above, regarding "entry into the host State", the Special Rapporteur wishes to refer to his observations on the similar comment reflected under the new article 27 *bis*,²⁶⁶ which he considers applicable in the case of permanent observer missions. In the light of those observations and, in particular, of his proposal for the inclusion in the draft of a new article 27 *bis*,²⁶⁷ the Special Rapporteur considers that, without prejudice to the final decision to be taken on his proposal, article 67 should contain a reference also to the provisions of that new article.

9. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, with the modification referred to in paragraph 8 above. Article 67 would, therefore, read as follows:

Article 67. Privileges and immunities of the permanent observer mission

The provisions of articles 25, 26, 27, 27 *bis*, 29 and 38, paragraph 1 (a), shall apply also in the case of permanent observer missions.

Article 68. Freedom of movement

(a) Observations of Governments and international organizations

1. The Government of Switzerland made reference to its comment on article 28.²⁶⁸ Another Government [Canada] suggested that article 68 "should follow article 34 of the Vienna Convention on Consular Relations instead of article 28 of this draft convention". A third Government [Japan] did not consider it

necessary for the performance of the functions of the permanent observer mission that members of the permanent observer mission and, in particular, members of their family enjoy the same freedom of movement as members of the permanent diplomatic mission.

(b) Observations of the Special Rapporteur

2. As regards the comments reflected in the preceding paragraph the Special Rapporteur wishes to refer to his observations on the comments made in the context of article 28²⁶⁹ and in the context of the general comments on section 2 of part III.²⁷⁰

3. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 68 would, therefore, read as follows:

²⁶⁵ See above, Section 2, General comments, para. 10.

²⁶⁶ See above, p. 52, document A/CN.4/Add.3, New article 27 *bis*, paras. 7-13 of the observations.

²⁶⁷ *Ibid.*, p. 53, para. 13.

²⁶⁸ *Ibid.*, p. 53, Article 28, para. 3 of the observations.

²⁶⁹ *Ibid.*, p. 54, para. 4 of the observations.

²⁷⁰ See above, Section 2, General comments, para. 10.

Article 68. Freedom of movement

The provisions of article 28 shall apply also in the case of members of the permanent observer mission and members of their families forming part of their respective households.

Article 69. Personal privileges and immunities

(a) Observations of Governments and international organizations

1. In the course of the debate in the Sixth Committee, the general comment was made that the Commission "should reconsider whether all the privileges and immunities thus granted were really necessary in the case of permanent observer missions and their members".²⁷¹

2. With regard to article 30 on personal inviolability, it was stated that

consideration should be given to the insertion of a second paragraph, reading: "This principle does not exclude in respect of the permanent representative either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing serious crimes or offences".²⁷²

3. In reference to the categories of persons enjoying privileges and immunities under the terms of article 40, paragraph 1 (members of the family of the permanent representative and members of the family of the diplomatic staff of the permanent mission forming part of their respective households), it was observed that the phrase "if they are not nationals of the host State" should be replaced by "if they are not nationals of or permanently resident in the host State".²⁷³

4. In its written comments, one Government [Japan] expressed the view that

the provision of article 69 goes too far. The Commission might amend the article to the effect that members of the permanent observer mission and members of their family enjoy such personal privileges and immunities as are accorded by the Vienna Convention on Consular Relations to members of consular posts.

5. Another Government [Canada] suggested that

article 69, paragraph 1, instead of referring to article 30 of the present draft articles, follow article 40 of the Convention on Consular Relations and that the following be added in article 69 to the text of article 40 of the Convention on Consular Relations: "This principle does not exclude, in respect of the permanent observer, either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing serious crimes or offences".

Also in paragraph 1, no reference should be made to article 31. Instead of referring to articles 32, 35, 36, 37 and 38, paragraphs 1 (b) and 2 of the present draft articles, paragraph 1 of article 69 should [. . .] refer to articles 41, 48, 49, 52 and 50, paragraphs 1 (b) and 2 of the Convention on Consular Relations. "In paragraphs 2, 3, 4 and 5, the provisions contemplated for the different categories of persons should be determined along the lines of the status of such categories of persons at a consular post".

6. The secretariat of UNESCO indicated that "article 69, which states that article 32 shall apply in the case

²⁷¹ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 53.

²⁷² *Ibid.*, para. 54.

²⁷³ *Ibid.*, para. 55.

of permanent observer missions, calls for the same observations as we made concerning article 32".^[274]

7. The secretariat of UNESCO also noted that

article 69 does not state that article 33 shall apply in the case of permanent observers and members of the diplomatic staff of the permanent observer mission.

In its view

this is the result of an oversight, because if such persons enjoy the immunity from jurisdiction provided for in article 32, provision must also be made for waiving that immunity. There is no reason why the question of waiving immunity should be provided for and regulated in the case of some (permanent representatives) and not in the case of others (permanent observers). [...] it would be better to speak of "withdrawing" the immunity rather than "waiving" it, because to speak of "withdrawing the immunity" shows immediately that it is not for the beneficiaries themselves to deprive themselves of the immunity but that such a decision must be taken by the authority to which they are responsible.

8. In connexion with the reference in article 69 to article 40, paragraphs 1, 2, 3 and 4, the secretariat of UNESCO recalled its comments concerning article 40²⁷⁵ and reiterated it regretted "the assimilation of persons having their permanent residence in the host State to nationals of that State".

9. In its editorial suggestions, the Secretariat of the United Nations took the view that "in the third line of paragraph 2, the words 'and the members' should be replaced by 'and of members'. This would make the meaning clearer." Also that "in paragraph 3 the words 'together with' should be replaced by 'and of' for the same reason". (A/CN.4/L.162/Rev.1, section B.)

(b) *Observations of the Special Rapporteur*

10. As regards the general comments reflected in paragraphs 1, 4 and 5 above, the Special Rapporteur wishes to refer to his observations in the context of the general comments on section 2 of part III.²⁷⁶

11. As regards the comment reflected in both paragraphs 2 and 5 above, the Special Rapporteur wishes to refer to his observation on a similar comment made in the context of article 30.²⁷⁷

12. As regards the suggestion reflected in paragraph 3 above, the Special Rapporteur wishes to refer to his observation on a similar suggestion made in the context of article 40.²⁷⁸

13. As regards the comment reflected in paragraph 6 above, the Special Rapporteur wishes to refer to his observations on the comments made in the context of subparagraph (d) of article 32.²⁷⁹

²⁷⁴ See above, p. 57, document A/CN.4/241/Add.3, Article 32, para. 15 of the observations.

²⁷⁵ *Ibid.*, p. 67, Article 40, para. 5 of the observations.

²⁷⁶ See above, Section 2, General comments, para. 10.

²⁷⁷ See above, p. 55, document A/CN.4/241/Add.3, Article 30, paras. 3 and 4 of the observations.

²⁷⁸ *Ibid.*, pp. 67 and 68, Article 40, paras. 3 and 10 of the observations.

²⁷⁹ *Ibid.*, pp. 57 and 58, Article 32, paras. 15 and 18-23 of the observations.

14. The Special Rapporteur confirms the comment made by the secretariat of UNESCO, reproduced in paragraph 7 above, to the effect that "article 69 does not state that article 33 shall apply in the case of permanent observers and members of the diplomatic staff of the permanent observer mission". He is, however, unable to agree with the contention of the secretariat of UNESCO that "this is the result of an oversight". The Special Rapporteur wishes to point out that article 69, which concerns "personal privileges and immunities" does not include a reference to article 33 because such reference has been expressly made in the text of article 71 on "waiver of immunity and settlement of civil claims". As regards the suggested replacement of the word "waiving" by "withdrawing", the Special Rapporteur is not inclined to agree with it since in his view the verb "to waive", which is the one used in the English text of the corresponding provisions of the Vienna Conventions on Diplomatic and on Consular Relations, the Convention on Special Missions and the Conventions on the privileges and immunities of the United Nations and of the Specialized Agencies, does not mean necessarily that it is "for the beneficiaries themselves to deprive themselves of the immunity".

15. As regards the comment reflected in paragraph 8 above, the Special Rapporteur wishes to refer to his observation on a comment made in the context of article 40.²⁸⁰

16. With respect to the comment reflected in paragraph 9 above, the Special Rapporteur wishes to point out that the words whose replacement is suggested have been included in article 69 because they are the ones used in the text of the provisions of article 40 to which reference is made therein. He is therefore, for the sake of consistency and uniformity, not in a position to accept the suggested changes.

17. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 69 would, therefore, read as follows:

Article 69. Personal privileges and immunities

1. The provisions of articles 30, 31, 32, 35, 36, 37 and 38, paragraphs 1 (b) and 2, shall apply also in the case of the permanent observer and the members of the diplomatic staff of the permanent observer mission.

2. The provisions of article 40, paragraph 1, shall apply also in the case of members of the family of the permanent observer forming part of his household and the members of the family of a member of the diplomatic staff of the permanent observer mission forming part of his household.

3. The provisions of article 40, paragraph 2, shall apply also in the case of members of the administrative and technical staff of the permanent observer mission, together with members of their families forming part of their respective households.

4. The provisions of article 40, paragraph 3, shall apply also in the case of members of the service staff of the permanent observer mission.

5. The provisions of article 40, paragraph 4, shall apply also in the case of the private staff of members of the permanent observer mission.

²⁸⁰ See above, pp. 67 and 68, document A/CN.4/241/Add.3, Article 40, paras. 5 and 11 of the observations.

Article 70. Nationals of the host State and persons permanently resident in the host State

(a) Observations of Governments and international organizations

1. The secretariat of UNESCO referred to the comments it made concerning article 41.²⁸¹

2. In its editorial suggestions, the Secretariat of the United Nations observed that

Grammatically, the phrase "who are nationals of or permanently resident in the host State" can be taken as applying only to "persons on the private staff". The sentence should be amended to make it clear that this phrase also applies to "members of the permanent observer mission". One possibility would be to insert commas before and after the words "and persons on the private staff"; alternatively the article could be amended to read: "The provisions of article 41 shall apply also in the case of *persons who, being* members of the permanent mission *or employed* on the private staff, are nationals of or permanently resident in the host State" (A/CN.4/L.162/Rev.1, section B).

(b) Observations of the Special Rapporteur

3. As regards the comment reflected in paragraph 1 above, the Special Rapporteur wishes to refer to his observation on a comment made in the context of article 41.²⁸²

4. The Special Rapporteur considers well taken the point raised in the comment reflected in paragraph 2 above. His own preference is for the first alternative suggested, which he proposes to adopt.

5. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, subject to the drafting change referred to in paragraph 4 above. Article 70 would, therefore, read as follows:

Article 70. Nationals of the host State and persons permanently resident in the host State

The provisions of article 41 shall apply also in the case of members of the permanent observer mission, and persons on the private staff, who are nationals of or permanently resident in the host State.

Article 71. Waiver of immunity and settlement of civil claims

(a) Observations of Governments and international organizations

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

Where a waiver of immunity could not be obtained because it would impede the performance of the functions of the permanent observer mission, the sending State should use its best endeavours to bring about a just settlement of the claim.²⁸³

²⁸¹ *Ibid.*, p. 68, Article 41, para. 2 of the observations.

²⁸² *Ibid.*, pp. 68 and 69, paras. 2 and 7.

²⁸³ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 56.

2. In its written comments, one Government [Canada] expressed the view that

Instead of referring to articles 33 and 34 of the present draft articles, article 71 should follow *mutatis mutandis* articles 44 and 45 of the Convention on Consular Relations.

(b) Observations of the Special Rapporteur

3. With respect to the view referred to in paragraph 1 above, the Special Rapporteur wishes to point out that that view has been textually reflected in article 34 as regards civil claims.

4. With respect to the comment reflected in paragraph 2 above, the Special Rapporteur wishes to refer to his observation in the context of the general comments on section 2 of part III.²⁸⁴

5. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 71 would, therefore, read as follows:

Article 71. Waiver of immunity and settlement of civil claims

The provisions of articles 33 and 34 shall apply also in the case of persons enjoying immunity under article 69.

Article 72. Exemption from laws concerning acquisition of nationality

(a) Observations of Governments and international organizations

1. In its editorial suggestions, the Secretariat of the United Nations expressed the view that "the words 'not being nationals' should be replaced by '*who are not nationals*', which is the clearest way to express this idea". (A/CN.4/L.162/Rev.1, section B.)

(b) Observations of the Special Rapporteur

2. The Special Rapporteur agrees with the suggested change reflected in the preceding paragraph, as the words "who are not nationals" are those now used in article 39,²⁸⁵ to which reference is made in article 72.

3. Subject to the drafting change referred to above the Special Rapporteur proposes that the article be retained in its present form. Article 72 would, therefore, read as follows:

Article 72. Exemption from laws concerning acquisition of nationality

The provisions of article 39 shall apply also in the case of members of the permanent observer mission who are not nationals of the host State and members of their families forming part of their household.

²⁸⁴ See above, Section 2, General comments, para. 10.

²⁸⁵ See above, p. 67, document A/CN.4/241/Add.3, Article 39, paras. 4 and 6 of the observations.

Article 73. Duration of privileges and immunities*(a) Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee the view was expressed in connexion with the notifications mentioned in article 42, paragraph 1 that "mention should be made only of notification to the host State ' by the Organization ' ".²⁸⁶
2. In its written comments, one Government [Canada] expressed the view that the article "should follow article 53 of the Convention on Consular Relations; only notification by the organization to the host State should be relevant". (A/CN.4/240, p. 15.)

(b) Observations of the Special Rapporteur

3. As regards the comments reflected in paragraphs 1 and 2 above concerning notifications, the Special Rapporteur wishes to refer to his observation on a similar comment made in the context of paragraph 1 of article 42.²⁸⁷
4. As regards the comment reflected in paragraph 2 above that the article "should follow article 53 of the Convention on Consular Relations" the Special Rapporteur wishes to observe that the text he proposed in his present report for paragraph 2 and the first sentence of paragraph 3 of article 42 has been based and drafted in the light of paragraphs 2 and 3 of article 53 of that Convention, respectively.²⁸⁸
5. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 73 would, therefore, read as follows:

Article 73. Duration of privileges and immunities

The provisions of article 42 shall apply also in the case of every person entitled to privileges and immunities under the present section.

Article 74. Transit through the territory of a third State*(a) Observations of Governments and international organizations*

1. One Government [Netherlands] referred to its comments relating to article 110.²⁸⁹
2. In its editorial suggestions, the Secretariat of the United Nations expressed the view that "the words ' and the couriers ' should be amended to read ' and of the couriers '. This would make for greater clarity." (A/CN.4/L.162/Rev.1, section B.)

²⁸⁶ *Official Records of the General Assembly, Twenty-fifth Session, Annexes, Agenda item 84, document A/8147, para. 57.*

²⁸⁷ See above, pp. 70 and 71, document A/CN.4/241/Add.3, Article 42, paras. 3 and 14 of the observations.

²⁸⁸ *Ibid.* pp. 70, 71 and 72, Article 42, paras. 12, 22 and 23, of the observations.

²⁸⁹ See below, p. 138, document A/CN.4/241/Add.6, Article 110, para. 1 of the observations.

(b) Observations of the Special Rapporteur

3. As regards the comment reflected in paragraph 1 above, the Special Rapporteur wishes to refer to his observations on the comment made in the context of article 110.²⁹⁰
4. The Special Rapporteur is in agreement with the editorial suggestion reflected in paragraph 2 above.
5. In the light of the foregoing, the Special Rapporteur wishes to propose that the article be retained in its present form, subject to the drafting change referred to in the preceding paragraph. Article 74 would, therefore, read as follows:

Article 74. Transit through the territory of a third State

The provisions of article 43 shall apply also in the case of the members of the permanent observer mission and members of their families, and of the couriers, official correspondence, other official communications and bags of the permanent observer mission.

Article 75. Non-discrimination*(a) Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee some representatives agreed with the inclusion of the article in the draft, noting that

it was based on the principle of sovereign equality of States proclaimed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 in resolution 2625 (XXV) at the closing meeting of the commemorative session on the occasion of the twenty-fifth anniversary of the United Nations.²⁹¹

2. In its written comments, one Government [Canada] expressed the view that "in article 75, reference could be made to article 72 of the Convention on Consular Relations".

3. Another Government [Netherlands] indicated that its comment concerning a different wording of article 44²⁹² was "equally applicable to article 75". It added that the question

may be asked whether the facility to grant exemption, in individual cases, from a general prohibition by the host State—such as the forbidding of visits to certain areas or the carrying of photographic equipment—might be incompatible with the non-discrimination principle.

In its view the answer was "in the negative".

(b) Observations of the Special Rapporteur

4. As regards the comment reproduced in paragraph 2 above, the Special Rapporteur wishes to make reference

²⁹⁰ *Ibid.*, p. 138, paras. 1 and 3.

²⁹¹ *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 58.*

²⁹² See above, p. 74, document A/CN.4/241/Add.3, Article 44, para. 5 of the observations.

to his observation in the context of the general comments on section 2 of part III.²⁹³

5. With respect to the comment referred to in paragraph 3 above, the Special Rapporteur wishes to recall his observation thereon in the context of article 44.²⁹⁴

6. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 75 would, therefore, read as follows:

Article 75. Non-discrimination

In the application of the provisions of the present part, no discrimination shall be made as between States.

SECTION 3. CONDUCT OF THE PERMANENT OBSERVER MISSION AND ITS MEMBERS

Article 76. Conduct of the permanent observer mission and its members

(a) Observations of Governments and international organizations

1. In the course of the debate in the Sixth Committee it was argued that

The provision concerning respect for the laws and regulations of the host State (article 45) did not give adequate protection to that State, since it could not be established whether the person concerned had committed a "grave and manifest violation" so long as the sending State did not waive his immunity.²⁹⁵

2. The view was also expressed that

A provision concerning compulsory insurance against third-party risks arising from the use, in the host State, of vehicles owned by permanent observer missions or their members should be included in this article.²⁹⁶

3. In its written comments one Government [Canada] suggested that "article 76 should follow in substance articles 55, 56 and 57 of the Convention on Consular Relations".

4. Another Government [Israel] suggested that

Permanent observer missions and their members, as well as all the other representatives to which the different parts of the draft articles apply, should be required to carry third party insurance policies to cover damage or injury that may arise from the use of vehicles by them in the receiving State. This observation applies to articles 45 and 112, and it is offered as a contribution to the solution of the problem dealt with in articles 32, paragraph 1 (d) and 100, paragraph 2 (d) (alternative A).

5. The Secretariat of the United Nations expressed the opinion that the obligation of the sending State, envisaged by reference in article 76

to recall or otherwise to remove a member of its permanent observer mission . . . , if it does not waive his immunity, should be extended to cover any serious abuse of the privilege of residence.

²⁹³ See above, Section 2, General comments, para. 10.

²⁹⁴ See above, p. 74, document A/CN.4/241/Add.3, Article 44, paras. 5 and 11 of the observations.

²⁹⁵ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 59.

²⁹⁶ *Ibid.*, para. 60.

6. The secretariat of UNESCO referred to its remarks concerning article 45.²⁹⁷

(b) Observations of the Special Rapporteur

7. As regards the comments reflected in paragraphs 1, 5 and 6 above, the Special Rapporteur wishes to refer to his observations on the similar comments made in the context of paragraph 2 of article 45.²⁹⁸

8. In view of the position he has taken in the present report as regards article 45,²⁹⁹ the Special Rapporteur does not deem it necessary to express his reaction in the context of article 76 to the suggestion reflected in both paragraphs 2 and 4 above which he is sure will be taken into consideration by the Commission in due course.

9. As regards the comment reproduced in paragraph 3 above, the Special Rapporteur wishes to refer to his observation in the context of the general comments on section 2 of part III.³⁰⁰

10. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 76 would, therefore, read as follows:

Article 76. Conduct of the permanent observer mission and its members

The provisions of articles 45 and 46 shall apply also in the case of permanent observer missions.

SECTION 4. END OF FUNCTIONS

Article 77. End of functions

(a) Observations of Governments and international organizations

1. In the course of the debate in the Sixth Committee it was stated that

Article 48, concerning facilities for departure, imposed an unrealistic duty on the host State. The last sentence of that article should be replaced by the following: "It shall, in case of emergency, facilitate in every possible way the obtaining of means of transport for them, and for such of their personal effects as is reasonable under the circumstances, to leave the territory".³⁰¹

2. In its written comments, one Government [Canada] expressed the view that "article 77 should follow articles 25, 26 and 27 of the Convention on Consular Relations".

3. The secretariat of UNESCO referred to its comments concerning article 49.³⁰²

²⁹⁷ See above, p. 76, document A/CN.4/241/Add.3, Article 45, para. 14 of the observations.

²⁹⁸ *Ibid.*, pp. 75, 76 and 77, paras. 4-15 and 20.

²⁹⁹ *Ibid.*, p. 77, paras. 18, 20 and 25.

³⁰⁰ See above, Section 2, General comments, para. 10.

³⁰¹ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 61.

³⁰² See above, p. 80, document A/CN.4/241/Add.3, Article 49, para. 3 of the observations.

(b) *Observations of the Special Rapporteur*

4. As regards the view reflected in paragraph 1 above, the Special Rapporteur wishes to recall his observation thereon made in the context of article 48.³⁰³

5. As regards the comment reflected in paragraph 2 above, the Special Rapporteur wishes to refer to his observation in the context of the general comments on section 2 of part III.³⁰⁴

6. With respect to the comment referred to in paragraph 3 above, the Special Rapporteur wishes to recall his observation thereon in the context of article 49.³⁰⁵

7. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 77 would, therefore, read as follows:

Article 77. End of functions

The provisions of articles 47, 48 and 49 shall apply also in the case of permanent observer missions.

* * *

DOCUMENT A/CN.4/241/ADD.5

NOTE

The present addendum is based on the comments of Governments and international organizations referred to in the introduction to the report.³⁰⁶ It is arranged along the same lines as explained in the introduction.³⁰⁷

Part IV. Delegations of States to organs and to conferences

SECTION 1. DELEGATIONS IN GENERAL

Article 78. Use of terms*(a) Observations of Governments and international organizations*

1. In its written observations³⁰⁸ the Netherlands Government refers to sub-paragraph (b) of article 78.³⁰⁹ It points out that

³⁰³ *Ibid.*, pp. 79 and 80, Article 48, paras. 5 and 10 of the observations.

³⁰⁴ See above, Section 2, General comments, para. 10.

³⁰⁵ See above, pp. 80 and 81, document A/CN.4/241/Add.3, Article 49, paras. 3 and 7 of the observations.

³⁰⁶ See above, p. 10, document A/CN.4/241 and Add.1 and 2, paras. 5-7.

³⁰⁷ *Ibid.*, p. 11, para. 8.

³⁰⁸ See foot-note 12 above.

³⁰⁹ For all references to the draft articles and the Commission's commentaries, see foot-note 34 above.

Besides conferences convened by or under the auspices of international organizations [...], there are other international conferences, some of which certainly have a universal character—e.g. the International Red Cross Conferences, the Hague Diplomatic Conferences of 1951 and 1964 on the Unification of Law Governing the International Sale of Goods, the Brussels Diplomatic Conferences on Maritime Law (since 1910), and the European Fisheries Conference of 1963/1964.

The Netherlands Government notes that

the status of delegations to these and similar conferences is not covered in the draft articles, nor would it seem to be covered by the 1969 Convention on Special Missions,^[310] unless article 6 of that Convention is to be interpreted as covering delegations to international conferences as well.

2. In its written observations on article 78 the ILO notes that "the article refers solely to delegations consisting of government representatives and not other delegations such as those representing employers and workers". It also refers to the relation between part IV of the draft articles and article 13, which deals with the accreditation of permanent representatives to organs. In the opinion of the ILO,

It would seem desirable to state specifically that delegations to organs or to conferences should always be accredited according to the rules of the organization and that general accreditation to the organization would not be a sufficient basis for assuming that permanent delegates are automatically members of the delegation of the country they represent in each particular meeting.

3. WHO refers to sub-paragraph (e) of article 78 (meaning of a "representative"). It points out that WHO uses a different term:

Under article 11 of its constitution, the persons who represent States are called "delegates". Under article 47 of the Constitution, the term "representative" is used in the case of WHO Regional Committees.

WHO suggests that the draft articles should therefore take account of the special system laid down in WHO's constituent instruments.

4. IBRD observes that since part IV of the draft is restricted to "Delegations of States to organs and to conferences" and article 78 (c) makes it clear that "a delegation to an organ" is to represent the State "therein", no provision of the proposed instrument appears to cover delegations sent by States to negotiate with the organization itself. It points out that

In the practice of the financial institutions of the IBRD Group (and probably of certain other international organizations) delegations of this type considerably outnumber those to which part IV is addressed, but international law is most deficient with respect to the former for they are referred to neither in the Articles of Agreement of any of the IBRD Group of organizations, nor in the Specialized Agencies' Convention^[311] or in other similar agreements. This would thus seem to be a significant lacuna in the existing international legal structure, to which the proposed instrument might well address itself.

5. ITU observes that

Members of delegations to ITU conferences are not usually diplomats and in most cases do not hold diplomatic passports. If it may be assumed, however, that all persons who have been formally

³¹⁰ See foot-note 41 above.

³¹¹ See foot-note 45 above.

accredited by a sending State are to be considered as having diplomatic status and are therefore "members of the diplomatic staff" for the purposes of article 78 (*h*), it would seem that the definitions in this article reflect the practice generally applied to delegations of States Members of ITU to plenipotentiary and administrative conferences of the Union.

It points out, however, that in addition to its Administrative Council, the Union has two organs, known as the CCIs for short, the meetings of which are attended by persons representing their Governments, namely: (*a*) the International Radio Consultative Committee (CCIR), and (*b*) the International Telegraph and Telephone Consultative Committee (CCITT). In the opinion of ITU,

Persons appointed by a member country to serve on the Council are accredited and would, according to the interpretation mentioned above, be included in the category of "members of the diplomatic staff" for the purposes of the draft treaty.

The CCIs, however, ITU goes on to say, do not seem to fit into the pattern envisaged in article 78:

As these bodies do not have the power to draw up treaties or regulations, but merely make recommendations, no system of formal accreditation for representatives of States is used. It would seem questionable, therefore, whether such persons enjoy diplomatic status for the purposes of article 78, although they have the same need for facilities, privileges and immunities as "members of the diplomatic staff" to ITU conferences. In actual practice, they are treated no differently from accredited representatives at conferences of the Union.

Another observation made by ITU in connexion with article 78 relates to certain representatives of entities—usually non-governmental—who attend CCI plenary assemblies and meetings of their study groups. ITU points out that these

non-governmental representatives make a major contribution to the work of the CCIs, and need to enjoy most of the privileges and immunities granted to representatives of States in order to perform their tasks.

ITU notes that, in practice, host Governments have accorded them the necessary facilities, but that the situation is anomalous.

6. The editing observations of the United Nations Secretariat (A/CN.4/L.162/Rev.1, section B) included the following suggestions with respect to article 78:

(i) The verb "to mean" should be used throughout instead of "to be".

(ii) In the opening phrase, the word "purpose" should be replaced by "purposes", to conform with articles 1 and 51.

(iii) In sub-paragraph (*a*), the words "and any commission" should be replaced by "or any commission".

(iv) In sub-paragraph (*h*), a comma should be inserted between the words "delegation" and "including".

(b) *Observations of the Special Rapporteur*

7. The examples of international conferences of a universal character cited by the Netherlands Government (para. 1 above) fall within the purview of the subject of relations between States and international organizations. The question of conferences convened by or through international organizations was included in the draft

articles on the assumption that such conferences are a collateral to organs of international organizations. The Special Rapporteur wishes, however, to recall in this respect the working paper which he submitted to the Commission at its twenty-second session on temporary observer delegations and conferences not convened by international organizations.³¹²

8. As to the observation of the ILO (para. 2 above) that article 78 refers solely to delegations consisting of government representatives and not other delegations such as those representing employers and workers, the Special Rapporteur wishes to point out that the tripartite system of representation as known in the ILO is a particular feature of that organization and as such is covered by articles 3 to 5. Furthermore it is to be noted that at the ILO General Conference, employers' and workers' delegates are in fact members of national delegations. Article 3 of the ILO Constitution³¹³ provides that member States shall be represented at the ILO General Conference by four representatives, of whom two shall be government delegates and the other two employers' and workers' delegates respectively. It is true that the employers' and workers' members of the Governing Body do not represent the countries of which these persons are nationals, but are elected by employers' and workers' delegates to the Conference. However, by virtue of annex I (concerning the ILO) to the Convention on the Privileges and Immunities of Specialized Agencies,³¹⁴ employers' and workers' members of the Governing Body are assimilated to representatives of member States, except that the waiver of the immunity of any such person may be made only by the Governing Body.

9. Article 78 does not prejudice the use of terms other than "representatives". The Special Rapporteur does not therefore consider it necessary to provide in the draft articles for the special system laid down in the constituent instruments of some international organizations in which terms such as "delegate" are used.

10. The Special Rapporteur wishes now to turn to the observation by IBRD (para. 4 above) that the definition of a "delegation to an organ" as the delegation sent by a State member of the organ to represent it "therein" does not appear to cover delegations sent by States to negotiate with the organization itself. It is true that in drafting part IV of the draft, the Commission has in mind delegations which participate *in* the meetings of the organs. Delegations sent by States to negotiate with the organization (or rather with an organ of the organization, which is usually the secretariat) belong to the "question of treaties concluded between States and international organizations or between two or more international organizations". The Commission decided at its twenty-second session to include this question in its general programme of work.³¹⁵

³¹² A/CN.4/L.151.

³¹³ International Labour Office, *Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference* (Geneva, 1971).

³¹⁴ United Nations, *Treaty Series*, vol. 33, p. 290.

³¹⁵ *Yearbook of the International Law Commission, 1970*, vol. II, p. 310, document A/8010/Rev.1, para. 89.

11. The Special Rapporteur does not share the doubts expressed by ITU concerning the diplomatic status of the persons appointed by a member State to serve in the CCIIs (para. 5 above). These persons possess the representative character even if they do not have the power to draw up treaties or regulations but merely make recommendations or no system of formal accreditation for representation is used for them. The Special Rapporteur notes that ITU itself in its written observations concedes that in actual practice these persons are treated no differently from accredited representatives at conferences of the Union. As to the second observation of ITU relating to non-governmental representatives, the Special Rapporteur wishes to point out that this observation bears on the scope of the draft articles, a question which he took up in the introduction of the present report.

12. The Special Rapporteur agrees with the editing suggestions made by the United Nations Secretariat relating to article 78 (para. 6 above). He notes that changes ii and iv suggested by the United Nations Secretariat are already incorporated in the printed version of the report of the Commission on the work of its twenty-second session.³¹⁶

13. In view of the foregoing, the Special Rapporteur proposes that the article be retained in its present form subject to the drafting changes referred to in paragraph 6 above. Article 78 would therefore read as follows:

Article 78. Use of terms

For the purposes of the present part:

(a) An "organ" means a principal or subsidiary organ of an international organization or any commission, committee or sub-group of any such organ, in which States are members;

(b) A "conference" means a conference of States convened by or under the auspices of an international organization, other than a meeting of an organ;

(c) A "delegation to an organ" means the delegation designated by a State member of the organ to represent it therein;

(d) A "delegation to a conference" means the delegation sent by a participating State to represent it at the conference;

(e) A "representative" means any person designated by a State to represent it in an organ or at a conference;

(f) The "members of the delegation" mean the representatives and the members of the staff of the delegation to an organ or to a conference, as the case may be;

(g) The "members of the staff of the delegation" mean the members of the diplomatic staff, the administrative and technical staff and the service staff of the delegation to an organ or to a conference, as the case may be;

(h) The "members of the diplomatic staff" mean the members of the delegation, including experts and advisers, who have been given diplomatic status by the sending State for the purposes of the delegation;

(i) The "members of the administrative and technical staff" mean the members of the staff of the delegation to an organ or to a conference, as the case may be, employed in the administrative and technical service of the delegation;

(j) The "members of the service staff" mean the members of the staff of the delegation to an organ or to a conference, as the case may be, employed by it as household workers or for similar tasks;

(k) The "private staff" mean persons employed exclusively in the private service of the members of the delegation to an organ or to a conference, as the case may be;

(l) The "host State" means the State in whose territory a conference or a meeting of an organ is held.

Article 79. Derogation from the present part

Article 80. Conference rules of procedure

*(a) Observations of Governments
and international organizations*

1. In the course of the consideration by the Sixth Committee³¹⁷ of the third group of draft articles at the twenty-fifth session of the General Assembly in 1970, it was noted with approval by a number of delegations that articles 79 and 80 introduced an element of flexibility into the draft and prevented unduly rigid application of the provisions.

2. In the opinion of the Government of Sweden, the content of article 79 seems to belong in part I (General provisions). It suggests, therefore, that the article be included in article 5.

3. The Government of Switzerland states that it might be desirable to amend article 79 so as to cover agreements already concluded, as well as those to be concluded in the future. It also points out that the purpose of this article, including the proposed addition, would be met by articles 4 and 5, provided it was clearly understood that they apply to the draft as a whole, as the Commission observes in its commentary on article 4, and that the wording of article 5, which is too restrictive in its present form, is revised accordingly.

4. The ILO points out that article 79, which it observes basically reproduces the text of article 5 of the draft, might create some ambiguity, particularly with regard to the scope of articles 3 and 4, which are not reproduced. The ILO feels that "it would be preferable either not to reproduce the substance of article 5, or to reproduce the whole of articles 3 to 5".

5. The Government of Japan refers to the commentary on article 80, where it is stated that the Commission is of the opinion that, in view of their nature, rules of procedure should not derogate from provisions relating to privileges and immunities. In the view of the Japanese Government, it is unlikely that conference rules of procedure would deal with provisions on privileges and immunities. It therefore suggests that the question of derogation from the provisions on privileges and immunities be left entirely to article 79 and that the application of article 80 be limited to section 1 of part IV.

6. IBRD observes that though part IV of the draft covers delegations to both organs and conferences, article 80 refers only to the rules of procedure of conferences. It states that in the light of the commentary

³¹⁶ *Ibid.*, p. 285, document A/8010/Rev.1, chap. II B.

³¹⁷ For all references to the Sixth Committee's discussion of the draft articles, see foot-note 39 above.

It is assumed that a reference to rules of procedure of organs was omitted as these are considered to be covered by the "rules of the Organization" referred to in draft article 3.

7. The United Nations Secretariat makes two editing suggestions:

(i) In article 79 it would be better to say "agreements containing different provisions".

(ii) In article 80 it would be better, for the sake of uniformity, to say "The provisions of articles . . .". Articles 66 to 74, 92, 104, 113 and 115 use this form of words consistently (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

8. The Governments and international organizations making the above-mentioned observations on article 79 appear to find difficulty in reconciling the provision of this article with those of articles 3 to 5. It is to be noted that article 79 was included by the Commission in part IV as supplementary to article 5 of part I, since the latter article applies only to "representatives of States to an international organization". The Special Rapporteur has suggested in the present report³¹⁸ and in the drafting of articles 3 to 5 a number of changes the purpose of which is to make them of general application to the draft as a whole. Should the Commission accept these suggestions, the above-mentioned difficulties encountered in connexion with article 79 would appear in a different light and there may not be a need for the inclusion of such provision in part IV.

9. The Special Rapporteur is not sure he sees contradiction between what is stated by the Commission in its commentary on article 80 and the observation of the Japanese Government inasmuch as all the articles referred to in article 80 are contained in section 1 of part IV and therefore do not relate to privileges and immunities.

10. The Special Rapporteur accepts the editing suggestions of the United Nations Secretariat.

11. Articles 79 and 80 would therefore read as follows:

Article 79. Derogation from the present part

Nothing in the present part shall preclude the conclusion of other international agreements containing different provisions concerning delegations to an organ or a conference.

Article 80. Conference rules of procedure

The provisions of articles 81, 83, 86, 88 and 90 shall apply to the extent that the rules of procedure of a conference do not provide otherwise.

Article 81. Composition of the delegation

(a) *Observations of Governments and international organizations*

1. In its written observations, the Netherlands Government states that it shares the view of the majority of

³¹⁸ See above, p. 15, document A/CN.4/241 and Add.1 and 2, paras. 29-31.

the Commission that a delegation must include at least one person empowered to represent the sending State.

2. The ILO notes in connexion with article 81 that although States may appoint a head of delegation, the rules applicable in the ILO do not compel them to do so, since each of the Government delegates (as well as the employers' and workers' delegates) are treated by the conference as being on an equal footing. It further points out that the delegates representing employers and workers are not subject to the authority of any head of delegation.

3. In its editorial observations (A/CN.4/L.162/Rev.1, section B), the United Nations Secretariat suggests that in the last sentence of article 81, the words "members of the" should be inserted between "include" and "diplomatic". The reason given for this suggestion is that article 78 does not define the term "staff" but the expressions "members of the [diplomatic] [administrative and technical] [service] staff".

(b) *Observations of the Special Rapporteur*

4. In reply to the above-mentioned observation of the ILO, the Special Rapporteur wishes to point out that by using the word "may" in article 81 the Commission intended to indicate—and an explicit statement to that effect appears in the commentary on the article—that the appointment of the head of the delegation is permissive and not mandatory.

5. In view of the above, the Special Rapporteur does not propose to make any change in the text of article 81. He wishes, however, to recommend to the attention of the Drafting Committee the editing point of the United Nations Secretariat on article 81. Article 81 would therefore read:

Article 81. Composition of the delegation

A delegation to an organ or to a conference shall consist of one or more representatives of the sending State from among whom the sending State may appoint a head. It may also include diplomatic staff, administrative and technical staff and service staff.

Article 82. Size of the delegation

(a) *Observations of Governments and international organizations*

1. In the course of the consideration by the Sixth Committee of the third group of draft articles at the twenty-fifth session of the General Assembly,

Certain representatives referred approvingly to [article 82]. Others did not consider it really necessary and suggested its deletion. It was also stated that the article did not give adequate protection to the host State.³¹⁹

2. In its written observations, the Government of Finland notes that

³¹⁹ *Official Records of the General Assembly, Twenty-fifth session, Annexes, agenda item 84, document A/8147, para. 64.*

Delegations often have functional difficulties due to the insufficient number of delegates appointed to them. However, some kind of limitation could at times be appropriate as regards the size of a delegation.

3. The Government of Switzerland expresses the view that the subject of article 82 is a rather delicate one, and that it is not easy to define the rights of the host State in cases where a delegation to an organ or to a conference is of an exaggerated size. It points out that the fundamental rule, deriving from general international law, is that each State is, in principle, free to refuse entry into its territory, subject to the special obligations it has entered into in that connexion, e.g. those resulting from the headquarters agreement concluded between the host State and the organization. The Swiss Government expresses the view that such special norms will commonly involve for the host State the obligation to allow delegations to enter, with some opportunity to formulate objections in cases where they are of an exaggerated size, and that, where it is not possible to invoke any special norm, the general principle applies and it may be wondered whether this article limits the discretionary power of the host State in that regard. In the opinion of the Swiss Government, this does not seem to be the case with the present wording of article 82 and such an approach appears to be acceptable. The Swiss Government also expresses its intention to pursue a most liberal policy in this matter.

4. WHO states that article 11 of its Constitution provides that each member State shall be represented by not more than three delegates, while article 12 provides that alternates and advisers may accompany delegates. It points out that there is no written provision limiting the number of alternates and advisers, and the size of the delegation varies considerably according to the country concerned.

5. ITU states that the terms of article 82 conflict with the definition of "delegations" in Annex 2 to the International Telecommunications Convention (Montreux, 1965)³²⁰ in which it is stated: "Each Member and Associate Member shall be free to make up its delegation as it wishes".

(b) *Observations of the Special Rapporteur*

6. The Special Rapporteur is unable to share the interpretation of the Swiss Government (para. 3 above) to the effect that article 82 does not limit the discretionary power of the host State in determining the size of a delegation to an organ or conference. It is also to be noted that article 82 is based on article 16 relating to the size of permanent missions. In paragraph 1 of its commentary on article 16 the Commission pointed out the essential difference between that article and paragraph 1 of article 11 of the Vienna Convention on Diplomatic Relations³²¹: according to the provision of the Vienna Convention, the receiving State

may require that the size of a mission be kept within limits to be

³²⁰ For the text of the Convention, see United Nations, *Juridical Yearbook, 1965* (United Nations publication, Sales No. 67.V.3), p. 173.

³²¹ See foot-note 38 above.

considered *by it*³²² to be reasonable and normal. [...] Article 16 of the present draft articles states the problem differently. It lays down as a guide line to be observed by the sending State that the latter should endeavour, when establishing the composition of its permanent mission, not to make it excessively large.

The remedy available to the host State in case of non-observance by the sending State of the rule laid down in article 82 will be regulated by article 50 and by any further provision which the Commission might decide to include in the draft concerning remedies available to the host State in the event of claimed abuses by a permanent mission, a permanent observer mission or a delegation to an organ or a conference.

7. Regarding the observations of ITU (para. 5 above), the Special Rapporteur does not see any conflict between article 82 and the definition of the term "delegations" in the Montreux Convention of ITU. This definition appears to regulate the question of the composition of the delegation and the freedom of choice of its members by the sending State.

8. The Special Rapporteur suggests that article 82 be retained in its present form. The article would therefore read as follows:

Article 82. Size of the delegation

The size of a delegation to an organ or to a conference shall not exceed what is reasonable or normal, having regard to the functions of the organ or, as the case may be, the tasks of the conference, as well as the needs of the particular delegation and the circumstances and conditions in the host State.

Article 83. Principle of single representation

(a) *Observations of Governments and international organizations*

1. In the course of the consideration by the Sixth Committee of the third group of draft articles at the twenty-fifth session of the General Assembly,

Some representatives expressed reservations concerning the desirability of the article and its present wording. The principle of single representation should not be formulated too categorically, but provision should be made for deviation from it in certain circumstances. At a time of increasing interdependence, it seemed wrong to prevent joint representation in some cases by providing that a delegation to an organ or to a conference might represent only one State. It should be borne in mind that joint representation facilitated the participation of small and developing countries, if only for financial reasons, and that there existed international agreements concerning the representation of one country by another. The following solutions were proposed: the insertion at the beginning of the article of the words "as a rule"; the addition at the end of the article of the words "unless the rules and practice of the organ or conference otherwise provide"; the deletion of the article, leaving the solution of the question to the practice of the international organization concerned.³²³

2. The Government of Canada suggests that article 83 be redrafted so as not to exclude double representation

³²² Italics supplied by the Special Rapporteur.

³²³ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 65.

when permitted by the organ or the organization concerned.

3. In the opinion of the Government of Finland, a delegation should be entitled to represent two or more States if necessary.

4. Article 83 does not appear to the Government of Japan to be necessary. In its view, progressive development of law on conferences convened by international organizations should not preclude a delegation to an organ or to a conference from representing more than one State.

5. The Government of Madagascar refers to article 6 of the Vienna Convention on Diplomatic Relations which specifies that two or more States may accredit the same person as head of mission to another State. It points out that article 83 raises a similar issue and that

It would be desirable for several reasons, not to specify so categorically the principle that a delegation may represent only one State. The Malagasy Government notes, moreover, that the practice described by the Special Rapporteur is not always followed at international conferences. It indicates that one representative acting for the Upper Volta and the Congo (Brazzaville) signed the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft.

6. The Government of the Netherlands makes the following observation:

From paragraph 1 of its commentary, it would seem that the Commission is under the impression that the principle of single representation, as laid down in this article, reflects the practice of international organizations, as described by the Special Rapporteur. But his fifth report³²⁴ shows that the Special Rapporteur based his findings on the practice of the United Nations alone. The Netherlands Government points out that there are other organizations which provide for the possibility of multiple representation. Bearing in mind the Commission's intention to review the matter of single or multiple representation in the light of comments from Governments, the following instances may be recalled:

The Universal Postal Union of 1874 (Berne Convention of 1874, revised in the Acts of the Union, Vienna, 1964). Article 101, paragraph 2 of the General Regulations of the Universal Postal Union³²⁵ provides for the possibility of double representation in the Congress of the Union.

The International Union for the protection of Industrial Property (Convention of Paris 1883, revised at Stockholm 1967).³²⁶ Article 13, paragraph 3 (b) contains a special regulation for group representation in the Assembly of the Union.

The International Telecommunication Union (Madrid Convention of 1932, revised at Montreux 1965). Chapter 5, margin Nos. 640-642, of the General Regulations pertaining to the Treaty³²⁷ provides for double representation in the Conference of the Union and also for the transference of votes up to a maximum of one extra vote.

The International Organization of Legal Metrology (Paris Convention, 1955).³²⁸ Article XVII provides for the possibility of trans-

ferring votes in the International Committee of Legal Metrology up to a maximum of two extra votes.

The European Economic Community (Treaty of Rome, 1957).³²⁹ Article 150 provides for the possibility of a member of the Council of the Community acting as proxy for not more than one other member in case of a vote.

It seems clear that international practice—from which no doubt further examples could be drawn—requires greater flexibility than allowed for by the Commission. On the other hand the draft articles do not aim to be more than directory; see articles 3 and 80.

The Netherlands Government is in agreement with the regulation laid down in article 83. If the statutes of an organization or the regulations for a conference do not mention this matter, it seems right to accept the principle of single representation as a general rule, one of the reasons being that—as is clear from our examples taken from international practice—divergent rules are conceivable for multiple representation and the latter is sometimes not practicable without additional provisions.

It seems however preferable that the commentary on this article more fully reflect current practice, and state more clearly the conclusion that it may be advisable for individual organizations and conferences to adopt a different rule than that contained in article 83.

7. The Government of Sweden states that when advanced as a general residuary rule, the contents of article 83—namely that unless the rules of procedure provide otherwise (cf. article 80), a delegation to an organ or to a conference may represent only one State—is not acceptable. In the opinion of the Swedish Government

It is hard to see why, in principle, several States should not be considered free to send one (joint) delegation to represent them all. It concedes that in the case of a particular organ or conference, the rules of procedure could prohibit such representation or else regulate the status of a delegation representing more than one State. The Swedish Government concludes its observation by suggesting that as the residuary rule referred to above need not be expressly stated, the article could be omitted and the matter left to rules of procedure.

8. The Government of New Zealand states the following:

The Government of New Zealand wishes to reiterate the views expressed by its representative in the Sixth Committee on 8 October 1970³³⁰ on article 83 of the International Law Commission's draft articles on representatives of States to international organizations.

Article 83 lays down a general rule that a delegation to an organ or conference may represent only one State. This article has to be read subject to articles 3, 4, 5, 79 and 80, which collectively ensure that the general rule it lays down does not in any way affect the relevant existing rules of international organizations or conferences nor preclude international organizations or conferences from adopting a different rule in the future. The rule in article 83 is therefore of a residual character only. The Government of New Zealand is nevertheless of the view that the rule is unnecessary and undesirable. It would prefer that the question of whether a delegation to an organ or conference should be permitted to represent more than one State should be left to be decided specifically by that organ or conference.

The Government of New Zealand has a particular interest in this question because under article V (b) of the Treaty of Friendship between New Zealand and Western Samoa concluded in 1962³³¹ it is provided that, when requested, and where permissible and appropriate the Government of New Zealand will represent the Government of Western Samoa at any international conference at which

³²⁴ *Yearbook of the International Law Commission, 1970*, vol. II, p. 1, document A/CN.4/227 and Add.1 and 2.

³²⁵ United Nations, *Treaty Series*, vol. 611, p. 86.

³²⁶ WIPO, *Paris Convention for the Protection of Industrial Property* (Geneva, 1970) [201 (E)].

³²⁷ ITU, *International Telecommunication Convention (Montreux, 1965)*, Geneva, General Secretariat of ITU, annex 4, p. 99.

³²⁸ United Nations, *Treaty Series*, vol. 560, p. 3.

³²⁹ *Ibid.*, vol. 294, p. 17.

³³⁰ *Official Records of the General Assembly, Twenty-fifth Session, Sixth Committee*, 1193rd meeting.

³³¹ United Nations, *Treaty Series*, vol. 453, p. 3.

Western Samoa is entitled to be represented. In pursuance of this provision New Zealand has over the past eight years represented the Government of Western Samoa at its request on a number of occasions. In addition to this formalized arrangement which gives New Zealand a special interest in this question of dual representation, the Government of New Zealand is concerned that a number of other small States and territories in the South-West Pacific might well wish, for financial reasons, to have single delegations representing more than one State at a particular conference or conferences of interest to them. It would be unfortunate, therefore, in New Zealand's view, if as a result of the inclusion of article 83, the principle of single representation were to govern all situations where rules of procedure of the organ or conference do not provide otherwise. The Government of New Zealand would prefer that the Commission included no rule on this matter in its final text.

The Government of New Zealand has consulted on this question with the Government of Western Samoa which has requested that the International Law Commission be informed that it wishes to be associated with the observations of the Government of New Zealand on this article.

9. The Government of Pakistan expresses the opinion that the Commission rightly recognized the correct position in draft article 83. It noted that this article is based on the general practice at conferences convened under the auspices of the United Nations.

10. The Government of Switzerland makes the following observation:

It would seem advisable to take account here of the trend towards multiple representation which has been noted on a number of occasions. Among its other advantages, this practice has the merit of facilitating the participation of small States in the work of international organizations and conferences. It is therefore suggested that the text of the draft should be amended to authorize multiple representation.

Apart from the representation of two or more States by the same delegation, it would be advisable—for the benefit of small States in particular—to raise no obstacle to the different but well-established practice whereby a member of a permanent mission or an observer mission acts as the delegate of another State at certain meetings. For example, in the election of judges at the International Court of Justice, a member of the Office of the Observer of Switzerland to the United Nations is usually designated as the delegate for Liechtenstein.

Since it shares some of the concern expressed by the Commission in the commentary, the Swiss Government proposes the addition of a new article 83 *bis* establishing that under certain conditions a member of a delegation may represent another State.

11. WHO states that the principle of single representation embodied in article 83 applies in WHO although it may be noted that WHO practice also allows delegates from a member State to represent one or indeed more non-governmental organizations in the Assembly.

12. ITU points out that the terms of article 83 conflict with chapter 5, paragraphs 6, 7 and 8 of the General Regulations³³² annexed to the ITU Montreux Convention, the texts of which are as follows:

“640 6. As a general rule, Members of the Union should endeavour to send their own delegations to conferences of the Union. However, if a Member is unable, for exceptional reasons, to send its own delegation, it may give the delegation of another Member of the Union powers to vote and sign on its behalf. Such powers must be

conveyed by means of an instrument signed by one of the authorities mentioned in 629 or 630, as appropriate.

“641 7. A delegation with the right to vote may give to another delegation with the right to vote a mandate to exercise its vote at one or more meetings at which it is unable to be present. In such a case it shall, in good time, notify the Chairman of the conference in writing.

“642 8. A delegation may not exercise more than one proxy in any of the cases referred to in 640 and 641.”

13. UPU points out that the regulations in force in UPU allow a delegation to represent only one member country other than its own (article 101, paragraph 2, of the General Regulations of UPU³³³). It therefore shares the reservations expressed by certain members of the Commission about article 83 and agrees with the reasoning advanced by them.

(b) *Observations of the Special Rapporteur*

14. The Special Rapporteur feels that there is substance in the reservations expressed by a number of delegations to the Sixth Committee concerning the categorical manner in which article 83 is formulated in its present wording. As appears from the Commission's commentary on this article, the position of the members of the Commission on that provision is divided. Moreover, the Commission included in the commentary an explicit statement emphasizing the provisional character of the present wording of article 83, in which it underlined the fact that it will review the matter of single representation at the second reading of the draft articles in the light of the observations which it receives from governments and international organizations. As to the three solutions proposed by delegations in the Sixth Committee (para. 1 above), the Special Rapporteur is not in agreement with the deletion of the article. He is in agreement with the insertion at the beginning of the article of the words “as a rule” or the addition at the end of the article of the words “unless the rules and practice of the organ or conference otherwise provide”.

15. The Special Rapporteur recognizes the validity of the suggestion of the Government of Canada (para. 2 above) that article 83 could be redrafted so as not to exclude double representation when permitted by the organ or the organization concerned.

16. The Special Rapporteur does not consider it possible to adopt the position suggested by the Government of Finland (para. 3 above) to the effect that as a general rule a delegation should be entitled to represent two or more States if necessary. In his fifth report, the Special Rapporteur referred to the practice in the United Nations bodies and the conferences convened by the United Nations.³³⁴ This practice revealed a number of problems encountered in voting as a result of double representation. He also cited from the Study by the Secretariat where it is stated that

³³³ UPU, *Constitution et Règlement général de l'Union* (Berne, Bureau de l'Union, 1965).

³³⁴ *Yearbook of the International Law Commission, 1970*, vol. II, p. 18, document A/CN.4/227 and Add.1 and 2, chap. II, article 63, commentary.

³³² See foot-note 327 above.

It has been the consistent position of the Secretariat and of the organs concerned that such representation is not permissible unless clearly envisaged in the rules of procedure of the particular body.³³⁵

17. The Special Rapporteur concurs with the statement of the Government of Japan (para. 4 above) that progressive development of law on international conferences should not preclude a delegation to an organ or a conference from representing more than one State. Article 83 lays down a general residual rule. In interpreting this rule, it should be borne in mind that article 83 is subject to the provisions of articles 3 to 5 of this draft. Therefore, the inclusion of article 83 in the draft would not preclude the possibility of a delegation representing more than one State to an organ or a conference if this is allowed by the rules and practice of the organ or conference concerned. These considerations should also allay the apprehensions expressed by ITU and UPU concerning the contradiction between article 83 and certain provisions of their regulations.

18. The Special Rapporteur wishes to express his appreciation for the number of cases of multiple representation cited in the comments of Governments and international organizations. He agrees that the commentary should refer to these cases in order to give a more comprehensive and balanced account of the practice of international organizations.

19. In view of the foregoing the Special Rapporteur proposes the two following alternatives for article 83:

Article 83. Principle of single representation

ALTERNATIVE A

As a rule, a delegation to an organ or to a conference may represent only one State.

ALTERNATIVE B

A delegation to an organ or to a conference may represent only one State, unless the rules and practice of the organ or conference otherwise provide.

Article 84. Appointment of the members of the delegation

(a) Observations of Governments and international organizations

1. The Government of the Netherlands refers to its comments on article 55 (Appointment of the members of the permanent observer mission), where it indicates that it "would like to see the position of the host State invested with further guarantees".

2. The Government of Switzerland also refers to its comments on preceding articles, namely article 10 (Appointment of the members of the permanent mission) and article 55 (Appointment of the members of the permanent observer mission), where it suggests that the host State

should be empowered to formulate objections to the presence of a given individual as a member of a permanent mission or as a member of a permanent observer mission.

3. The secretariat of the ILO states that its comments concerning article 81³³⁶ apply equally to article 84.

(b) Observations of the Special Rapporteur

4. As regards the comments reflected in the three preceding paragraphs, the Special Rapporteur wishes to refer to his observations on comments made in the context of articles 55³³⁷ and 81³³⁸ respectively.

5. In the light of the foregoing, the Special Rapporteur proposes that article 84 be retained in its present form. Article 84, would, therefore, read as follows:

Article 84. Appointment of the members of the delegation

Subject to the provisions of articles 82 and 85, the sending State may freely appoint the members of its delegation to an organ or to a conference.

Article 85. Nationality of the members of the delegation

(a) Observations of Governments and international organizations

1. The Government of Canada suggests that consideration be given to including in the category of persons that cannot be appointed without the consent of the host State the persons having permanent residence in the host State; to that effect, the words "or persons having permanent residence in the host State" should be included after the words "persons having the nationality of the host State".

2. In the opinion of the Government of Finland, it should be possible to compose a delegation of persons of different nationality; the functions of a delegation often require special knowledge and expertise which all States do not have at their disposal.

3. The Japanese Government favours the view of some of the members of the Commission that the consent of the host State can be withdrawn only if that would not seriously inconvenience the delegation in carrying out its functions. It points out that unlike in the case of permanent missions, sudden withdrawal of the consent of the host State in the course of the session of an organ or conference might place the sending State in an awkward situation.

4. The secretariat of WHO states that WHO has no rule on the question of the nationality of members of a

³³⁶ See above, Article 81, para. 2 of the observations.

³³⁷ See above, p. 95, document A/CN.4/241/Add.4, Article 55, para. 4 of the observations.

³³⁸ See above, Article 81, paras. 4-5 of the observations.

³³⁵ Study by the Secretariat, op. cit. (see foot-note 47), p. 169, para. 40.

delegation, although the principle laid down in article 85 always seems to have been observed, at least so far as delegations to the Assembly are concerned. It notes, however, that in the Executive Board, which is made up not of delegates but of "persons" designated by twenty-four States selected by the Assembly (Constitution, article 24),³³⁹ a State has sometimes chosen a person who was not one of its nationals—for example the members of the Benelux Union.

5. The secretariat of ITU observes that it is the practice of some States members of the Union to include in their delegations from time to time nationals of other States.

(b) *Observations of the Special Rapporteur*

6. As regards the suggestion, reflected in paragraph 1 above, to reword the last sentence of the article through the addition of a reference to "persons having permanent residence in the host State", the Special Rapporteur wishes to refer to his observations on comments made in the context of article 55³⁴⁰ which he considers equally applicable in the case of delegations to organs or conferences.

7. As regards the case of the persons mentioned in paragraph 4 above, the Special Rapporteur wishes to point out that such particular cases for which a certain practice develops within an organization are covered by article 3 of these draft articles.

8. As regards the comments reflected in paragraphs 2 and 3 above, the Special Rapporteur himself has favoured in his fifth report to the Commission a less restrictive rule than the one laid down in article 85. In paragraph 2 of his "Note on nationality of members of a delegation" the Special Rapporteur stated:

The Special Rapporteur is of the opinion that the sending State should have a wider freedom of choice with respect to the members of its delegations to organs of international organizations and to conferences convened by such organizations. One of the salient features of present-day international relations is the increasing number of subsidiary organs set up by international organizations to deal with very specialized matters of highly technical character which require the enlisting of the services of experts possessing the necessary training and experience. This trend is by no means limited to international organizations of technical character (the specialized agencies). It is also increasingly witnessed in general international organizations of predominantly political character such as the United Nations and the regional organizations which have a general rather than specialized character. Similarly, conferences for the promotion of institutionalized international co-operation are convened at a rate which exceeds by far that of international conferences prior to the era of the United Nations. For these reasons it is highly desirable, if not indispensable, that the sending State should enjoy the widest possible freedom in the choice of the members of its delegations to such organs and conferences.

Furthermore, it should be noted that such organs and conferences meet temporarily and for short periods. Given this fact, the question of the requirement of the consent of the host State to the appointment of one of its nationals in the delegation of another State

³³⁹ For the WHO Constitution, see United Nations, *Treaty Series*, vol. 14, p. 185 and *ibid.*, vol. 377, p. 380.

³⁴⁰ See above, p. 96, document A/CN.4/241/Add.4, Article 56, para. 6 of the observations.

should be seen in a light different from that in which the Commission viewed the question in relation to members of permanent missions.³⁴¹

9. In the light of the foregoing, the Special Rapporteur proposes that article 85 be amended to read as follows:

Article 85. Nationality of the members of the delegation

The representatives and members of the diplomatic staff of a delegation to an organ or to a conference should in principle be of the nationality of the sending State. They may not be appointed from among persons having the nationality of the host State, if the host State objects, which it may do at any time.

Article 86. Acting head of the delegation

(a) *Observations of Governments and international organizations*

1. The Government of Sweden is of the opinion that this article should be omitted and that it is unnecessary and in any case too rigid.

2. The Government of Switzerland points out that it would be preferable for the acting head to be designated in advance, before any case of unavoidable absence can occur.

3. The secretariat of the ILO states that its comments on article 81³⁴² apply equally to article 86.

4. The secretariat of ITU indicates that it is the practice in ITU conferences that if a head of a delegation is going to be absent, he informs the President or Chairman of the Conference through the secretariat and indicates which member of the delegation will act in his absence.

5. In its editorial observations (A/CN.4/L.162/Rev.1, section B) the Secretariat of the United Nations suggests the following points:

(i) In the fourth line of paragraph 1, the words "in case he is unable to do so" should be replaced by "if he is unable to do so", which are clearer and more precise.

(ii) In paragraph 2, the word "provided" should be inserted before "in paragraph 1"; the phrase would then read ". . . another person may be designated as provided in paragraph 1 of this article".

(b) *Observations of the Special Rapporteur*

6. As regards the observation reflected in paragraph 1 above, the Special Rapporteur does not think that article 86 is unnecessary or too rigid.

7. With respect to the suggestion reflected in paragraph 2 above, the Special Rapporteur fears that its adoption might inject in the article some undue rigidity.

8. As to the observation reflected in paragraph 3 above, the Special Rapporteur wishes to refer to his corresponding comment in the context of article 81.³⁴³

³⁴¹ *Yearbook of the International Law Commission*, 1970, vol. II, p. 19, document A/CN.4/227 and Add.1 and 2, chap. II.

³⁴² See above, Article 81, para. 2 of the observations.

³⁴³ *Ibid.*, paras. 4-5.

9. The Special Rapporteur agrees with the editorial points reflected in paragraph 5 above.

10. In the light of the foregoing, the Special Rapporteur proposes that article 86 be drafted to read as follows:

Article 86. Acting head of the delegation

1. If the head of a delegation to an organ or to a conference is absent or unable to perform his functions, an acting head may be designated from among the other representatives in the delegation by the head of the delegation or, if he is unable to do so, by a competent authority of the sending State. The name of the acting head shall be notified to the Organization or to the conference.

2. If a delegation does not have another representative available to serve as acting head, another person may be designated as provided in paragraph 1 of this article. In such case credentials must be issued and transmitted in accordance with article 87.

Article 87. Credentials of representatives

(a) Observations of Governments and international organizations

1. The secretariat of WHO refers to rule 22 of the rules of procedure of the World Health Assembly³⁴⁴ which states that credentials shall be issued by the Head of State or by the Minister for Foreign Affairs or by the Minister of Health or by any other competent authority. It notes that the Health Assembly's practice has been to regard as a "competent authority", apart from those mentioned above, the ministerial departments responsible for health matters, embassies and permanent delegations.

2. The secretariat of ITU refers to its comment on article 78.³⁴⁵

(b) Observations of the Special Rapporteur

3. As regards the observation reflected in paragraph 2 above, the Special Rapporteur wishes to refer to his comment on the similar observation made in the context of article 78.³⁴⁶

4. The Special Rapporteur does not propose to make any change in article 87. The article would therefore read as follows:

Article 87. Credentials of representatives

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

2. The credentials of a representative in the delegation to a conference shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent authority if that is allowed in relation to the conference in question, and shall be transmitted to the conference.

³⁴⁴ For the text of the rules of procedure of the World Health Assembly, see WHO, *Basic Documents*, 22nd ed. (Geneva, April 1971), p. 97.

³⁴⁵ See above, Article 78, para. 5 of the observations.

³⁴⁶ *Ibid.*, para. 11.

Article 88. Full powers to represent the State in the conclusion of treaties

(a) Observations of Governments and international organizations

1. In the course of the debate in the Sixth Committee it was observed that

A representative to an organ or to a conference should be in possession of full powers for the purpose of signing a treaty and that paragraph 3 of [article 88] was therefore redundant.³⁴⁷

2. In its written comments the Government of the Netherlands expresses the view that paragraph 3 of article 88 is redundant. With regard to the article as a whole it states that it is questionable whether in this case the repetition of what is already laid down in the Vienna Convention on the Law of Treaties³⁴⁸ is to be recommended.

(b) Observations of the Special Rapporteur

3. The Special Rapporteur is not convinced that paragraph 3 is redundant. Nor does he share the doubts expressed concerning the advisability of retaining article 88. He believes that for the purpose of making these draft articles as complete as possible, it would be useful to include a provision on full powers of representatives to organs and conferences and that such a provision should be co-ordinated with article 7 of the Vienna Convention on the Law of Treaties.

4. The Special Rapporteur does not propose to make any change in article 88. The article would therefore read as follows:

Article 88. Full powers to represent the State in the conclusion of treaties

1. Heads of State, Heads of Government and Ministers for Foreign Affairs, in virtue of their functions and without having to produce full powers, are considered as representing their State for the purpose of performing all acts relating to the conclusion of a treaty in a conference or in an organ.

2. A representative to an organ or in a delegation to a conference, in virtue of his functions and without having to produce full powers, is considered as representing his State for the purpose of adopting the text of a treaty in that organ or conference.

3. A representative to an organ or in a delegation to a conference is not considered in virtue of his functions as representing his State for the purpose of signing a treaty (whether in full or *ad referendum*) concluded in that organ or conference unless it appears from the circumstances that the intention of the Parties was to dispense with full powers.

Article 89. Notifications

(a) Observations of Governments and international organizations

1. The Government of Sweden is of the opinion that the provisions of article 89 seem unduly detailed.

³⁴⁷ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 66.

³⁴⁸ See foot-note 36 above.

2. The Government of Turkey states that paragraph 4 of article 89 seems inadequate from the practical standpoint. It suggests that, since it is the host State which grants privileges and immunities, it is to the host State that the notifications should be sent first.

3. The secretariat of the ILO makes the following observations on article 89:

It would indeed be desirable if organizations could be told of the dates of arrival and departure of the persons referred to in article 81 and so inform the Government of the country in which the conference meets of the period in which those persons will fall under the system established in the draft convention.

However, this provision might face almost insurmountable difficulties when it came to be implemented. In the first place, it is easy to imagine that some delegates, not to say members of their family, will fail to inform the organization of their arrival or departure; equally some delegates, including the employers' and workers' delegates in the ILO, will prolong their stay at the place in which the conference meets beyond the closing date. In that case, should the Government be informed of the actual date of departure of the persons concerned? Alternatively (and, it would seem, more logically) should the period of application of the draft convention cease on the closing date of the conference?

4. The secretariat of WHO points out that WHO is notified of the members of the delegation, but notification is not required in the other instances set out in article 89, paragraph 1 (persons belonging to the family of a member of the delegation, persons employed by members of a delegation, etc.).

5. The secretariat of ITU states that ITU does not accept responsibility for notifying to host States the information envisaged in paragraph 3 of article 89 and is not therefore interested to have information regarding arrival and departure of delegates and their families or the movements of other persons employed in delegations.

(b) *Observations of the Special Rapporteur*

6. As regards the observation reflected in paragraph 1 above, the Special Rapporteur agrees that article 89 is detailed. However, he does not think it is possible to make it less detailed without impairing the elaborate system it seeks to lay down.

7. As regards the observation reflected in paragraph 2 above, the Special Rapporteur wishes to point out that article 89 is modelled on the provisions of article 17. In paragraph 7 of its commentary on article 17, the Commission stated that the rationale of the rule formulated in that article is that since the direct relationship is between the sending State and the organization, notifications are to be made by the sending State to the organization which in turn transmits them to the host State.

8. As regards the observations reflected in paragraphs 3, 4 and 5 above, the Special Rapporteur wishes to state that article 89 seeks to elaborate a general pattern. This does not, however, preclude the application of a practice which had developed or may develop within a given organization and which may differ in one way or another from the general pattern as laid down in article 89. Such possibility is provided for in articles 3 to 5.

9. In the light of the foregoing, the Special Rapporteur does not propose to make any change in the text of article 89. The article would therefore read as follows:

Article 89. Notifications

1. The sending State, with regard to its delegation to an organ or to a conference, shall notify the Organization or, as the case may be, the conference, of:

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

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

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

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

(e) The location of the premises occupied by the delegation and of the private accommodation enjoying inviolability under articles 94 and 99, as well as any other information that may be necessary to identify such premises and accommodation.

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

3. The Organization or, as the case may be, the conference, shall transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

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

Article 90. Precedence

(a) *Observations of Governments and international organizations*

1. The Government of Finland observes that it remains to some extent unclear by what alphabetical order the precedence among delegates shall be determined in countries which have several official languages.

2. The secretariat of the ILO states that in the ILO the problem of precedence among member States does not really arise since, in practice, the order in which Governments are called in roll-call votes and seated in the conference room is alternately forward and reverse French alphabetical order. These are the only cases in which some precedence is observed.

3. The secretariat of WHO states that in WHO precedence among delegations is determined by using English or French alphabetical order in alternate years, in accordance with the rules of procedure.

4. The secretariat of ITU states that it is the practice of ITU to seat delegations in the alphabetical order of the French names of the countries represented. It is in this order that the delegations are called in case of a roll-call vote. These are the only cases in which it is the practice of the Union to invoke an order of precedence between delegations.

(b) *Observations of the Special Rapporteur*

5. As regards the observation reflected in paragraph 1 above, the Special Rapporteur wishes to point out that what is envisaged in article 90 is the alphabetical order used in the Organization. The Special Rapporteur proposes that this be reflected clearly in the text of the article.

6. As regards the observations reflected in paragraphs 2, 3 and 4, the Special Rapporteur has taken note of the practices referred to therein and does not believe that they call for any comment on his part.

7. In the light of the foregoing, the Special Rapporteur proposes that article 90 be reworded to read as follows:

Article 90. Precedence

Precedence among delegations to an organ or to a conference shall be determined by the alphabetical order used in the Organization.

* * *

DOCUMENT A/CN.4/241/ADD.6**NOTE**

The present addendum is based on the comments of Governments and international organizations referred to in the introduction to the report.³⁴⁹ It is arranged along the same lines as explained in the introduction.³⁵⁰

Part IV. Delegations of States to organs and to conferences (continued)**SECTION 2. FACILITIES, PRIVILEGES AND IMMUNITIES OF DELEGATIONS****General comments****(a) Observations of Governments and international organizations**

1. In the course of the debate in the Sixth Committee,³⁵¹ most of the views expressed on the facilities, privileges and immunities of delegations were similar to those expressed on the facilities, privileges and immunities of permanent observer missions to international organizations, an account of which has already been given in the present report.³⁵² In addition, some representatives

³⁴⁹ See above, p. 10, document A/CN.4/241 and Add.1 and 2, paras. 5-7.

³⁵⁰ *Ibid.*, p. 11, para. 8.

³⁵¹ For all references to the Sixth Committee's discussion of the draft articles, see foot-note 39 above.

³⁵² See above, p. 84, document A/CN.4/241/Add.4, Part. III in general, paras. 1-3 of the observations.

shared the opinion that the privileges and immunities of delegations to organs and to conferences should, in view of the representative character of such delegations and the temporary nature of their tasks, be formulated in the light of the privileges and immunities of "special missions" and, after any adjustments necessitated by their temporary nature, by reference to the law of international organizations.

Other representatives, however, considered that delegations to organs and conferences did not have the same functions as did special missions nor did they have the same character. It was also said that

In their present form the draft articles could produce the anomalous situation in which delegations to organs and conferences of lesser importance would be accorded a higher scale of privileges and immunities than delegations to United Nations organs or conferences convened under its auspices.

... Finally, attention was drawn to the question of the application of the privileges and immunities provided for in the draft articles to the large numbers of regional or technical conferences convened by international organizations of a universal character. The view was expressed that "it would be advisable to limit the application of the draft articles to the more important conferences and organs of such organizations".³⁵³

2. In its written comments,³⁵⁴ one Government [Israel] stated its inclination

towards a broad formulation of facilities, privileges and immunities for the official representatives of States; it considers that uniformity of treatment is preferable to the many ambiguities and obscurities now encountered. If, however, that view is not adopted, it suggested that the Commission might wish to consider presenting the material in a series of separate instruments. At all events the present opportunity should be taken to introduce the greatest possible degree of unification and systematization into the law governing the official representatives of States, and to co-ordinate the provisions governing representatives to universal international organizations with those governing direct and inter-State representatives, now consolidated in the 1961 Convention on Diplomatic Relations, in the 1963 Convention on Consular Relations and in the 1969 Convention on Special Missions.^[355]

3. Another Government [Poland] expressed the view that the codification of the matters dealt with in part IV of the draft articles "should primarily aim at systematizing the existing rules and filling the existing gaps". It indicated that it would

support such solutions as will afford delegates of States to organs and to conferences the best possible conditions necessary for the performance of their functions.

4. A number of Governments emphasized the "functional necessity" element as regards the facilities, privileges and immunities of delegations. In this connexion, the Government of Australia expressed agreement

with those States which consider that the draft articles on the delegations of States to organs and conferences go well beyond the level required for effective performance of their functions.

Likewise, the Government of Turkey considered that

Acceptance of the text as it stands would represent a considerable departure from the principle that privileges and immunities should

³⁵³ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 28-35.

³⁵⁴ See foot-note 12 above.

³⁵⁵ For the references to the Convention on Diplomatic Relations, the Convention on Consular Relations and the Convention on Special Missions, see above foot-notes 38, 50 and 41 respectively.

be accorded to the extent necessary for the performance of the respective functions.

The Government of France expressed in general its belief that

In its study of the question of relations between States and international organizations, the Commission should be guided essentially by considerations of functional necessity and should not lose sight of the need to strike a balance between the interests of the host State and the independence of the organization.

In its opinion, therefore, "privileges and immunities should be granted only to the extent that they satisfy the criterion of functional necessity". For the Government of Canada "the extent of privileges and immunities to be granted should be based on the actual needs of the delegations in respect of the performance of their duties". Similar views were expressed by the Governments of Japan, the Netherlands and the United Kingdom.

5. On the basis of the "functional necessity" element, some governments emphasized the need to take into account the existing body of rules and practice referred to by the Commission in its general comments on section 2 of part IV. Thus, the Government of the United Kingdom noted that

the privileges and immunities of delegations to meetings of organs of the United Nations and the specialized agencies and to conferences convened by them are provided for in the General Convention on the Privileges and Immunities of the United Nations^[366] and in the Convention on the Privileges and Immunities of the Specialized Agencies.^[367] The relevant provisions are Article IV (Sections 11 to 16) of the General Convention and Article V (Sections 13 to 17) read with the definition in Section 1 (vi) of the Specialized Agencies Convention. There is also a considerable body of international practice based on these agreements.

Express reference to the above-mentioned conventions was also made by the Governments of Canada, the Netherlands and France. The Government of the United Kingdom further observed that "underlying these agreements and this practice is the principle, embodied in paragraph 2 of Article 105 of the United Nations Charter, of functional need". A similar consideration was made by the Government of France. Also, in the view of the Government of the United Kingdom

Any attempt to codify and develop the law must have regard to existing agreements and practice. The correctness of this approach appears to have been recognized by the Commission in paragraph 1 of its commentary on draft article 3 where the Commission explains its general aim [. . .]

[. . .]

Consistently with this approach, the Government of the United Kingdom would have expected that articles 78 to 116 would reflect existing agreements and practice. The Conventions referred to above purported to lay down the scale of privileges and immunities considered necessary for the exercise of the functions of the United Nations and of the specialized agencies. They have been in force and have been applied in practice for some twenty years. The Government of the United Kingdom are aware of no evidence to suggest that this aspect of the Conventions is in any substantial way inadequate or unsatisfactory.

The Government of France likewise considered that the agreements at present in force seemed in fact to have proved satisfactory. In its view, the

Commission might usefully reconsider the articles of this part of its draft in the light of the agreements at present in force and, as regards problems which are not dealt with in these agreements, in the light of the actual practice of States and organizations.

It emphasized that it was

highly desirable for the Commission to give due consideration to provisions [of the Convention on the Privileges and Immunities of the United Nations] and of similar texts which strike the necessary balance between the various interests involved in the life of an international organization.

The Government of the United Kingdom indicated that it did

not see how it would be possible to justify abandoning at this stage the principles underlying the General Convention on the Privileges and Immunities of the United Nations and the Specialized Agencies Convention merely to gain the convenience of having further texts based on the Vienna Convention on Diplomatic Relations.

The Government of the Netherlands questioned whether it was desirable to deviate from these existing rules to any considerable extent.

The Government of Canada suggested that

mutatis mutandis, taking into account comments made on particular articles, the Convention on the Privileges and Immunities of the Specialized Agencies be used as the main point of reference in the redrafting of part IV.

6. The Australian Government considered "particularly disturbing the degree to which the present articles go beyond the level of the privileges and immunities accepted in the past in relation to most international organizations". It observed that of some thirty such organizations which the Australian Government has had reason to consider in relation to its own legislation on the matter, the highest level of privileges and immunities for a representative accredited to, or attending a conference convened by an international organization is as follows:

- (1) Immunity from personal arrest or detention;
- (2) Immunity from suit and from other legal process in respect of acts and things done in his capacity as a representative;
- (3) Inviolability of papers and documents;
- (4) The right to use codes and to send and receive correspondence and other papers and documents by couriers or in sealed bags;
- (5) Exemption (including exemption of the spouse of the representative) from the application of laws relating to immigration, the registration of aliens and the obligation to perform national service;
- (6) Exemption from currency or exchange restrictions to such an extent as is accorded to a representative of a foreign Government on a temporary mission on behalf of that Government;
- (7) The like privileges and immunities, not being privileges and immunities of a kind referred to in any of the preceding paragraphs, as are accorded to an envoy, other than exemption from:
 - (a) Excise duties;
 - (b) Sales taxes; and
 - (c) Duties on importation or exportation of goods not forming part of personal baggage.

The Australian Government took the view that "such a scale is adequate on the basis of functional necessity: furthermore it is consistent with that applied to other international organizations in the past".

7. The Government of France considered that, after analysing the existing body of rules referred to in its

³⁶⁶ See foot-note 20 above.

³⁶⁷ See foot-note 45 above.

general comments on section 2 of part IV, the Commission then departs from them and grants diplomatic status to all the persons referred to in its draft, although it admits that this is not in keeping with the usual practice of States, as it appears from the conventions at present in force, including the General Convention on the Privileges and Immunities of the United Nations. The Commission has preferred to assimilate delegations of this kind to special missions rather than follow the line laid down by the Committee on Legal Questions of the San Francisco Conference

likewise referred to by the Commission in its general comments on section 2. The French Government expressed the opinion that the Commission should reconsider the question along that line. Similarly, the Government of the United Kingdom considered that

In formulating this group of draft articles, the Commission appears to have departed substantially from the Conventions. Instead it has adopted a different approach which bears little relationship to existing practice and consists of applying *mutatis mutandis* the provisions of the Convention on Special Missions. The United Kingdom Government can set no justification for this. They continue to share the view expressed by the General Assembly of the United Nations in resolution 22 D (I) of 13 February 1946.

8. In the opinion of the Government of the Netherlands,

The third and last category of representatives of States to international organizations [delegations] differs from the two previous categories in more than one respect: the length of their stay is by nature limited; their task is specific and limited; and the host State is not necessarily the State in which the organization has its headquarters. By the first two of these characteristics the delegations are comparable to special missions. On the other hand, their business is not connected with the relations between the sending State and the host State, as in the case of special missions, but with the aims and procedures of an organization.

9. The Government of the United Kingdom stated that

It is no doubt true that in some ways a delegation to an organ of an organization or to a conference convened by an organization is comparable to a special mission (within the meaning of the Convention on Special Missions) sent by one State to another. They both temporarily represent a State in the territory of another State. But the special status of a special diplomatic mission also reflects the fact that it is merely another form and, as a matter of historical fact, an older form of diplomatic mission. As between adopting the law relating to diplomatic missions between States and adopting the law relating to delegations to international organizations, the Government of the United Kingdom consider it correct to place special diplomatic missions in the framework of the law relating to diplomatic missions (as does the Convention on Special Missions and as customary international law perhaps already does) and to place delegates to organs and conferences of international organizations in the framework of the law and practice which has already developed in relation to such persons. A special mission is sent by one State to another State and under the Convention on Special Missions, a State may only send a special mission to another State with the consent of the latter. It is one matter to accord extensive immunities and privileges to a special mission; but it is quite another matter to do so in respect of large numbers of persons attending meetings of international organizations.

10. For the Government of France "due account also must be taken of the temporary character of delegations". It noted that

In the discussion on special missions which have the same temporary character, the French Government has already had occasion to draw attention to the serious difficulties which might arise for administrations if they were obliged to accord certain diplomatic

privileges to persons whose presence in their territory was essentially transitional. The Convention on Special Missions, in accordance with the definition adopted, applies only to well-defined missions. However, the articles now being proposed would apply to delegations to conferences and (article 78 (a) and (c)) to delegations to the principal or subsidiary organs of an international organization and to any commission, committee or sub-group of any such organ, in which States are members. It would seem very difficult in practice, and hardly justifiable in principle, to apply the described status indiscriminately to all persons who—according to the terms of the draft—would be able to avail themselves of it.

The Government of France did not consider it

self-evident that delegations to organs of international organizations or to conferences convened under the auspices of international organizations should have exactly the same status in the host State as missions sent directly to the host State by a foreign State.

In its view it was

impossible to extend diplomatic law, as it stands, to temporary delegations to international organizations.

11. The Government of Japan stated that it was

not fully convinced that, because of the temporary character of their task, the privileges and immunities of delegations to organs of international organizations and to conferences convened by international organizations should be determined in the light of those granted to special missions. In the view of the Japanese Government, privileges and immunities of delegations should be determined bearing in mind the fact that the principle of reciprocity, which functions as a balancing factor between the interests of the sending States and those of the receiving States with regard to privileges and immunities of special missions, does not exist in the case of multilateral relations.

For the Japanese Government

It would seem that the Commission takes the position that the delegations to organs of international organizations and conferences convened by such organizations should, irrespective of their nature and functions, be accorded the same extent of privileges and immunities on the ground that they represent sovereign States.

The Japanese Government hesitates to concur fully with this view, since, in its opinion, representatives to conferences which are of purely technical character and of relatively secondary importance need not enjoy some of the privileges and immunities (personal inviolability and protection, in particular), which may be indispensable to the representatives to conferences of highly political character.

It may be sometimes difficult to distinguish between conferences of technical nature and those of political nature. However, this does not mean that the difference of character may be lightly dismissed.

For the Government of Japan

It should also be borne in mind that, because of the temporariness of the task of delegations to organs of international organizations and conferences convened by international organizations, the question of their privileges and immunities will give rise, for the host State, to particular difficulties which might not be known to States where the seat of international organizations is permanently placed. For example, the host State of an international conference convened by an international organization might be required to take special and temporary administrative and legislative measures in order to assure privileges and immunities provided for in the draft articles.

12. In the opinion of the Government of Australia, the magnitude of the problem might well be emphasized by considering also the number of conferences to which these articles are intended to apply. Although they concern only international organizations of a universal character, they apply to all meetings convened under the aegis of such organizations. Very many of these meetings are regional

in their composition or are narrowly technical in their range of interests. As an example, FAO during 1970 scheduled some 120 conferences involving more than twenty host States. The calendar of conferences of other agencies is probably no less extensive or less diverse in its range of technical interests. There are therefore literally hundreds of conferences each year to which the broad range of privileges and immunities envisaged in the draft articles will apply.

13. The Government of the United Kingdom expressed the view that

Draft articles 78 to 116 could produce the anomalous situation that members of delegations to other organizations of a lesser importance would be accorded a higher scale of privileges and immunities than delegations to organs of the United Nations. In many countries, there is already much parliamentary and public criticism of the extent to which privileges and immunities are accorded to international organizations and persons connected with them, and it is very difficult to see how the additional privileges and immunities provided by the Commission's draft articles could be justified as necessary in the light of the experience of the last twenty years. It must be borne in mind that the conferring of privileges and immunities on one person deprives others of their normal legal rights and remedies. This is justifiable within certain limits. Nevertheless, care must be taken not to recommend extensions of these privileges beyond what is strictly justifiable. Rather the effort should be made to seek acceptable limitations of those privileges which already exist and appropriate means of protecting the interests of third parties.

In conclusion, the Government of the United Kingdom stated that it was "not able to accept the principles underlying part IV of the Commission's draft articles" and expressed the hope that the Commission will revise part IV with the considerations it had made in mind.

14. The Government of Turkey indicated that it

does not support the view that the same privileges and immunities should be accorded without distinction to delegations of States to organs and to delegations of States to conferences.

15. The Japanese Government also stated that it

would favour the inclusion of a provision for the effective settlement of difficulties which might arise between the sending States and the host State regarding privileges and immunities.

16. General comments were also submitted by the secretariats of four international organizations concerning section 2 of part IV. The secretariat of WHO stated the following:

The facilities, privileges and immunities of delegations participating in WHO conferences are established in a number of texts. Article 67 (b) of the Constitution^[368] provides that representatives of member States, persons designated to serve on the Board and technical and administrative personnel of the Organization shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization. The Convention on the Privileges and Immunities of the Specialized Agencies also contains a number of special provisions which require no comment. So far as WHO Headquarters is concerned, these provisions were supplemented in the headquarters agreement concluded with the Swiss Federal Council in 1948.^[369] Similar agreements have also been envisaged for each of the six regional offices and for the International Agency for Research on Cancer. When conferences are held in countries with which there is

no special agreement, an *ad hoc* agreement is concluded. It either contains a number of special provisions or refers to an existing agreement—most often the Convention on the Privileges and Immunities of the Specialized Agencies. The legal system laid down in such agreements is well known and needs no special comment.

17. The secretariat of IBRD stated the following:

[...] even to the extent that the draft articles are relevant to the operations of the IBRD Group, any impact of the proposed instrument is likely to be delayed for a considerable time because for the present most relevant questions appear to be adequately regulated by a number of existing instruments: the Articles of Agreement of IBRD,^[370] IFC^[371] and IDA^[372] (and the SID Convention in relation to ICSID), the Convention on the Privileges and Immunities of the Specialized Agencies and the United Nations Headquarters Agreements^[373]—the provisions of all of which are, by draft articles 3-5 and 79-81, to be preserved from supersession by the proposed instrument; in addition, reference must be made to national legislation, in particular the Bretton Woods Agreement Act and the International Organizations Immunities Act of the host State of the IBRD Group. However, in the long run it is likely that certain of these instruments may be interpreted or even altered to conform to the provisions of the proposed instrument, if, as is intended, that instrument comes to be accepted as expressing the consensus of the world community as to the questions to which it is to relate."

18. Some of the comments made by the secretariat of ITU have been already reproduced in the context of article 78.³⁶⁴ The secretariat of ITU also remarked that

In addition to delegations of States the following may be admitted to ITU conferences:

- (a) Observers of the United Nations, the specialized agencies and IAEA;
- (b) Observers of certain other international organizations;
- (c) Representatives of certain recognized private operating agencies.

The provisions of the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies respectively accord the necessary facilities, privileges and immunities to persons in category (a) where the host State is a party to them.

There is no provision for any facilities for persons in categories (b) and (c) in the Headquarters Agreement between the United Nations and the Swiss Confederation^[374] which is applied by analogy to ITU, but in practice no difficulties have arisen in connexion with ITU conferences held in Switzerland.

The final draft of the Headquarters Agreement now under negotiation between the Union and the Confederation contains the following article which would be applicable in such cases:

"The Swiss authorities shall take the necessary measures to facilitate the entry into, sojourn in and departure from Swiss territory of all persons, irrespective of nationality, summoned by the Union in their official capacity." [*Provisional translation*]

As for ITU conferences outside Switzerland, such observers and representatives could enjoy special status only by virtue of any relevant provisions which might be included in *ad hoc* agreements between the Union and host States.

The secretariat of the ITU indicated further that

³⁶⁰ *Ibid.*, vol. 2, p. 134.

³⁶¹ *Ibid.*, vol. 264, p. 117.

³⁶² *Ibid.*, vol. 439, p. 249.

³⁶³ *Ibid.*, vol. 11, p. 11.

³⁶⁴ See above, p. 111, document A/CN.4/241/Add.5, Article 78, para. 5 of the observations.

³⁶⁵ United Nations, *Treaty Series*, vol. 1, p. 163 and *ibid.*, vol. 509, p. 309.

³⁶⁸ For the text of the WHO Constitution, see United Nations, *Treaty Series*, vol. 14, p. 185 and *ibid.*, vol. 377, p. 380.

³⁶⁹ United Nations, *Treaty Series*, vol. 26, p. 331.

The term "representative" as used in the Montreux Convention [366] refers to a "person sent by a recognized private operating agency". Such agencies may, with the approval of the members of ITU which have recognized them, become members of the CCIs (Montreux Convention, No. 769) and, under certain circumstances, they may vote in Plenary Assemblies (*idem*, No. 789).

"Furthermore, scientific and industrial organizations engaged in telecommunication work may participate in an advisory capacity in meetings of the study groups of the CCIs (*idem*, No. 773).

"These agencies and organizations contribute towards defraying the expenses of the CCIs (*idem*, No. 224).

"International organizations which co-ordinate their work with ITU and which have related activities may be admitted to participate in the work of the CCIs.

The secretariat of ITU finally observed that it had

commented at some length on the draft articles as we feel that the International Law Commission should be aware of the extent to which the provisions of part IV depart from the practice in organizations such as the Union. We believe that the draft in its final form will be widely accepted and that difficulties may well arise in connexion with ITU conferences and meetings, despite the provisions of articles 5 and 79, if so great a discrepancy between its provisions and ITU practice remains.

19. The secretariat of UPU stated that

We are inclined to believe that, despite the reservation in article 80, some of the suggested provisions would complicate existing practice, without meeting any real need. In addition, so far as UPU is concerned, the regulations on the subject embodied in the Convention on the Privileges and Immunities of the Specialized Agencies (article V) and the Switzerland/United Nations agreement on the privileges and immunities of the United Nations (article IV), which is applied *mutatis mutandis* to UPU, have not proved to be in any way inadequate or imperfect. Moreover, they cover the case of observers to organs and conferences, which is not dealt with in the draft articles.

(b) *Observations of the Special Rapporteur*

20. The Special Rapporteur in order to facilitate the discussion in the Commission, deemed it appropriate to include in the preceding paragraphs a systematic and full account of the observations of a number of governments and international organizations critical of the Commission's approach to the question of the facilities, privileges and immunities of delegations. In this respect, he wishes to observe that the arguments advanced in support of such a position, which relate to a great extent to the Commission's general comments on section 2 of part IV, reproduce in general those which were made during the discussion at the twenty-second session of the Commission. As for himself, the Special Rapporteur wishes to point out that the view he expressed on the question in his own commentary to the then draft article 69 in the fifth report he submitted on the topic³⁶⁷ received the endorsement of the Commission, as it is reflected in paragraph 16 of the above-mentioned general comments in the following terms:

As regards the nature and extent of privileges and immunities of members of delegations to organs of international organizations and

³⁶⁶ For the text of the International Telecommunication Convention, see United Nations, *Juridical Yearbook, 1965* (United Nations publication, Sales No. 67.V.3), p. 173.

³⁶⁷ *Yearbook of the International Law Commission, 1970*, vol. II, p. 22-23, document A/CN.4/227 and Add.1 and 2, chap. II.

to conferences convened by international organizations, the Commission takes the position that these should be based upon a selective merger of the pertinent provisions of the Convention on Special Missions and the provisions regarding permanent missions to international organizations provided for in Part II of these articles. This position is derived from a number of recent developments which have taken place in the codification of diplomatic law. One of these developments is the evolution of the institution of permanent missions to international organizations and the assimilation of their status and immunities to diplomatic status and immunities. Another factor is that during the discussion and in the formulation of its provisional draft articles on special missions, the Commission expressed itself in favour of: (a) making the basis and extent of the immunities and privileges of special missions more or less the same as that of permanent diplomatic missions, and (b) taking the position that it was impossible to make a distinction between special missions of a political nature and those of a technical nature; every special mission represented a sovereign State in its relations with another State. The Commission is of the view that, owing to the temporary character of their task, delegations to organs of international organizations and to conferences convened by international organizations occupy, in the system of diplomatic law of international organizations, a position similar to that of special missions within the framework of bilateral diplomacy. It follows that the determination of their privileges and immunities should be made in the light of those of special missions. However, after taking into account adjustments required by the fact that their task is temporary, privileges and immunities of these delegations should reflect the essential role that the law of international organizations must play in their formulation.³⁶⁸

The Special Rapporteur remains of the same opinion. He wishes further to point out that in their comments, governments and international organizations made concrete reference to most of the provisions of the articles included in section 2 of part IV of the Commission's draft. In these circumstances, the Special Rapporteur does not consider it necessary, for the purposes of the present report, to alter the Commission's approach in the presentation of the articles on facilities, privileges and immunities with which he is to furnish the Commission for consideration and final decision.

21. The Special Rapporteur does not deem it pertinent to express an opinion on the suggested distinction between the privileges and immunities to be accorded to delegations to organs and those to be accorded to delegations to conferences as no reasons were given to explain it.

22. As regards the comment of the Government of Japan reproduced in paragraph 15 above, the Special Rapporteur wishes to refer to the provisions of article 50 which, as explained by the Commission in the report on the work of its twenty-first session

was put provisionally at the end of the group of articles adopted by the Commission at its twenty-first session. Its place in the draft as a whole will be determined by the Commission at a later stage.³⁶⁹

He wishes also to recall paragraph 5 of the Commission's commentary on article 50 and his observation on the question of the inclusion in the draft articles of the provisions on the settlement of disputes.³⁷⁰

³⁶⁸ *Ibid.*, pp. 291-292, document A/8010/Rev.1, chap. II, B.

³⁶⁹ *Ibid.*, 1969, vol. II, p. 221, document A/7610/Rev.1, footnote 44.

³⁷⁰ See above, p. 83, document A/CN.4/241/Add.3, Article 50, para. 16 of the observations.

23. The Special Rapporteur takes note of the information given by international organizations regarding their rules and practice on the subject. In this respect he wishes to refer to the provisions of articles 3 and 4 which, as the Commission indicated in its commentary to article 79, are intended to apply generally to part IV of the draft.

Article 91.³⁷¹ Status of the Head of State and persons of high rank

(a) Observations of Governments and international organizations

1. In the course of the debate in the Sixth Committee, the Commission

was commended for having included in the draft this provision, which is based on article 21 of the Convention on Special Missions.³⁷²

2. In its written comments, the Government of Finland expressed the view that

The status of the persons of high standing mentioned in this article should be defined in the draft articles but it is doubtful whether the references to official visits and international law are enough in this respect.

3. The Government of the United Kingdom stated that as in the case of the comparable provision in the Convention on Special Missions (in connexion with the adoption of which the *United Kingdom* delegation made a statement of its position),³⁷³ they

[...] find it difficult to accept the implication in paragraph 2 that persons other than the Head of State and his suite have privileges and immunities under international law, as opposed to those which may be accorded as a matter of courtesy, going beyond those contemplated in the succeeding articles.

4. Some Governments criticized the inclusion of the article in the draft. The Government of Sweden considered that the article was "superfluous". In its view, "in substance it only provides that the rules of international law regarding the status of heads of State and persons of high rank should be respected". The Government of Turkey was of the opinion that the article "is out of place in the convention. This matter should be left to international law to be dealt with in accordance with custom."

5. The Government of the United States expressed its belief that

This draft article is unnecessary since the privileges and immunities covered in the article are already accorded by international law. However, we have no difficulty with the article.

(b) Observations of the Special Rapporteur

6. The Special Rapporteur is of the opinion that, to paraphrase the Commission's observation in paragraph 1

³⁷¹ For reference to the draft articles and the Commission's commentaries, see foot-note 34 above.

³⁷² *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 67.

³⁷³ *Ibid.*, *Twenty-fourth Session, Annexes*, agenda item 87, document A/7799, paras. 177-178.

of the commentary to article 21 of its final draft on Special Missions,³⁷⁴ in international law, rank may confer on the person holding it exceptional facilities, privileges and immunities which he retains on becoming a member of a delegation. In this connexion he wishes to point out that, as regards the Head of the sending State, the facilities, privileges and immunities which he is to enjoy are, in the words of paragraph 2 of the above-mentioned commentary, those accorded by international law to Heads of State "on an official visit".³⁷⁵ In these circumstances, in the Special Rapporteur's view, the provision of article 91, which reproduces with the requisite adaptations the provision of article 21 of the Convention on Special Missions, would appear to be called for even more in the context of relations between States and international organizations than in that of relations between States.

7. In view of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 91 would, therefore, read as follows:

Article 91. Status of the Head of State and persons of high rank

1. The Head of the sending State, when he leads a delegation to an organ or to a conference, shall enjoy in the host State or in a third State the facilities, privileges and immunities accorded by international law to Heads of State on an official visit.

2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a delegation of the sending State to an organ or to a conference, shall enjoy in the host State or in a third State, in addition to what is granted by the present part, the facilities, privileges and immunities accorded by international law.

Article 92. General facilities, assistance by the Organization and inviolability of archives and documents

No comments were made by Governments or international organizations concerning article 92. The Special Rapporteur has no observations to make on the text of the article and consequently, he proposes that the article be retained in its present form. Article 92 would, therefore, read as follows:

Article 92. General facilities, assistance by the Organization and inviolability of archives and documents

The provisions of articles 22, 24 and 27 shall apply also in the case of a delegation to an organ or to a conference.

Article 93. Premises and accommodation

(a) Observations of Governments and international organizations

1. In its written comments the Government of the Netherlands stated that it did not see

³⁷⁴ *Yearbook of the International Law Commission, 1967*, vol. II, p. 359, document A/6709/Rev.1, chap. II, D.

³⁷⁵ Italics supplied by the Special Rapporteur.

the analogy drawn in the Commission's commentary with article 23 of the 1969 Convention on Special Missions. A special diplomatic mission entertains relations with the host State, whilst the relations referred to in this article are multilateral, or else are relations with an organization. In practice, too, as far as is known, in finding accommodation for delegates to conferences or assemblies of an organ, assistance is often given by the secretariat of the organization. To make this the responsibility of the host State seems to impose an unnecessary extra burden on the latter's hospitality. It is therefore proposed that the provision be reversed to the effect that the organization provides assistance and that, where necessary, it is assisted therein by the host State.

2. The secretariats of WHO and ITU considered inapplicable to their organizations the provisions of the article. The secretariat of WHO observed that "to date, WHO has not followed [the] practice" referred to in the article. The secretariat of the ITU observed that "ITU accepts no responsibility for finding premises and accommodation for delegations".

3. The Secretariat of the United Nations referred to its editorial observations concerning article 23.³⁷⁶ It added that to bring this article into line with article 23, paragraph 2, the word "delegation" should be replaced by "delegations" throughout. With the necessary consequential changes the article would then read:

The host State shall assist *delegations* to an organ or to a conference, if *they so request*, in procuring the necessary premises and obtaining suitable accommodation for *their* members. The organization shall, where necessary, assist *delegations* in this regard. (A/CN.4/L.162/Rev.1, section B.)

(b) *Observations of the Special Rapporteur*

4. The Special Rapporteur wishes to point out that in the present draft, article 66 on accommodation and assistance makes the provisions of articles 23 and 24 applicable also in the case of permanent observer missions. For the sake of consistency, therefore, he cannot agree to the suggestion made by the Government of the Netherlands.

5. As to the comments made by the secretariats of WHO and ITU, the Special Rapporteur wishes to refer to the provisions of articles 3 and 4 of the present draft and to his observations in the context of those articles.³⁷⁷

6. As regards the editorial suggestions of the United Nations Secretariat, the Special Rapporteur wishes to refer, on the question of titles, to his general observation in the context of article 23.³⁷⁸ He agrees to the replacement of the word "delegation" by "delegations" and consequential changes.

7. In view of the foregoing the Special Rapporteur proposes that, subject to the drafting changes referred to in the preceding paragraph, the article be retained in its present form. Article 93 would therefore read as follows:

³⁷⁶ See above, p. 46, document A/CN.4/241/Add.3, Article 23, para. 2 of the observations.

³⁷⁷ See above, p. 25, document A/CN.4/241 and Add.1 and 2, Articles 3 and 4, paras. 102 *et seq.* of the observations.

³⁷⁸ See above, p. 46, document A/CN.4/241/Add.3, Article 23, para. 7 of the observations.

Article 93. Premises and accommodation

The host State shall assist delegations to an organ or to a conference, if they so request, in procuring the necessary premises and obtaining suitable accommodation for their members. The Organization shall, where necessary, assist delegations in this regard.

Article 94. Inviolability of the premises

(a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee some representatives urged that

Paragraph 1 of this article should be brought into line with the corresponding provision of the Vienna Convention on Diplomatic Relations of 1961. They expressed serious reservations with regard to the last sentence of that paragraph. In their view, the sentence should be deleted and they argued that the provision set out in it imposed limitations on the principle of inviolability of the premises that might result in practice in its virtual negation; the legal prerogative of inviolability was subject "in case of fire or other disaster that seriously endangers public safety" to the subjective evaluation of the host State in detriment of the rights of the sending State. Apart from the fact that it opened the way to abuses, the provision was ambiguously worded and might consequently lead to misunderstandings and disputes. It was noted that the words "that seriously endangers public safety" referred only to "other disaster", from which it would appear that "in case of fire" local authorities could enter the premises of the delegation even if there was no serious danger to public safety. Furthermore, the words "and only in the event that it has not been possible to obtain the express consent of the head of the delegation or of the head of the permanent diplomatic mission" could be interpreted to mean that local authorities were allowed to enter the premises of the delegation even if the head of the delegation or of the permanent diplomatic mission expressly refused to admit them because in his view there was no serious danger to public safety.³⁷⁹

2. In its written comments, the Government of Pakistan pointed out that

It attaches great importance to the inviolability of the premises where a delegation to an organ or to a conference is established.

It expressed its concern in respect of the last sentence of paragraph 1 of the article as it believed that "the inviolability should be strictly maintained and no relaxation should be allowed without express consent". The Government of Hungary considered that the last sentence of paragraph 1 of the article ought to be deleted since in this way

The paragraph would reflect exactly the right principle accepted by a large majority of States in article 22 of the Vienna Convention on Diplomatic Relations.

3. The Government of the United Kingdom expressed the view that the obligations which would be imposed by the article

go beyond the provisions in the existing Conventions. It is very difficult to conceive how such general obligations could be carried out in practice in the case of all delegations and delegates to organs and conferences of international organizations, except of course where a special situation called for special protection.

³⁷⁹ *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 68.*

The Government of the United States questioned "the wisdom of paragraph 1" of the article. The Government of Sweden expressed doubts whether

the provisions regarding the inviolability of the premises of a delegation are realistic, especially when extended, in accordance with articles 99 and 105, to the private accommodation of delegation members.

The Government of Turkey considered that paragraphs 1 and 2 "would be very difficult to apply, although in appearance they may be worth retaining".

4. The Government of Turkey added that paragraphs 1 and 2

would seem to relate mainly to hotels. The provisions relating to the premises occupied by the mission cannot be applied to commercial buildings.

The Government of Canada stressed that "delegations are often located in commercial buildings". The Governments of the United States and Sweden observed that most members of delegations would commonly be housed in hotels often for short periods of time in different parts of a conference site. The United States Government then asked

Is this what is meant by "premises where a delegation [...] is established"? As suggested in the commentary, [...] a definition would be necessary. It would seem unreasonable to make such hotel rooms inviolable. The normal functioning of a hotel necessitates that service personnel enter the room. One cannot expect that a hotel will permit its routine to be disrupted because a delegation member is there. On the other hand, if the "premises" turn out to be those of the permanent mission, draft article 25 already provides the necessary protection.

The Government of Sweden considered that

in the case of a fairly big conference, the task imposed upon the authorities of the host State [...] might well be impossible to fulfil. Much depends of course on what precise meaning is given to the term "all appropriate steps".

5. In connexion with paragraph 3 of the article, the Government of the Netherlands referred to its comments on article 25,³⁸⁰ and to its position as regards the analogy drawn by the Commission with special missions.³⁸¹

6. In the opinion of the Government of Sweden, "it would be advisable to reconsider the [article] in order to formulate the obligations imposed by [it] to what it is possible to fulfil". The Government of Turkey suggested that "to avoid any possible dispute, [...] the [first] two paragraphs be either deleted or at least redrafted so as to diminish the obligation therein laid down". The Government of Canada likewise favoured the redrafting of the article.

(b) *Observations of the Special Rapporteur*

7. The Special Rapporteur wishes to point out that the provision of article 94 is based on that of article 25 of the Convention on Special Missions. In addition to recalling his observations in the context of the general comments on section 2 of part IV,³⁸² the Special Rapporteur wishes

³⁸⁰ See above, p. 48, document A/CN.4/241/Add.3, Article 25, para. 12 of the observations.

³⁸¹ See above, Article 93, para. 1 of the observations.

³⁸² See above, Section 2, General comments, para. 20.

to refer to the Commission's commentary on the present article, to the effect that

The problems involved in the inviolability of the premises of delegations and those of the inviolability of the premises of the special missions are identical since both are usually housed in hotels or other temporary quarters such as office space in the premises of a permanent diplomatic mission.

He wishes further to note that the Convention on Special Missions does not include a definition of the "premises of the special mission", an omission which might find its justification in the temporary character of those missions.

8. As regards the general question raised by the comments made concerning the provision of the last sentence of paragraph 1, the Special Rapporteur wishes to refer to his observations on similar comments made in the context of articles 25 and 67.³⁸³

9. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 94 would, therefore, read as follows:

Article 94. Inviolability of the premises

1. The premises where a delegation to an organ or to a conference is established shall be inviolable. The agents of the host State may not enter the said premises, except with the consent of the head of the delegation or, if appropriate, of the head of the permanent diplomatic mission of the sending State accredited to the host State. Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the head of the delegation or of the head of the permanent diplomatic mission.

2. The host State is under a special duty to take all appropriate steps to protect the premises of the delegation against any intrusion or damage and to prevent any disturbance of the peace of the delegation or impairment of its dignity.

3. The premises of the delegation, their furnishings, other property used in the operation of the delegation and its means of transport shall be immune from search, requisition, attachment or execution.

Article 95. Exemption of the premises of the delegation from taxation

(a) *Observations of Governments and international organizations*

1. In its written comments, the Government of Switzerland considered that

The reference to the nature of the functions performed by delegations introduces an element which might lead to difficulties of interpretation and one which is not perhaps indispensable. This reference could be deleted and the article could start with the words "For the duration of the functions . . .".

2. The Government of the United States expressed its belief that the article "needs clarification".

3. The Government of Canada stated that the article offered an example of "practical administrative problems that would arise for a country subscribing to its text" and

³⁸³ See above, p. 49, document A/CN.4/241/Add.3, Article 25, paras. 15 and 20 of the observations, and p. 105, document A/CN.4/241/Add.4, Article 67, para. 6 of the observations.

added that its "redrafting should be guided by the functional approach".

(b) *Observations of the Special Rapporteur*

4. In connexion with the comment made by the Government of Canada (para. 3 above), while recalling his observation in the context of the general comments on section 2 of part IV,³⁸⁴ the Special Rapporteur wishes to observe that, as explained by the Commission in its commentary to the article, article 95

differs from article 26 on permanent missions in that the exemption from taxation is related to the nature and duration of the functions performed by the delegation.

The Special Rapporteur is, however, in agreement with the United States Government that the article "needs clarification", a view similarly held by the Government of Switzerland as far as the reference to the nature of the functions performed is concerned. As the adoption of the suggestion made by the Swiss Government would imply that a similar provision would be couched, in the context of delegations, in different language from that used in the context of permanent missions (and permanent observer missions) and of special missions, the Special Rapporteur proposes to revert to the model of article 26 of the present draft, to maintain uniformity and consistency among the various parts of the same draft. Article 95 would, therefore, read as follows:

Article 95. Exemption of the premises of the delegation from taxation

1. The sending State of the members of a delegation to an organ or to a conference acting on behalf of the delegation shall be exempt from all national, regional or municipal dues and taxes in respect of the premises occupied by the delegation, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State or with a member of the delegation.

Article 96. Freedom of movement

(a) *Observations of Governments and international organizations*

1. The secretariat of WHO noted that

As a general rule WHO has always refused to allow any discrimination to be practised by the host country among the delegates attending a conference. In one most unusual case, however, it agreed to a certain restriction on the movements of a delegation from a particular country, but the situation never materialized because the conference was later transferred as a result of important political changes in the country where it was originally to have been held.

(b) *Observations of the Special Rapporteur*

2. The Special Rapporteur takes note of the information given by the secretariat of WHO, which does not seem to call for any observation on his part. He proposes that the

article be retained in its present form. Article 96 would, therefore, read as follows:

Article 96. Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure to all members of a delegation to an organ or to a conference such freedom of movement and travel in its territory as is necessary for the performance of the functions of the delegation.

Article 97. Freedom of communication

(a) *Observations of Governments and international organizations*

1. The Secretariat of the United Nations indicated that the editorial suggestion it had made with respect to article 29, paragraph 7, applied to article 97, paragraph 8 (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

2. The Special Rapporteur wishes to recall his observation on the suggestion referred to by the United Nations Secretariat, made in the context of article 29.³⁸⁵ In these circumstances, he proposes that the article be retained in its present form. Article 97 would, therefore, read as follows:

Article 97. Freedom of communication

1. The host State shall permit and protect free communication on the part of a delegation to an organ or to a conference for all official purposes. In communicating with the Government of the sending State, its diplomatic missions, consular posts, permanent missions, permanent observer missions, special missions and delegations, wherever situated, the delegation may employ all appropriate means, including couriers and messages in code or cipher. However, the delegation may install and use a wireless transmitter only with the consent of the host State.

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

3. Where practicable, the delegation shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission, of the permanent mission or of the permanent observer mission of the sending State.

4. The bag of the delegation shall not be opened or detained.

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

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

7. The sending State or the delegation may designate couriers *ad hoc* of the delegation. In such cases the provisions of paragraph 6 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the delegation's bag in his charge.

8. The bag of the delegation may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port

³⁸⁴ See above, Section 2, General comments, para. 20.

³⁸⁵ See above, p. 55, document A/CN.4/241/Add.3, Article 29, para. 9 of the observations.

of entry. The captain shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the delegation. By arrangement with the appropriate authorities, the delegation may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

Article 98. Personal inviolability

(a) *Observations of Governments and international organizations*

1. In the opinion of the Government of Finland "the provisions of this article have gained additional significance as a result of the recent kidnappings of diplomats".

2. The Government of the United Kingdom observed that

The corresponding provision in the United Nations and Specialized Agencies Conventions does not confer such a general personal inviolability

and that it did "not see any justification for the change".

3. The Governments of Canada and the Netherlands made applicable to article 98 their comments included under article 95³⁸⁶ and 100³⁸⁷ respectively.

(b) *Observations of the Special Rapporteur*

4. With respect to the comment of the United Kingdom Government (para. 2 above), the Special Rapporteur wishes to refer to his observation in the context of the general comments on section 2 of part IV.³⁸⁸

5. As regards the comments of the Governments of Canada and the Netherlands (para. 3 above), the Special Rapporteur wishes to refer to his observations on the applicable comments made in the context of the general comments on section 2³⁸⁹ and of article 95.³⁹⁰

6. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 98 would, therefore, read as follows:

Article 98. Personal inviolability

The persons of the representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

Article 99. Inviolability of the private accommodation

(a) *Observations of Governments and international organizations*

1. The Governments of the United Kingdom, Sweden, the United States, Canada and the Netherlands made

³⁸⁶ See above, Article 95, para. 3 of the observations.

³⁸⁷ See below, Article 100, para. 3 of the observations.

³⁸⁸ See above, Section 2, General comments, para. 20.

³⁸⁹ *Ibid.*

³⁹⁰ See above, Article 95, para. 4 of the observations.

applicable to article 99 their comments included under articles 94,³⁹¹ 95,³⁹² and 100.³⁹³

2. The Government of Japan expressed the view that the article

seems to impose too great a burden on the host State by requiring that State to give special protection to members of delegations. The Commission might reconsider the formulation in the light of the temporariness of the task and accommodation of members of delegations.

(b) *Observations of the Special Rapporteur*

3. The Special Rapporteur, while pointing out that article 99 reproduces with the requisite adaptations the provisions of article 30 of the Convention on Special Missions, wishes to refer to his observations in the context of the general comments on section 2 of part IV³⁸⁴ and on the applicable comments made in the context of articles 94,³⁹⁵ and 95.³⁹⁶

4. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Subject to the filling of the blank in paragraph 2 in accordance with the decision to be reached concerning article 100, article 99 would, therefore, read as follows:

Article 99. Inviolability of the private accommodation

1. The private accommodation of the representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff shall enjoy the same inviolability and protection as the premises of the delegation.

2. Their papers, their correspondence and, except as provided in paragraph ... of article 100, their property shall likewise enjoy inviolability.

Article 100. Immunity from jurisdiction

(a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee, some representatives "expressed a preference for alternative A of this article as being broader and being based directly on the corresponding article of the Convention on Special Missions of 1969. Others stated that they favoured alternative B, because they considered that it set out all the safeguards that were needed for the proper functioning of delegations or because they felt that the future convention must be acceptable to the largest possible number of States. Other representatives expressly reserved their positions for the time being."³⁹⁷

2. In their written comments, the Governments of Madagascar and Hungary and the secretariat of IAEA

³⁹¹ See above, Article 94, paras. 3, 4 and 6 of the observations.

³⁹² See above, Article 95, para. 2 of the observations.

³⁹³ See below, Article 100, para. 3 of the observations.

³⁹⁴ See above, Section 2, General comments, para. 20.

³⁹⁵ See above, Article 94, para. 7 of the observations.

³⁹⁶ See above, Article 95, para. 4 of the observations.

³⁹⁷ *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 69.*

expressed preference for alternative A. In support of their position, the Government of Madagascar took the view that alternative B

would raise the same difficulties of interpretation regarding the definition of "acts performed outside official functions" as have already been noted in the analysis of article 32 of the draft,³⁹⁸

while alternative A was "clearer and more specific". The Government of Hungary considered that

alternative B narrows down, with no reason, the immunity from civil and administrative jurisdiction of the representatives of States members of an international organization.

The secretariat of IAEA observed that alternative A is based on the Vienna Convention on Diplomatic Relations and the Convention on Special Missions which we assume to reflect more closely the current thinking on the subject than the earlier Convention on the Privileges and Immunities of the United Nations.

3. The Governments of Canada, Finland, France, Japan, the Netherlands, Pakistan, Sweden, Switzerland, Turkey and the United States expressed preference for alternative B. In support of their position the Government of Switzerland drew attention to "the fairly loose ties delegates have in the host State—where their stay is only temporary"—and added that "in the circumstances, this wording of the text ensures adequate protection". The Government of Finland observed that

Delegations are usually composed of various categories of persons and [...] ensuring the proper performance of their functions is the purpose of provisions in several other articles (reference is made to articles 82, 95 and 96).

The Government of the Netherlands stressed its preference for "provisions limiting the immunity to acts carried out during the performance of the duties of the delegations". The Government of the United States referred to its comments on draft articles 30, 32 and 45. The Government of France emphasized the "current practice in the matter" and the "proper sphere of application of the draft".

4. The Government of France, however, did not regard alternative B as

entirely satisfactory since it would enable persons benefiting from it to enjoy total immunity from jurisdiction, which is not provided for by article IV of the Convention on the Privileges and Immunities of the United Nations.

The Government of the United Kingdom likewise stated that

The two alternatives offered by the Commission are substantially different from the existing position under the United Nations and Specialized Agencies Conventions. Alternative A is based on the Convention on Special Missions which, as already explained, is not considered to be the appropriate precedent. But even alternative B would confer immunity from criminal jurisdiction in respect of the non-official acts of a representative. Under the United Nations and Specialized Agencies Conventions, the immunity is only from arrest and detention in connexion with such matters and not immunity from jurisdiction as such. The Government of the United Kingdom do not consider that the proposed departure from existing practice is justifiable.

5. The Government of the Netherlands offered for consideration

³⁹⁸ See above, p. 57, document A/CN.4/241/Add.3, Article 32, para. 12 of the observations.

A supplementary provision permitting the host State to require that the representatives and members of delegations be covered by third-party insurance according to the laws of the host State, such insurance to include accidents occurring whilst on their official business. This is especially important in the case of those States where legal responsibility for damages depends on the establishment of guilt under criminal law.

In this respect, the Government of Madagascar indicated that

The comments already made on the subject of the provision concerning actions arising out of a traffic accident [³⁹⁹] are also applicable to article 100 (alternative A), paragraph 2 (d).

6. The Government of the Netherlands also considered that

A provision on the settlement of civil claims, such as the Commission envisages in paragraph 4 of its commentary on article 100, should be included.

(b) *Observations of the Special Rapporteur*

7. The Special Rapporteur notes that in ten of their written comments on the point, governments and international organizations expressed preference for alternative B, while three were in favour of alternative A. Without trying to prejudice the conclusions that the Commission may wish to draw therefrom, the Special Rapporteur considers it only appropriate, for the purposes of the present report, to include the two alternatives for the text of article 100 with which he is to furnish the Commission for its consideration and final decision.

8. As regards the comments of the Governments of France and the United Kingdom reproduced in paragraph 4 above, the Special Rapporteur wishes to refer to his observation made in the context of the general comments on section 2 of part IV.⁴⁰⁰

9. With respect to the comments of the Governments of the Netherlands and Madagascar concerning the inclusion of a provision on insurance, the Special Rapporteur wishes to reiterate his approach to similar comments made in the context of article 32.⁴⁰¹

10. As to the comment of the Government of the Netherlands regarding a provision on the settlement of civil claims, the Special Rapporteur wishes to indicate that, as stated in paragraph 4 of its commentary to the article, the Commission did not reach any decision regarding the inclusion of such a provision, pending a decision on the two alternatives for article 100.

11. The texts of the two alternatives adopted by the Commission for submission to Governments and international organizations were as follows:

Article 100. Immunity from jurisdiction

ALTERNATIVE A

1. The representatives in a delegation to an organ or to a conference and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the host State.

³⁹⁹ *Ibid.*

⁴⁰⁰ See above, Section 2, General comments, para. 20.

⁴⁰¹ See above, p. 58, document A/CN.4/241/Add.3, Article 32, paras. 19, 21 and 23 of the observations.

2. They shall also enjoy immunity from the civil and administrative jurisdiction of the host State, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the delegation;

(b) An action relating to succession in which the person concerned is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the person concerned in the host State outside his official functions;

(d) An action for damages arising out of an accident, caused by a vehicle used outside the official functions of the person concerned.

3. The representatives in the delegation and the members of its diplomatic staff are not obliged to give evidence as witnesses.

4. No measures of execution may be taken in respect of a representative in the delegation or a member of its diplomatic staff except in the cases coming under sub-paragraphs (a), (b), (c), and (d) of paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person or his accommodation.

5. The immunity from jurisdiction of the representatives in the delegation and of the members of its diplomatic staff does not exempt them from the jurisdiction of the sending State.

ALTERNATIVE B

1. The representatives in a delegation to an organ or to a conference and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the host State.

2. (a) The representatives and members of the diplomatic staff of the delegation shall enjoy immunity from the civil and administrative jurisdiction of the host State in respect of all acts performed in the exercise of their official functions.

(b) No measures of execution may be taken in respect of a representative or a member of the diplomatic staff of the delegation unless the measures concerned can be taken without infringing the inviolability of his person or his accommodation.

3. The representatives and members of the diplomatic staff of the delegation are not obliged to give evidence as witnesses.

4. The immunity from jurisdiction of the representatives and members of the diplomatic staff of the delegation does not exempt them from the jurisdiction of the sending State.

Article 101. Waiver of immunity

(a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee,⁴⁰² views were expressed on article 101 similar to those mentioned in connexion with article 71 in part III of the draft.⁴⁰³

2. In its written comments the Government of the United Kingdom observed that

This draft article omits the provision requiring the sending State to waive the immunity in certain circumstances which is contained in the United Nations and Specialized Agencies Conventions. This provision is useful in practice.

⁴⁰² *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 62.

⁴⁰³ See above, p. 108, document A/CN.4/241/Add.4, Article 71, para. 1 of the observations.

3. The Government of Turkey considered that

Seeing that immunity is granted in the interest of the functions performed a further paragraph should be added providing for waiver of immunity where immunity is not warranted by the function performed.

4. The Government of Switzerland referred to its comments on articles 33⁴⁰⁴ and 34.⁴⁰⁵

(b) *Observations of the Special Rapporteur*

5. With respect to the views expressed in the Sixth Committee referred to in paragraph 1 above, the Special Rapporteur wishes to recall his observation thereon in the context of article 71.⁴⁰⁶

6. As regards the comments of the Governments of the United Kingdom and Turkey (para. 3), the Special Rapporteur wishes to refer to his observation in the context of the general comments on section 2 of part IV.⁴⁰⁷

7. The Special Rapporteur wishes to recall his observations on the comments of the Swiss Government made in the context of article 33.⁴⁰⁸

8. In view of the foregoing, the Special Rapporteur proposed that the article be retained in its present form. Article 101 would, therefore, read as follows:

Article 101. Waiver of immunity

1. The immunity from jurisdiction of the representatives in a delegation to an organ or to a conference, of the members of its diplomatic staff and of persons enjoying immunity under article 105 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by any of the persons referred to in paragraph 1 of this article shall preclude them from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

Article 102. Exemption from dues and taxes

(a) *Observations of Governments and international organizations*

1. The Government of Switzerland considered that

The detailed provisions of this article do not seem destined for broad practical application, since delegates do not in principle have a domicile in the host State or, if they do, they generally have diplomatic status. Consequently, it might be desirable to attempt to

⁴⁰⁴ See above, p. 59, document A/CN.4/241/Add.3, Article 33, para. 2 of the observations.

⁴⁰⁵ *Ibid.*, p. 60, Article 34, para. 3 of the observations.

⁴⁰⁶ See above, p. 108, document A/CN.4/241/Add.4, Article 71, para. 3 of the observations.

⁴⁰⁷ See above, Section 2, General comments, para. 20.

⁴⁰⁸ See above, p. 60, document A/CN.4/241/Add.3, Article 33, para. 8 of the observations.

simplify the wording of this article and reduce it to a simple statement of principle. The wording might be something similar to the following:

"The sojourn in the host State of representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff shall never make the persons concerned liable to dues and taxes, personal or real, national, regional or municipal to which such persons would not have been liable if they did not have such status."

The idea underlying this text is that delegates shall be liable to the taxes which affect all persons who are in the territory for any purpose, even if they are merely passing through (for example, the indirect purchase taxes referred to in sub-paragraph (a) or those referred to in sub-paragraph (e), and the taxes to which they are liable regardless of their presence in the territory of the country (sub-paragraphs (b) to (d))—i.e. precisely the exceptions listed in the present draft—whilst they are exempted from all other taxes which are generally based on the existence of a domicile or sojourn in the territory of the host country.

2. The Government of the United States took the view that

To exempt members of a delegation from sales taxes and other taxes of this nature is impractical. The relatively brief period of time most delegations spend in the host country and the small amounts involved do not warrant the significant administrative burden that would be required to arrange for the refund of such taxes.

The Government of Canada made applicable to the article its comment included under article 95.⁴⁰⁹

3. The Government of the United Kingdom considered that the article is "substantially different from the provisions in the United Nations and Specialized Agencies Conventions" and indicated that it did "not accept that the proposed departure from the provisions of those Conventions is justified".

(b) *Observations of the Special Rapporteur*

4. With respect to the comments of the Governments of Switzerland (para. 1 above) and the United States (para. 2), the Special Rapporteur wishes to emphasize in general the decision of the Commission referred to in its commentary to the article that "it was desirable to adhere to the pattern originally laid down in the Convention on Diplomatic Relations". He wishes to add that that pattern has been followed in the Convention on Special Missions and in article 36 of the present draft on permanent missions, the provisions of which have been made applicable to permanent observer missions by paragraph 1 of article 69.

5. As regards the comments of the Governments of Canada (para. 2) and the United Kingdom (para. 3), the Special Rapporteur wishes to refer to his observation made in the context of the general comments on section 2 of part IV.⁴¹⁰

6. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 102 would, therefore, read as follows:

Article 102. Exemption from dues and taxes

The representatives in a delegation to an organ or to a conference and the members of its diplomatic staff shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) Indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) Dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the delegation;

(c) Estate, succession or inheritance duties levied by the host State, subject to the provisions of article 109;

(d) Dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State;

(e) Charges levied for specific services rendered;

(f) Registration, court or record fees, mortgage dues and stamp duty, subject to the provisions of article 95.

Article 103. Exemption from customs duties and inspection

(a) *Observations of Governments and international organizations*

1. The Government of the United States considered it "important that the language of articles 38 and 103 be uniform".

2. The Government of Canada expressed the view that the article

could be summarized by stating that: "The host State shall do all that is necessary to facilitate the entry of and to grant exemption from all customs duties [. . .] on articles for the official use of a delegation including the personal baggage of a representative in a delegation."

3. The Government of Finland considered that

The status of a representative should be stated in his passport or in an additional document given to him, as the implementation of the provision could otherwise be difficult.

4. The Government of Japan was of the view that paragraph 1 (b) should be deleted. It stated that

Because of the temporariness of the task of delegations, exemption from customs duties and inspection of articles for the personal use of the members of the delegation does not seem justified.

5. The Government of the United Kingdom made applicable to article 103 its comment included under article 102.⁴¹¹

6. In its editorial suggestions the Secretariat of the United Nations recalled the Commission's commentary to the article and stated that it "therefore submits no suggestions with respect to article 103" (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

7. The Special Rapporteur wishes to point out that the provision of article 103 reproduces, with the requisite adaptations, the provision of article 35 of the Convention on Special Missions. In this connexion he wishes to recall

⁴⁰⁹ See above, Article 95, para. 2 of the observations.

⁴¹⁰ See above, Section 2, General comments, para. 20.

⁴¹¹ See above, Article 102, para. 3 of the observations.

his observations in the context of the general comments on section 2 of part IV.⁴¹³ The Special Rapporteur wishes also to refer to his observation in the context of article 102⁴¹³ which he considers generally applicable.

8. In view of the fact that, as stated in its commentary to the article, the Commission intends to review in the course of the second reading certain differences in formulation between the article and article 38 on permanent missions, the Special Rapporteur does not consider it appropriate to introduce any drafting changes in the text of the article with which he is to furnish the Commission for its consideration and final decision. As far as one of those differences is concerned, he merely wishes to recall that for article 38 he accepted the editorial suggestion of the United Nations Secretariat to replace the word "such" by "in such cases" in the second sentence of paragraph 2, thus bringing it into line with the corresponding text in article 103.⁴¹⁴

9. In the light of the foregoing and subject to the review referred to in the preceding paragraph, the Special Rapporteur proposes that the article be retained in its present form. Article 103 would, therefore, read as follows:

Article 103. Exemption from customs duties and inspection

1. Within the limits of such laws and regulations as it may adopt, the host State shall permit entry of, and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

(a) Articles for the official use of a delegation to an organ or to a conference;

(b) Articles for the personal use of the representatives in the delegation and the members of its diplomatic staff.

2. The personal baggage of the representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. In such cases, inspection shall be conducted only in the presence of the person concerned or of his authorized representative.

Article 104. Exemption from social security legislation, personal services and laws concerning acquisition of nationality

(a) Observations of Governments and international organizations

1. The Government of Canada considered that

Instead of referring to articles 35, 37 and 39, article 104 could simply state that members of delegations shall be exempted from social security legislation, personal services and laws concerning acquisition of nationality.

⁴¹³ See above, Section 2, General comments, para. 20.

⁴¹³ See above, Article 102, para. 4 of the observations.

⁴¹⁴ See above, p. 65 and 66, document A/CN.4/241/Add.3, Article 38, paras. 3 and 7 of the observations.

2. The Secretariat of the United Nations suggested that "the capital letters in the title should be reduced to lower case as in all the other titles". (A/CN.4/L.162/Rev.1, section B.)

(b) Observations of the Special Rapporteur

3. The Special Rapporteur, while recalling his observations made in the context of the general comments on section 2 of part IV⁴¹⁵ and of article 102,⁴¹⁶ is of the view that the suggested wording would render the text vague and imprecise.

4. The Special Rapporteur notes that the editing change suggested by the United Nations Secretariat is already incorporated in the printed version of the report of the Commission on the work of its twenty-second session.⁴¹⁷

5. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 104 would, therefore, read as follows:

Article 104. Exemption from social security legislation, personal services and laws concerning acquisition of nationality

The provisions of articles 35, 37 and 39 shall apply also in the case of a delegation to an organ or to a conference.

Article 105. Privileges and immunities of other persons

(a) Observations of Governments and international organizations

1. The Government of Japan deemed it sufficient that members of the families of representatives and the diplomatic staff be accorded the privileges and immunities provided for in article 104 (Exemption from social security legislation, personal services and laws concerning acquisition of nationality).

2. The Government of Sweden referred to its comments on article 94.⁴¹⁸

3. The Government of the United States referred to its comments on draft article 40 and indicated that "if the preferable alternative B of article 100 is adopted, paragraph 2 of article 105 will require revision". A similar observation was made by the Government of Finland.

4. In its editorial observations the Secretariat of the United Nations made the following suggestions concerning paragraph 2 of the article:

In the third line, the word "immunities" should be replaced by "immunity" (singular), as in paragraph 2 of article 100 (both alternatives), and in the corresponding passage of article 36 of the Convention on Special Missions.

⁴¹⁵ See above, Section 2, General comments, para. 20.

⁴¹⁶ See above, Article 102, para. 4 of the observations.

⁴¹⁷ *Yearbook of the International Law Commission, 1970*, vol. II, p. 296, document A/8010/Rev.1, chap. II, B.

⁴¹⁸ See above, Article 94, paras. 3, 4 and 6 of the observations.

The words "specified in paragraph 2 of article 100" in the third line should be transferred to the fourth line, and placed after the words "host State.". This is the natural order, and it is followed in article 36 of the Convention on Special Missions.

In the second sentence, the word "mentioned" should be replaced by "specified", which is the word used everywhere else in this article for such references (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

5. The Special Rapporteur wishes to point out that article 105 is based on articles 36 to 39 of the Convention on Special Missions and article 40 of the present draft and, in that connexion, to refer to his observations made in the context of the general comments on section 2 of part IV.⁴¹⁹ He wishes also to recall his observations on the comment referred to in paragraph 2 above, made in the context of article 94.⁴²⁰

6. The Special Rapporteur agrees with the editorial suggestions of the United Nations Secretariat (para. 4 above). However, pending the Commission's decision on the two alternative texts proposed for article 100, he does not deem it appropriate to introduce any further drafting changes in the text of the article with which he is to furnish the Commission in the present report.

7. Subject to the decision on the final text of article 100 and to the drafting changes referred to in the preceding paragraph, the Special Rapporteur proposes that the article be retained in its present form. Article 105 would, therefore, read as follows:

Article 105. Privileges and immunities of other persons

1. If representatives in a delegation to an organ or to a conference or members of its diplomatic staff are accompanied by members of their families, the latter shall enjoy the privileges and immunities specified in articles 98, 99, 100, 101, 102, 103 and 104 provided they are not nationals of or permanently resident in the host State.

2. Members of the administrative and technical staff of the delegation shall enjoy the privileges and immunities specified in articles 98, 99, 100, 101, 102 and 104, except that the immunities specified in paragraph 2 of article 100 from the civil and administrative jurisdiction of the host State, shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges mentioned in paragraph 1 of article 103 in respect of articles imported at the time of their entry into the territory of the host State to attend the meeting of the organ or conference. Members of their families who accompany them and who are not nationals of or permanently resident in the host State shall enjoy the same privileges and immunities.

3. Members of the service staff of the delegation shall enjoy immunity from the jurisdiction of the host State in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment, and exemption from social security legislation as provided in article 104.

4. Private staff of the members of the delegation shall be exempt from dues and taxes on the emoluments they receive by reason of their employment. In all other respects, they may enjoy privileges and immunities only to the extent permitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the delegation.

⁴¹⁹ See above, Section 2, General comments, para. 20.

⁴²⁰ See above, Article 94, para. 8 of the observations.

Article 106. Nationals of the host State and persons permanently resident in the host State

No comments were made by governments or international organizations concerning article 106. The Special Rapporteur has no observations to make on the text of the article and, consequently, he proposes that the article be retained in its present form. Article 106 would, therefore, read as follows:

Article 106. Nationals of the host State and persons permanently resident in the host State

The provisions of article 41 shall apply also in the case of a delegation to an organ or to a conference.

Article 107. Privileges and immunities in case of multiple functions

(a) *Observations of Governments and international organizations*

1. The Government of the Netherlands referred to its comments in relation to article 59, paragraph 2.⁴²¹

2. In its editorial observations, the Secretariat of the United Nations suggested that

in the third line the words "the privileges" should be replaced by "their privileges" as in article 9, paragraph 2, of the Convention on Special Missions and article 59, paragraph 2, on permanent observer missions. (A/CN.4/L.162/Rev.1, section B.)

(b) *Observations of the Special Rapporteur*

3. The Special Rapporteur wishes to recall his observation on the comment of the Netherlands Government made in the context of article 59.⁴²²

4. The Special Rapporteur notes that the drafting change suggested by the Secretariat of the United Nations has already been incorporated in the printed version of the report of the Commission on the work of its twenty-second session.⁴²³

5. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 107 would, therefore, read as follows:

Article 107. Privileges and immunities in case of multiple functions

When members of a permanent diplomatic mission, a consular post, a permanent mission or a permanent observer mission, in the host State, are included in a delegation to an organ or to a conference, their privileges and immunities as members of their respective missions or consular post shall not be affected.

⁴²¹ See above, p. 99, document A/CN.4/241/Add.4, Article 59, para. 4 of the observations.

⁴²² *Ibid.*, p. 99, para. 6.

⁴²³ *Yearbook of the International Law Commission, 1970, vol. II, p. 296, document A/8010/Rev.1, chap. II, B.*

Article 108. Duration of privileges and immunities

(a) *Observations of Governments and international organizations*

1. The Government of Switzerland considered that

In paragraph 2, the words "in which to do so" might be interpreted as meaning that the privileges and immunities would subsist so long as the host State had not fixed a time-limit for the delegate to leave the territory. Since such a practice is not followed at the present time and there would be no advantage in encouraging its introduction, it would seem preferable to adopt the following version [. . .]:

"When the functions of a person entitled to privileges and immunities under this part have come to an end, the privileges and immunities of such a person shall normally cease at the moment when he leaves the territory of the host State or on the expiry of a reasonable period after the functions have come to an end."

2. The Government of the Netherlands referred to its comment on article 42⁴²⁴ and stated that it

supports the notion, expressed by the Commission in paragraph 3 of its commentary, that a "reasonable time-limit" should be set in paragraph 1 on the enjoyment of the privileges and immunities. It is proposed that this should be one week before the date set for the commencement of the meeting.

3. The Secretariat of the United Nations observed that

Paragraph 2 of article 108 is based on the provisions of the Convention on Special Missions (paragraph 2 of article 43) which reproduce *mutatis mutandis* the language of paragraph 2 of article 39 of the Convention on Diplomatic Relations including the phrase "but shall subsist until that time, even in case of armed conflict". Since that phrase does not appear in paragraph 2 of article 108, the words "continue to" in the last line should be deleted for the reasons indicated [. . .] in paragraph 3 of the suggestions concerning article 42⁴²⁵ (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

4. The Special Rapporteur is of the view that the English expression "in which to do so", which is the one used in the corresponding provisions of the Vienna Conventions on Diplomatic and Consular Relations, in the Convention on Special Missions and in article 42 of the present draft, the provisions of which have been made applicable to permanent observer missions by article 73, does not necessarily admit of the interpretation suggested by the Swiss Government (para. 1 above). He therefore sees no compelling reason to depart from a well-established precedent on the subject.

5. As to the suggestion of the Government of the Netherlands (para. 2 above), the Special Rapporteur considers that its acceptance would unduly restrict the flexibility which characterizes the text as presently drafted.

6. Concerning the observation made by the United Nations Secretariat (para. 3), the Special Rapporteur would refer to his reply to the suggestion relating to article 42.⁴²⁶

⁴²⁴ See above, p. 70, document A/CN.4/241/Add.3, Article 42, para. 12 of the observations.

⁴²⁵ *Ibid.*, p. 70, para. 6.

⁴²⁶ *Ibid.*, p. 71, para. 17.

7. The Special Rapporteur wishes to recall that pursuant to the replies of governments to the question raised by the Commission on the matter, he proposed in the present report a text for article 42 modelled on the corresponding provision of the Vienna Convention on Consular Relations.⁴²⁷ However, having had the benefit of the Commission's discussion on his proposed text for article 42,⁴²⁸ he deemed it appropriate to revert to the Commission's original pattern as regards article 108.

8. In the light of the foregoing, and subject to the drafting change referred to in paragraph 6 above, the Special Rapporteur proposes that the article be retained in its present form. Article 108 would, therefore, read as follows:

Article 108. Duration of privileges and immunities

1. Every person entitled to privileges and immunities under the provisions of this part shall enjoy such privileges and immunities from the moment he enters the territory of the host State in connexion with the meeting of an organ or conference or, if he is already in its territory, from the moment when his appointment is notified to the host State by the Organization, by the conference or by the sending State.

2. When the functions of a person entitled to privileges and immunities under this part have come to an end, the privileges and immunities of such person shall normally cease at the moment when he leaves the territory of the host State, or on the expiry of a reasonable period in which to do so, but shall subsist until that time. However, with respect to acts performed by such a person in the exercise of his functions as a member of a delegation to an organ or to a conference, immunity shall subsist.

3. In the event of the death of a member of a delegation, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the territory of the host State.

Article 109. Property of a member of a delegation or of a member of his family in the event of death

1. No comments were made by Governments or international organizations concerning article 109.

2. The Special Rapporteur wishes to point out that, as explained by the Commission in its commentary to the article, the corresponding provisions in part II of the Commission's present draft are paragraphs 3 and 4 of article 42. He wishes also to recall that in the text proposed by him in the present report for article 42, the former paragraphs 3 and 4 of article 42 were renumbered 5 and 6 and that in the light of comments made by the United Nations Secretariat he introduced a change in wording for the second sentence of the former paragraph 4 which, in his view, would render its meaning clearer.⁴²⁹ Having had the benefit of the Commission's discussion on the text he submitted for article 42, paragraphs 5 and 6 of which appeared to have given rise to no difficulties,⁴³⁰ the Special Rapporteur, for the sake of consistency,

⁴²⁷ *Ibid.*, pp. 70-72, paras. 12, 22 and 23.

⁴²⁸ *Yearbook of the International Law Commission, 1971*, vol. I, pp. 67-70, 1097th meeting, paras. 10-45.

⁴²⁹ See above, pp. 70 and 71, document A/CN.4/241/Add.3, Article 42, paras. 10 and 21-23 of the observations.

⁴³⁰ *Yearbook of the International Law Commission, 1971*, vol. I, p. 70, 1097th meeting, para. 43.

cy and uniformity, proposes to introduce in paragraph 2 of the text for article 109 with which he is to furnish the Commission a change in wording similar to that made in the second sentence of the former paragraph 4 of article 42. Article 109 would, therefore, read as follows:

Article 109. Property of a member of a delegation or of a member of his family in the event of death

1. In the event of the death of a member of a delegation to an organ or to a conference or of a member of his family accompanying him, if the deceased was not a national of or permanently resident in the host State, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death.

2. Estate, succession and inheritance duties shall not be levied on movable property which, at the time of the death of a member of the delegation or of a member of the family of a member of the delegation, was in the host State solely because of the presence there of the deceased.

Article 110. Transit through the territory of a third State

(a) Observations of Governments and international organizations

1. The Government of the Netherlands considered that

There is room for uncertainty about the meaning of the term "third State" in the relationship between a sending State on the one hand and an international organization on the other hand. Assuming that "third State" means any State which is neither the sending State, nor the State in which the organization has its headquarters, nor the State in which the organ is assembling or the conference is convened, the question still arises whether the provision under review also considers as "third States" States which are not members of the organization concerned. A state which becomes a party to the convention under review will not necessarily be a member of all the international organizations covered by the convention and may even be strongly opposed to some of the organizations. Would such a State nevertheless have to grant all the facilities mentioned in article 110?

The Netherlands Government further observed that

The concluding words of paragraph 4—"and has raised no objection to it"—completely undermine the provisions contained in paragraphs 1, 2 and 3. The Netherlands Government is of the opinion that the third State ought not, in principle, to object to transit on subjective grounds. The reasons for refusing transit should be such as can be tested against an objective criterium, and this should be laid down in the article under review. If no objective criterium can be formulated for refusing transit, there seems to be little point in retaining the article.

2. In its editorial observations the Secretariat of the United Nations suggested that

In the second line of paragraph 4, the word "*respectively*" might be added before "in paragraphs 1, 2 and 3". If this word is considered necessary in paragraph 5, and in article 43, paragraph 4, it may also be necessary here. If it is not necessary, it could be omitted from all these paragraphs.

It pointed out, however, that "the same inconsistency in the use of the word 'respectively' occurs in article 42 of the Convention on Special Missions on which article 110 is based." (A/CN.4/L.162/Rev.1, section B).

(b) Observations of the Special Rapporteur

3. The Special Rapporteur does not share the doubts expressed by the Government of the Netherlands (para. 1 above) as regards the meaning of the term "third State". He is of the view that for the purposes of part IV a third State is any State which is neither a sending State nor a host State within the meaning of article 78, irrespective of membership in an international organization. The obligation of a third State to grant the facilities, privileges and immunities referred to in article 110 would be consequential upon its having become a party to the future convention embodying such a provision. He wishes further to observe that in the absence of an express provision such as that of article 110 in the draft, the persons concerned would not be entitled to enjoy the facilities, privileges and immunities provided for therein while in transit through a third State which had been informed in advance of such transit and had raised no objection to it. In his opinion the words "and has raised no objection to it" which appear in the corresponding provision of the Convention on Special Missions are intended to protect the interests of the third State and its suppression would alter the balance achieved in the text as presently drafted.

4. As regards the editorial comment of the United Nations Secretariat (para. 2 above), the Special Rapporteur ventures to suggest that perhaps the omission of the word "respectively" in the second line of paragraph 4 might have resulted from the use in the same line of the words "in respect" which do not appear in the text of the other articles cited by the Secretariat.

5. The Special Rapporteur wishes also to note that of the drafting changes he introduced in the text of article 43 as proposed by him in the present report,⁴³¹ only one would be applicable to the text of article 110, namely the replacement of the words "the person" by "one of the persons" in the last sentence of paragraph 1. For the sake of consistency and uniformity he therefore proposes to make a similar drafting change in the text of article 110 with which he is to furnish the Commission.

6. In the light of the foregoing, and subject to the modification referred to in the preceding paragraph, the Special Rapporteur proposes that the article be retained in its present form. Article 110 would therefore read as follows:

Article 110. Transit through the territory of a third State

1. If a representative in a delegation to an organ or to a conference or a member of its diplomatic staff passes through or is in the territory of a third State while proceeding to take up his functions or returning to the sending State, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying one of the persons referred to in this paragraph, whether travelling with him or travelling separately to join him or to return to their country.

⁴³¹ See above, p. 72, document A/CN.4/241/Add.3, Article 43, paras. 3-5 and 7-9 of the observations.

2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the transit of members of the administrative and technical or service staff of the delegation, or of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as the host State is bound to accord under the present part. Subject to the provisions of paragraph 4 of this article, they shall accord to the couriers and bags of the delegation in transit the same inviolability and protection as the host State is bound to accord under the present part.

4. The third State shall be bound to comply with its obligations in respect of the persons mentioned in paragraphs 1, 2 and 3 of this article only if it has been informed in advance, either in the visa application or by notification, of the transit of those persons as members of the delegation, members of their families or couriers, and has raised no objection to it.

5. The obligations of third States under paragraph 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to the official communications and the bags of the delegation, when the use of the territory of the third State is due to *force majeure*.

Article 111. Non-discrimination

(a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee, views were expressed on article 111⁴³² similar to those mentioned in connexion with article 75.⁴³³

2. In its written comments, the Government of the United States referred to its comments on article 44. The Government of the Netherlands likewise referred to its comments on articles 44⁴³⁴ and 75.⁴³⁵

(b) *Observations of the Special Rapporteur*

3. The Special Rapporteur wishes to recall his observations made in the context of articles 44⁴³⁶ and 75.⁴³⁷

4. The Special Rapporteur notes that unlike the texts of article 44 and 75, the text of article 111 does not include the word "as" before "between States". For the sake of consistency and uniformity he therefore proposes to add the word "as" to the text for article 111 with which he is to furnish the Commission in the present report.

5. In the light of the foregoing, the Special Rapporteur proposes that the article he retained in its present form, subject to the drafting change referred to in the preceding paragraph. Article 111 would, therefore, read as follows:

⁴³² *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 62.

⁴³³ See above, p. 109, document A/CN.4/241/Add.4, Article 75, para. 1 of the observations.

⁴³⁴ See above, p. 74, document A/CN.4/241/Add.3, Article 44, para. 5 of the observations.

⁴³⁵ See above, p. 109, document A/CN.4/241/Add.4, Article 75, para. 3 of the observations.

⁴³⁶ See above, p. 74, document A/CN.4/241/Add.3, Article 44, para. 11 of the observations.

⁴³⁷ See above, p. 110, document A/CN.4/241/Add.4, Article 75, para. 5 of the observations.

Article 111. Non-discrimination

In the application of the provisions of the present part, no discrimination shall be made as between States.

SECTION 3. CONDUCT OF THE DELEGATION AND ITS MEMBERS

Article 112. Respect for the laws and regulations of the host State

(a) *Observations of Governments and international organizations*

1. In the course of the debate in the Sixth Committee some representatives were of the opinion that

The article did not fully guarantee the freedom of delegations' members, since on occasion they might have to perform functions of the delegation outside the premises where the organ or conference was meeting or outside the premises of the delegation.

Also, observations similar to those mentioned in connexion with article 76⁴³⁸ were made with regard to protection of the host State generally and to accidents caused by vehicles owned by the delegation or its members. Other representatives holding the views already referred to in connexion with article 50,⁴³⁹ considered that provisions such as those contained in article 112 were "inadequate". Also, some representatives said that the sending State should be obliged to withdraw from its delegation "any person who had interfered in the internal affairs of the host State, if the latter so requested". Others agreed with the view, provided that the organization concerned would determine whether interference in internal affairs had occurred. The commission of a grave and manifest violation of the criminal law of the host State and engaging in professional or commercial activities in that State were also mentioned as legitimate grounds for requesting the recall of a member of a delegation.⁴⁴⁰

2. In their written comments, the Governments of Sweden, the Netherlands and the United States referred to their comments concerning article 45.⁴⁴¹

3. One Government [Israel] referred to its comments concerning article 76.⁴⁴²

4. The Secretariat of the United Nations expressed the opinion that

The obligation of the sending State, envisaged by reference in article [. . .] 112 of part IV, to recall or otherwise to remove a member of [. . .] its delegation to an organ or conference, if it does not waive his immunity, should be extended to cover any serious abuse of the privilege of resident.

⁴³⁸ *Ibid.*, p. 110, Article 76, paras. 1 and 2 of the observations.

⁴³⁹ See above, p. 81, document A/CN.4/241/Add.3, Article 50, para. 2 of the observations.

⁴⁴⁰ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 70-71 and 23-24.

⁴⁴¹ See above, p. 74, document A/CN.4/241/Add.3, Article 45, paras. 6, 7 and 17 of the observations.

⁴⁴² See above, p. 110, document A/CN.4/241/Add.4, Article 76, para. 4 of the observations.

5. The Secretariat of the United Nations, recalling its editorial suggestion concerning article 45, paragraph 2,⁴⁴³ expressed the view that "In the second sentence of paragraph 2 the words 'in the premises' should be replaced by 'on the premises', which is the accepted English expression" (A/CN.4/L.162/Rev.1, section B.)

(b) *Observations of the Special Rapporteur*

6. The Special Rapporteur wishes to refer to his observations on the views expressed and the comments made in the context of articles 45,⁴⁴⁴ 50⁴⁴⁵ and 76,⁴⁴⁶ which he considers applicable in the context of the present article. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form. Article 112 would, therefore, read as follows:

Article 112. Respect for the laws and regulations of the host State

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the host State. They also have a duty not to interfere in the internal affairs of that State.

2. In the case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from criminal jurisdiction, the sending State shall, unless it waives this immunity, recall the person concerned, terminate his functions with the delegation or secure his departure, as appropriate. This provision shall not apply in the case of any act that the person concerned performed in carrying out the functions of the delegation in the premises where the organ or conference is meeting or the premises of the delegation.

3. The premises of the delegation shall not be used in any manner incompatible with the exercise of the functions of the delegation.

Article 113. Professional activity

(a) *Observations of Governments and international organizations*

1. The Government of Finland considered that

If this article purports to prohibit all professional or economic activities of both diplomatic and non-diplomatic members of a delegation, it seems to go too far.

2. In its editorial observations the Secretariat of the United Nations, recalling its suggestion on article 46,⁴⁴⁷ expressed the view that the title should be amended to read "professional or commercial activity".

(b) *Observations of the Special Rapporteur*

3. The Special Rapporteur wishes to point out that article 113 makes applicable to delegations the provisions of article 46 on permanent missions, which were likewise

⁴⁴³ See above, p. 74, document A/CN.4/241/Add.3, Article 45, para. 15 of the observations.

⁴⁴⁴ *Ibid.*, p. 77, paras. 18, 20 and 22-25.

⁴⁴⁵ *Ibid.*, p. 83, Article 50, para. 17 of the observations.

⁴⁴⁶ See above, p. 110, document A/CN.4/241/Add.4, Article 76, paras. 7-8 of the observations.

⁴⁴⁷ See above, p. 78, document A/CN.4/241/Add.3, Article 46, para. 2 of the observations.

made applicable to permanent observer missions by article 76.

4. The Special Rapporteur wishes to recall his observation on the editorial suggestion of the United Nations Secretariat made in the context of article 46.⁴⁴⁸ He therefore proposes that, subject to his general observation concerning titles made in the context of article 23,⁴⁴⁹ the words "or commercial" also be inserted in the title of article 113.

5. In the light of the foregoing, the Special Rapporteur proposes that the article be retained in its present form, subject to the change in title referred to in the preceding paragraph. Article 113 would, therefore, read as follows:

Article 113. Professional or commercial activity

The provisions of article 46 shall apply also in the case of a delegation to an organ or to a conference.

SECTION 4. END OF FUNCTIONS

Article 114. End of the functions of a member of a delegation

(a) *Observations of Governments and international organizations*

1. The Government of Switzerland was of the view that "it would be desirable for the notification referred to in sub-paragraph (a) to be sent to the host State as well".

2. The Government of Finland was of the opinion that

The wording of this article should be reconsidered to the effect that the functions of a member of a delegation shall come to an end *inter alia* upon the conclusion of the meeting of the organ or the conference and of all measures arising directly therefrom. The provisions could perhaps be enlarged by reviewing the language used.

3. In its editorial observations the Secretariat of the United Nations indicated that the two suggestions concerning article 47⁴⁵⁰ apply to article 114. It considered, further, that "in sub-paragraph (b) of article 114 the word 'upon' should be replaced by 'on', to match sub-paragraph (a)" (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

4. Having in mind that, as in the case of article 47 of the present draft, the notification referred to in sub-paragraph (a) concerns the end of functions and not the duration of privileges and immunities which is dealt with in article 108, the Special Rapporteur does not see a compelling reason to accept the suggestion of the Swiss Government (para. 1 above).

5. The Special Rapporteur is also unable to agree to the suggestion of the Government of Finland in that it implies

⁴⁴⁸ *Ibid.*, p. 69, para. 4.

⁴⁴⁹ *Ibid.*, p. 46, Article 23, para. 7 of the observations.

⁴⁵⁰ *Ibid.*, p. 78, Article 47, para. 3 of the observations.

the deletion of sub-paragraph (a) since in his view the provision of that sub-paragraph covers the frequent cases when the functions of a member of a delegation come to an end before the conclusion of the meeting of the organ or the conference. As to the reference to "all measures arising directly therefrom", he is of the view that its inclusion would introduce an element of imprecision and vagueness in the text.

6. Regarding the observation contained in paragraph 3, the Special Rapporteur wishes to reiterate his observation on the editorial suggestion of the Secretariat of the United Nations regarding the words "to this effect" in sub-paragraph (a) made in the context of article 47.⁴⁵¹ He does not see, however, a compelling reason to replace the word "upon" by "on" in sub-paragraph (b).

7. In the light of the foregoing, and subject to the drafting change referred to in the preceding paragraph, the Special Rapporteur proposes that the article be retained in its present form. Article 114 would, therefore, read as follows:

Article 114. End of functions of a member of a delegation

The functions of a member of a delegation to an organ or to a conference shall come to an end, *inter alia*:

(a) On notification of their termination by the sending State to the Organization or the conference;

(b) Upon the conclusion of the meeting of the organ or the conference.

Article 115. Facilities for departure

(a) Observations of Governments and international organizations

1. No comments were made by governments or international organizations concerning the text of article 115. Their comments related rather to the question of entry into the territory of the host State referred to by the Commission in its commentary to the article.

2. The Government of the Netherlands noted that

It is mentioned in the commentary that the Commission wishes to make further investigations to determine whether there is need for a provision governing the obligation of the host State to allow members of a delegation to enter the country. It would seem that this obligation already follows from articles 22 and 92, so that there is no need for a separate provision.

3. In connexion with the question of "entry", the Secretariat of the United Nations expressed its belief that

Express provision should be made [...] to ensure to members of [...] delegations of States to organs or conferences of international organizations, and to members of their families, the right of entry into and sojourn in the territory of the host State and the freedom of transit to and from the premises of the international organization, or to and from the site of the organ or the conference concerned.

⁴⁵¹ *Ibid.*, p. 79, para. 6.

It added that

The reasons for the foregoing suggestions may be found in the Secretariat's observations on part II of the provisional draft, [⁴⁵²] which are applicable, *mutatis mutandis*, to those on [...] delegations to organs and conferences.

(b) Observations of the Special Rapporteur

4. As regards the question of entry into the host State, the Special Rapporteur wishes to refer to his observations reflected under the new article 27 *bis*⁴⁵³ which he made applicable in the case of permanent observer missions⁴⁵⁴ and which he considers to be applicable as well in the case of delegations. In the light of those observations and, in particular, of his proposal for the inclusion in the draft of a new article 27 *bis* and of a reference to that article in article 67, the Special Rapporteur considers that, without prejudice to the final decision to be taken on those proposals, part IV of the present draft should also contain a provision on the matter, either as a separate new article or by reference to the provisions of the new article 27 *bis* to be made in the text of article 92, under an appropriate heading. The text of a new article, whose place in part IV of the draft should be determined on the basis of the corresponding decision to be taken regarding the new article 27 *bis*, should be along the lines of this latter article, as follows:

Article Z. Entry into the host State

1. The host State shall ensure entry into its territory (and freedom of transit to and from the premises of the Organization) to members of a delegation to an organ or to a conference and members of their families forming part of their respective households.

2. Visas, where required for any person referred to in paragraph 1 of this article, shall be granted as promptly as possible.

The Special Rapporteur has included in brackets the phrase "and freedom of transit to and from the premises of the Organization" in the light of the discussion held in the Commission on his proposed new article 27 *bis*.⁴⁵⁵

5. As regards the text of article 115, the Special Rapporteur proposes that it be retained in its present form. Article 115 would, therefore, read as follows:

Article 115. Facilities for departure

The provisions of article 48 shall apply also in the case of a delegation to an organ or to a conference.

Article 116. Protection of premises and archives

(a) Observations of Governments and international organizations

1. The Government of the United States questioned "whether it is reasonable to require protection of the

⁴⁵² *Ibid.*, p. 51, Article 27 *bis*, para. 5 of the observations.

⁴⁵³ *Ibid.*, p. 52, paras. 7-13.

⁴⁵⁴ See above, p. 105, document A/CN.4/241/Add.4, Article 67, para. 8 of the observations.

⁴⁵⁵ *Yearbook of the International Law Commission, 1971*, vol. I, pp. 44-48, 1094th meeting, paras. 22-79.

premises of a delegation after the end of a conference". It considered that

As noted in previous comments on other draft articles in part IV [⁴⁶⁶], the premises of a delegation will normally be a hotel room and the archives, one would assume, would consist of a briefcase full of documents.

2. In its editorial observations the Secretariat of the United Nations indicated that its suggestion concerning the title of article 49 ⁴⁶⁷ applies to the title of article 116. It expressed further the view that

In the last line of paragraph 1 of article 116, the word "to" before the "host State" should be replaced by "of". This is probably a typing error (A/CN.4/L.162/Rev.1, section B).

(b) *Observations of the Special Rapporteur*

3. The Special Rapporteur wishes to observe that the obligation to respect and protect the premises, which has been provided for in the Convention on Special Missions as well as in the context of permanent missions and permanent observer missions by articles 49 and 77 of the present draft, exists for the host State under article 116 so long as those premises are assigned to a delegation. Furthermore, while recalling his observation on the comment of the United States Government made in the context of article 94,⁴⁶⁸ the Special Rapporteur considers that the archives of a delegation, which are not defined in article 78 on the use of terms, but which do not necessarily have to "consist of a briefcase full of documents", should, even if that were the case, be given protection in a manner similar to that provided for archives of the special mission in the Convention on Special Missions.

4. Regarding the observation quoted in paragraph 2 above, the Special Rapporteur wishes to reiterate his observation on the editorial suggestion of the United Nations Secretariat concerning the title made in the context of article 49,⁴⁶⁹ subject to his general observation on the question of titles made in the context of article 23.⁴⁶⁰ He wishes further to point out that the replacement of the word "to" by "of" in the last line of

paragraph 1 has already been made in the text of the article as it appears in the printed version of the report of the Commission on the work of its twenty-second session.⁴⁶¹

5. The Special Rapporteur wishes also to recall that for the text of article 49 which he proposed in the present report, he replaced the word "must" by "shall" wherever it appeared in paragraph 1 and inserted a third sentence to the same paragraph making express reference to one of the ways in which the sending State may discharge its obligation under the article, namely entrusting the premises, property and archives to the custody of a third State. For the sake of consistency and uniformity the Special Rapporteur proposes to introduce similar changes to the text of article 116 with which he is to furnish the Commission for its consideration and final decision. Having had the benefit of the Commission's discussion on article 49,⁴⁶² the Special Rapporteur has deemed it appropriate to include within brackets the words "In the discharge of its obligations under the present paragraph" at the beginning of the proposed new third sentence. Finally, for the sake of symmetry with the text proposed by him for article 49, the Special Rapporteur proposes to suppress the word "the" before "archives" in the second paragraph.

6. In the light of the foregoing, the Special Rapporteur proposes that the text of the article be retained in its present form, subject to the addition and terminological changes referred to in the two preceding paragraphs. Article 116 would, therefore, read as follows:

Article 116. Protection of premises, property and archives

1. When the meeting of an organ or a conference comes to an end, the host State shall respect and protect the premises of a delegation so long as they are assigned to it, as well as the property and archives of the delegation. The sending State shall take all appropriate measures to terminate this special duty of the host State within a reasonable time. [In the discharge of its obligations under the present paragraph,] the sending State may entrust the custody of the premises, property and archives of the delegation to a third State.

2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and archives of the delegation from the territory of the host State.

⁴⁶⁶ See above, Article 94, paras. 3-4 of the observations.

⁴⁶⁷ See above, p. 80, document A/CN.4/241/Add.3, Article 49, para. 4 of the observations.

⁴⁶⁸ See above, Article 94, para. 7 of the observations.

⁴⁶⁹ See above, p. 81, document A/CN.4/241/Add.3, Article 49, para. 8 of the observations.

⁴⁶⁰ *Ibid.*, p. 46, Article 23, para. 7 of the observations.

⁴⁶¹ *Yearbook of the International Law Commission, 1970*, vol. II, p. 299, document A/8010/Rev.1, chap. II, B.

⁴⁶² *Ibid.*, 1971, vol. I, pp. 81-82, 1098th meeting, paras. 85-100.